



# CORONAVIRUS INDUSTRY ALERT

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## CA COVID-19 SUPPLEMENTAL PAID SICK LEAVE

SB 95 FAQ

*Revised May 14, 2021*

### DISCLAIMER:

This set of FAQs is intended to provide general information about the California COVID-19 Supplemental Paid Sick Leave law (SB 95) and legal issues relating to it. It should not be relied upon as legal advice. Please consult an attorney if you need formal advice.

For more details, refer to the Labor Commissioner's [2021 COVID -19 Supplemental Paid Sick Leave FAQs](#).

## FREQUENTLY ASKED QUESTIONS REGARDING SB 95

On March 19, 2021, California Governor Gavin Newsom signed [Senate Bill \(SB\) 95](#). The bill became effective on March 29, 2021, but **applies retroactively to January 1, 2021**. The law creates new COVID-19 Supplemental Paid Sick Leave (SPSL) requirements for employers with more than 25 employees under new [Labor Code Section 248.2](#).

Note that there is substantial intersection with voluntary FFCRA payments – please refer to UCON's revised [FFCRA Guide](#) for additional information.

### 1. Which employers are covered by SB 95?

Employers with **26 or more employees** are covered by SB 95. It is not clear if this number is for nationwide employees or only employees in California; the conservative approach is to assume nationwide.

### 2. If we are not covered now but if we add employees later in the year to reach 26 employees, does coverage start at that point or is it then retroactive to January 1, 2021?

You would be covered by the law starting from the time you have 26 employees.

### 3. Which employees are eligible to receive COVID-19 Supplemental Paid Sick Leave (SPSL)?

Leave is available **immediately to all employees**, regardless of length of employment. It applies only to employees, not to bona fide independent contractors.

### 4. Can the requirements of SB 95 be waived through collective bargaining for union employees?

No, SB 95 does not allow a collective bargaining waiver of COVID-19 SPSL.

### 5. When are employees entitled to COVID-19 SPSL payments?

Employees are entitled to COVID-19 SPSL **if they are unable to work or telework** for any of the following reasons:

1. Subject to a federal, state, or local quarantine or isolation order or guidelines related to COVID-19 (this does not include a general stay-at-home order);
2. Advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19;
3. Attending an appointment for a COVID-19 vaccine;
4. Experiencing symptoms related to a COVID-19 vaccine and is unable to work or telework;
5. Experiencing symptoms of COVID-19 and seeking a medical diagnosis;
6. Caring for a family member (child, grandchild, grandparent, parent, sibling or spouse) who is subject to an order as in #1 above or is advised to self-quarantine as in #2 above; OR

7. 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 clearly states that an employer's obligation to provide COVID-19 SPSL is triggered "upon the oral or written request of the employee." This means that employers may not require a doctor's note or other certification from a health care provider, unless the employer has reason to believe that the employee is not requesting SPSL for a valid purpose. From March 29 onward, employers are recommended to provide this sick leave to employees if they know that their absence is for any of the above reasons. However, for retroactive leave that occurred between January 1, 2021 and March 29, 2021, employers only need to take action if an employee makes an oral or written request.

#### **6. How many hours of COVID-19 SPSL payments are employees entitled to receive?**

The number of hours of COVID-19 SPSL payments depends upon the employee's schedule:

1. **Full-Time:** Employees who the employer considers to work "full time" or who were scheduled to work or did work on average at least 40 hours per week in the two weeks preceding the date of taking this leave are entitled to **80 hours** of COVID-19 SPSL payments;
2. **Part-Time:** Employees with a normal weekly schedule are entitled to COVID-19 SPSL hours equal to the total number of hours the employee is normally scheduled to work over two weeks;
3. **Variable Hours:** If an employee works a variable number of hours, the employee is entitled to COVID-19 SPSL equal to 14 times the average number of hours the employee worked each day in the six months preceding the date the employee took COVID-19 SPSL (or, if the employee has worked less than six months but more than 14 days, 14 times the average hours worked each day over the entire employment period);
4. **Variable Hours (New Employee):** If an employee works a variable number of hours and has worked for a period of 14 or fewer days, the employee is entitled to COVID-19 SPSL equal to the total number of hours the employee has worked for that employer.

Any retroactive pay requested by employees is counted towards the total number of hours owed. (See *Question #16* in the [\*DLSE FAQs\*](#).)

#### **7. Do employers need to provide any notice to employees?**

Employers must **display a poster** in a conspicuous place that provides notice of COVID-19 SPSL. This could include a job trailer, or a standing board posted by the side of the road for highway/road work.

1. The Labor Commissioner has created a [standard template poster](#).
2. If employees do not go to a workplace, the employer may satisfy this requirement by giving notice through electronic means or by providing the employee with a physical copy.

#### **8. What actions do employers need to take with regard to paystubs?**

Beginning at the next full pay period after the law took effect, paycheck stubs need to identify the amount of COVID-19 SPSL available and if any SPSL was paid on that paycheck, separate from any other sick leave or PTO. **Your payroll department or payroll service should double check that they have updated their paystub forms to comply with SB 95.** Additionally,

- For retroactive SPSL payments, they must be made during the first full pay period after the request was made by the employee.
- An employer who is entitled to an offset or credit under SB 95 (see Question #15 below) should ensure that the paystubs reflect such offsets.
- Manual calculations must be made for part-time employees who work variable hours (see Question #6 above); the calculation should be made initially with "(variable)" next to it, and it only needs to be recalculated when the employee actually takes SPSL.

Instead of providing this information on paystubs, employers can provide employees with this information in a separate writing furnished to the employees on the employees' designated pay dates.

#### **9. Who decides how many hours of COVID 19 SPSL to use?**

**The employee** determines how many hours of COVID 19 SPSL to use, up to the maximum number of hours authorized by the statute. As stated above, the employee merely needs to make an oral or written request for SPSL.

COVID-19 SPSL is only available if the employee is eligible as described in Questions #3 and #5 above.

***10. Can employers ask employees to prove that they were eligible with a medical certification?***

**No.** This leave is not dependent on medical certification. However, if the employer has reason to believe that the employee is requesting SPSL for an improper purpose, it may be reasonable to request other documentation. (See Question #11 in the [DLSE FAQs](#).)

***11. Can employers require employees to use other paid or unpaid leave before taking SPSL?***

**No.** SB 95 prohibits an employer from requiring an employee to use any other paid leave unrelated to COVID-19 before the employee uses COVID-19 SPSL. For example, employees cannot be required to use vacation, PTO or non-COVID sick leave before using COVID-19 SPSL.

***12. Can employers require employees to use SPSL when the employer needs to exclude them from the workplace under the Cal/OSHA COVID-19 Emergency Temporary Standard (ETS)?***

**Yes.** When an employee is excluded from the jobsite by their employer due to COVID-19 exposure and is entitled to exclusion pay, an employer may require the use of 2021 COVID-19 SPSL before providing other exclusion pay. (See [Cal/OSHA FAQs on Exclusion Pay and Benefits](#) for more details on exclusion pay.)

***13. What rate should be used for COVID-19 SPSL payments?***

Each hour of COVID-19 SPSL is to be paid at the highest of the following:

1. The employee's regular rate of pay for the workweek in which they are taking leave
2. A rate calculated by dividing the employee's total wages (not including overtime premium pay) by the total hours worked in the full pay periods of the prior 90 days of employment (This calculation will increase the regular rate for employees who received commissions, bonuses and other monetary amounts not related to hours worked in the prior 90 days.)
3. The state minimum wage
4. The local minimum wage

If the employee is an exempt employee, SPSL should be calculated in the same manner as wages are calculated for other forms of paid leave

**Pay Cap:** An employer is not required to pay more than five hundred eleven dollars (\$511) per day and five thousand one hundred ten dollars (\$5,110) in the aggregate for COVID-19 SPSL payments to an employee who is entitled to receive COVID-19 SPSL.

***14. Does the hourly rate for COVID-19 SPSL payments include benefits?***

No, SB 95 standing alone does not require the payment of any fringe benefits to the Union Trust Funds. The FFCRA, in contrast, requires the payment of Health & Welfare contributions. Unless otherwise specified and/or paid to the Trust Funds, wage payments include the amounts for Vacation/Holiday/Sick Pay and Supplemental Dues/Work Fee, as these are part of the normal taxable wage amount.

The complexity occurs when the applicable Master Labor Agreement requires fringe benefits to be paid for "all hours worked or paid," not merely for "hours worked." UCON is currently negotiating MOUs with its union partners concerning what fringe benefits will need to be paid, if any, in connection with COVID-19 SPSL payments. The following chart shows the current status. Contact UCON [Labor & Member Services](#) if you have questions. (**NOTE:** If you are choosing to pay voluntary FFCRA payments as an offset for SB 95 requirements [see Question #15 below], you will need to pay in accordance with the FFCRA rules. See UCON's [Union COVID-19 Leave Pay Chart](#) for comparisons.)

## **Requirements for Union Fringe Benefit Payments**

### **NORTHERN CALIFORNIA**

<b>UNION</b>	<b>CALIFORNIA COVID-19 SPSL</b>
Carpenters/Pile Drivers	H&W, Vacation and Work Fee only
Cement Masons	H&W, Vacation and Supplemental Dues only
Iron Workers	<i>PENDING</i>
Laborers	No fringe benefits required
OE3	No fringe benefits required
Teamsters	No fringe benefits required

### **SOUTHERN CALIFORNIA**

<b>UNION</b>	<b>CALIFORNIA COVID-19 SPSL</b>
Carpenters/Pile Drivers	No fringe benefits required
Cement Masons	No fringe benefits required
Iron Workers	<i>PENDING</i>
Laborers	<i>PENDING</i>
OE12	<i>PENDING</i>

#### ***15. What offsets/credits can employers take for other leave that they have provided or payments they have made for COVID-19 related reasons?***

SB 95 allows an employer to receive a credit or offset for supplemental benefits that were used to provide paid leave for the same reasons that employees can take COVID-19 SPSL. For example, payment of EPSL pursuant to the FFCRA is a permissible offset, as is payment of COVID-19 Emergency Paid Sick Leave pursuant to a Local Ordinance. (See *Questions #16-19 in the [DLSE FAQs](#)*.)

Offsets or credits are not available, however, for paid sick leave that [Labor Code Section 246](#) requires employers to provide. This refers to California Paid Sick Leave - the Healthy Workplaces, Healthy Families Act of 2014. All of UCON's CBAs contain waivers of non-COVID California paid sick leave, but employers are subject to this for non-union employees.

#### ***16. How will SB 95 be enforced?***

The law authorizes the Labor Commissioner to impose civil penalties. For example, the Labor Commissioner can recover:

- A penalty of up to \$100 per offense for a willful violation of the poster requirement;
- An administrative penalty equal to the dollar amount of leave withheld multiplied by three, or \$250 (whichever amount is greater), up to a \$4,000 aggregate penalty;
- Where failure to comply results in other harm or a violation of rights, a sum of \$50 for each day or portion thereof that the violation occurred or continued, not to exceed \$4,000 in aggregate; and
- Investigation and enforcement costs of not more than \$50 for each day or portion of a day a violation occurs or continues for each employee or other person whose rights were violated.

These penalty provisions are cumulative and do not preclude other remedies under applicable law; however, penalties for COVID-19 SPSL paystub violations are in lieu of the penalties for a violation of the general paystub statute, [Labor Code Section 226](#).

In addition to the penalties imposed by the Labor Commissioner, the requirements of SB 95 can be enforced through California's unfair competition laws and through other statutes in much the same way as the requirements of the Healthy Workplaces, Healthy Families Act of 2014, which provides for paid sick leave, can be enforced.

#### ***17. Do collective bargaining agreement (CBA) grievance and arbitration procedures apply?***

Depending on the specific language of the applicable CBA, individual claims for COVID-19 SPSL payments may be subject to the grievance and arbitration procedures. Not all CBAs have the same language with regard to use of

the grievance procedure for statutory claims. Claims brought by the Labor Commissioner may also be subject to the grievance and arbitration procedures of the applicable master labor agreement; however, it is often difficult to convince the Labor Commissioner to recognize this CBA language.

Contact UCON [Labor & Member Services](#) if you have questions about whether an individual's claim for COVID-19 SPSL payments is subject to the grievance procedures under the particular CBA.

***18. If an employee travels out of the country knowing the company requires a quarantine upon return, are they entitled to this pay?***

This is one area where the law is not very clear. There is an argument that an employee who travels is subject to a quarantine "period" within the meaning of Qualifying Reason #1 if that quarantine period is pursuant to a "guidance" issued by the CDC, CDPH or a local health department – even if that quarantine period is merely a recommendation or guidance and not a specific mandate. So, a conservative view until we hear otherwise would be to consider a travel quarantine as covered if it is pursuant to an official guidance. This probably does not apply if it is merely a company policy or requirement, but it might extend to a post-travel quarantine period to the extent it lines up with CDC, CDPH or local health guidance in this regard.

***19. If an employee used their PTO, are we obligated to give them back PTO and use SPSL?***

The legislation is not clear about whether an employer has to go back and retroactively use SPSL for a previous qualifying leave, and then "credit back" PTO, regular sick leave, or other previous leave taken. A conservative approach to avoid risk as much as possible might be to credit back such time.

***20. If the employee has been terminated prior to the effective date of 03/29/21, can they come back and request for this pay?***

There is no guidance yet as to whether "former employees" can request retroactive payments. Some employers are taking the position that only current employees can make such requests, but a more conservative position would be to provide retroactive payments to former employees until we get clarification otherwise.

***21. If an employee is experiencing symptoms but gets no medical diagnosis, are we required to pay for that time off?***

They generally would not fall under Qualifying Reason #5 if they are experiencing symptoms but not seeking a diagnosis. However, they would arguably fall under Qualifying Reason #1, as state and local guidance generally provide that individuals with symptoms should self-quarantine. They would have a claim they are subject to a quarantine or isolation "period" based on federal, state or local guidance.

***22. Some of the employees who have taken time off for COVID related incidents filed for and received funds from state disability. Do we still have to pay them through SB 95? What happens with their disability? Won't the state ask them for the money back?***

The DIR has not provided any guidance yet on how to handle employee requests for retroactive pay for periods when they may have received SDI or other government assistance. A conservative approach would be to pay the difference between what they received from the state and what they would have received from the employer under SB 95.