

# Here We Go Again: California's New COVID-19 Supplemental Paid Sick Leave Requirement



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## Today's Agenda

- How We Got Here
- Effective Date and Retroactivity
- Requirements
- Interaction with Other Leave
- Next Steps

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## How We Got Here

- FFCRA (fewer than 500 employees) expired 12/31/2020
- AB 1867 (500 or more employees) expired 12/31/2020
- Pressure on Legislature to extend/expand COVID-19 Supplemental Paid Sick Leave (SPSL)
- Legislature passed **SB 95** as a “budget” bill

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## Effective Date and Retroactivity

- Governor Newsom signed SB 95 on March 19, 2021
- Went into effect 10 days later (**March 29, 2021**)
- Also has provisions that go back **retroactively** to 1/1/2021 (discussed more later)
- DIR issued FAQs:  
<https://www.dir.ca.gov/dlse/C OVID19Resources/FAQ-for-SPSL-2021.html>

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## The Basics

- Applies to public and private employers with **more than 25 employees**
- Up to 80 hours of SPSL
- Expanded list of qualifying reasons for leave, including vaccine-related reasons
- Retroactive provisions may require payments going back to 1/1/2021
- Expires **9/30/2021**
- Required [Notice](#)
- Paystub requirement

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## Which Employers Are Covered?

- Applies to public and private employers with **more than 25 employees**
- Regardless of industry
- Therefore, applies to many more California employers than were covered by AB 1867

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## Which Employees Are Covered?

- Applies to employees who are ***“unable to work or telework”*** due to a listed qualifying reason
- ***Does not*** apply to independent contractors

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## Qualifying Reasons for Paid Sick Leave

- Expands upon the covered reasons available to use SPSL
- Largely tracks the (now voluntary) reasons for providing leave under the FFCRA (as recently amended in federal Stimulus 3.0)

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## Qualifying Reason #1

- **The employee is subject to a quarantine or isolation period related to COVID-19 as defined by an order or guidelines of the state, the CDC, or local public health authorities**
- If an employee is subject to more than one quarantine or isolation period, they can use SPSL under the order or guideline that provides for the longest minimum period

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## Qualifying Reason #2

- **The employee is advised by a health care provider to self-quarantine due to concerns related to COVID-19**

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### Qualifying Reason #3

- **The employee is attending an appointment to receive a vaccine for protection against contracting COVID-19**
- No guidance yet on how much time is permissible or what, if any, limitation an employer can put on time to attend the appointment

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### Qualifying Reason #4

- **The employee is experiencing symptoms related to a COVID-19 vaccine that prevent the employee from being able to work or telework**
- There may be considerations such as vaccine tracking, incentives and more

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## Qualifying Reason #5

- **The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis**

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## Qualifying Reason #6

- **The employee is caring for a family member who is subject to an order or guidelines (Reason #1) or has been advised to self-quarantine (Reason # 2)**
- **“Family member” includes:**
  - Child (biological, adopted, foster, stepchild, legal ward, in loco parentis) regardless of age or dependency status
  - Spouse/Registered Domestic Partner
  - Grandparent
  - Grandchild
  - Sibling

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## Qualifying Reason # 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**
- **“Child” includes:**
  - Biological, adopted, foster, stepchild, legal ward, in loco parentis - regardless of age or dependency status

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## Summary of Qualifying Reasons for SPSL

- 1) The employee is subject to a quarantine or isolation period related to COVID-19 as defined by an order or guidance of the state, the CDC, or local public health authorities
- 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 for protection against contracting COVID-19
- 4) The employee is experiencing symptoms related to a COVID-19 vaccine that prevent the employee from being able to work or telework
- 5) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis
- 6) The employee is caring for a family member who is subject to an order or guidelines (Reason #1) or has been advised to self-quarantine (Reason # 2)
- 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

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## Employee Requests and Documentation

- Employers must make leave available *immediately* upon the **oral** or **written** request by the employee

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## Can You Require Documentation??

- Generally, documentation or certification ***cannot*** be required
- But DIR FAQ # 11 states:
  - *Although an employer cannot deny 2021 COVID-19 Supplemental Paid Sick Leave solely for lack of a medical certification, 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. In any such claim, the reasonableness of the parties' actions will undoubtedly come into play*
  - *For example, if a covered employee informs an employer that the covered employee is subject to a local quarantine order or recommendation, has to stay home, and qualifies for 2021 COVID-19 supplemental paid sick leave, but the employer subsequently learns that the covered employee was out at a park, the employer could reasonably request documentation*

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## How Much SPSL Do We Have To Provide?

- Full-time employees get 80 hours of SPSL
- Part-time employees with variable schedules – have to make a calculation (not to exceed 80 hours of SPSL)
- This is a new “bank” of leave from 1/1/2021 – 9/30/2021

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## Full-Time Employees

Employee is entitled to 80 hours of SPSL if either of the following apply:

- 1) The employer considers the employee to work full time; or
- 2) The employee worked or was scheduled to work, on average, at least 40 hours per week in the two weeks preceding the leave

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## Part-Time Employees

### Part-time employees with normal weekly schedules:

- The total number of hours the employee is normally scheduled to work over two weeks

### Part-time employees with variable hours:

- 14 times the average number of hours the employee worked each day for the employer in the preceding six months (or entire period if they worked less than six months)
- Use “total days” not “work days”
- If they have worked 14 days or less, the total number of hours they have worked

***\*Capped at 80 hours***

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## Example # 1 – Part Time Employee with Variable Schedule (who has worked at least 6 months)

Total Number of Hours Worked During 6-Month Period	520 hours
Total Number of Days in 6-Month Period	182 days
Average Number of Hours Worked Each Day in 6-Month Period	$520 \text{ hours} \div 182 \text{ days} = 2.857 \text{ hours}$
2021 COVID-19 Supplemental Paid Sick Leave Entitlement	$2.857 \times 14 = 40 \text{ hours}$

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## Example # 2 – Part Time Employee with Variable Schedule (who has worked less than 14 days)

- Employee only worked 2 days
- Day 1 – worked 1 hour
- Day 2 – worked 6 hours
  
- Employee would be eligible for 7 total hours of SPSL

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What is the Rate of Pay?

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## Non-Exempt Employees

### Must pay the *higher* of the following:

- The employee's regular rate of pay for the workweek in which leave is taken
- The rate calculated by dividing the employee's total wages (not including overtime premium pay) by the employee's total hours worked in the full pay periods of the previous 90 days
- The state minimum wage
- Any applicable local minimum wage

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## Exempt Employees

SPSL is paid at the same rate at which the employer calculates wages for other forms of paid leave time

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## Total Leave Pay is Capped

- \$511 per day per employee (\$5,110 per employee total)
- Be aware that FFCRA tax credits are \$511/day for employee “self-care” but only \$200/day for “caring for others”

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## Interaction With Other Leaves

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## Interaction With Other Leaves

- SPSL is in **addition** to regular paid sick days (LC 246)
- An employer cannot require an employee to use other unpaid or paid leave, vacation or PTO **before** or **in lieu of** SPSL.

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## Interaction With Other Leaves

- SPSL may run concurrently with **FFCRA, local ordinance COVID-19 sick or other supplemental COVID-19 paid sick leave benefit** provided by the employer if taken on or after 1/1/2021 for the same reasons and compensated at the same rate (can “true up” if not compensated at same rate)

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## Some Notes on FFCRA Tax Credits

- FFCRA only applies to employers with fewer than 500 employees
- FFCRA tax credit only \$200 per day for caring for others (may not cover all paid leave under SB 95)
- FFCRA tax credit may not cover retroactive payments

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## Interaction With Other Leaves

As of March 26, 2021, the following local jurisdictions in CA have COVID-19 supplemental paid sick leave ordinances that were in effect on or after January 1, 2021:

- Long Beach (City)
- Los Angeles (City and County)
- Oakland (City)
- Sacramento (City and County)
- San Francisco (City and County)
- San Jose (City)
- San Mateo (County)
- Santa Rosa (City)
- Sonoma (County)

**\* *Need to look closely at these ordinances – See [UCON PSL CBA Waiver Chart](#) for status of CBA waivers.***

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## Payments for Union Employees

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### Payments for Union Employees

- Wages are assumed to include Vacation/Holiday and Supplemental Dues amounts.
- Unlike FFCRA, SB 95 does not require continuation of healthcare or other benefits.
- UCON is clarifying both SB 95 and voluntary FFCRA with unions/trusts.

**\* Refer to [UCON SB 95 FAQ](#) & [FFCRA Guide](#) for updates, or contact UCON.**

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## Fringe Benefit Payments for Union Employees (as of 4/7/21)

UNION	CA SPSL (SB 95)	VOLUNTARY FFCRA
Carpenters/Pile Drivers (NorCal)	H&W, Vacation, Work Fee	H&W, Vacation, Work Fee
Carpenters/Pile Drivers (SoCal)	TBD	Extension expected – H&W
Cement Masons (NorCal)	TBD	Extension expected – H&W, Vac, Supp Dues
Cement Masons (SoCal)	TBD	Extension expected – H&W
Iron Workers	TBD	TBD
Laborers (NorCal)	No fringes	H&W
Laborers (SoCal)	TBD	Extension expected – H&W
OE3	TBD	Extension expected – H&W
OE12	TBD	Extension expected – H&W
Teamsters	No fringes	H&W

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Interaction With  
Cal/OSHA ETS  
“Continued Earnings”

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## Interaction With Cal/OSHA ETS

- The Cal/OSHA Emergency Temporary Standard (ETS) requires employers to “continue earnings” for employees who are excluded from work as COVID-19 cases or exposures
- SB 95 provides that an employer **may require** an employee to first exhaust their SPSL before being entitled to such “continued earnings”
- \* ***Currently unclear if exhaustion of exclusion pay paid from January 1, 2021 to March 29, 2021 is allowed***

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## Retroactivity

- SB 95 effective March 29, 2021
- Has “retroactivity” language that may require you to make retroactive payments (upon employee request) for leave taken back to 1/1/2021

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## Retroactivity – General Concepts

- Applies back to 1/1/2021 in order to protect the ***“economic well-being”*** of employees who took leave for the covered reasons after expiration of the FFCRA and AB 1867
- If the employee took leave for the same qualifying reasons and the employer either (1) did not pay, or (2) did not pay the required amount, the employee can request ***retroactive compensation***

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## Retroactivity – Employee Must Ask For It

- Retroactive payments only required upon the ***oral or written request*** of the employee
- **DIR FAQ # 10:**
  - Only applies to requests made on or after March 29, 2021
  - *“A request made before March 29, 2021 does not count.”*

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## Retroactivity – Payment and Credits

- Retroactive payments must be made on or before the payday for the next full pay period and reflected on paystub
- Employers get credit for such payments (i.e., the number of hours of leave that corresponds to the amount retroactive payment counts towards the total number of hours of SPSL the employer is required to provide if for an applicable eligible reason and compensated at the same rate)

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## Notice/Poster

- Must provide/display poster (like regular paid sick days)
- DIR poster available now: <https://www.dir.ca.gov/dlse/2021-COVID-19-Supplemental-Paid-Sick-Leave.pdf>
- If employees do not frequent a workplace (i.e., still working remotely) can send electronically

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## Paystubs

- This is always one of the more burdensome requirements
- Work closely with payroll
- SB 95 provides some helpful clarity

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## Paystub

- Must be listed on paystub like regular paid sick days - Labor Code 246(i)
- But must be listed *separately* from regular paid sick days
- Only have to make calculation for part-time employees initially and indicating *“(variable)”*
- Must update calculation when employee requests to use leave or makes a request for payroll records
- Paystub requirement is not enforceable until next full pay period after the date the law takes effect

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## Expiration

- Expires **9/30/2021**
- Employee on leave at time of expiration can continue to take full amount
- Legislature could extend further
- Keep tabs on local ordinances and their extensions

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## Action Plan/Next Steps

- Provide notice/poster
- Implement policies/procedures/forms
- Work with payroll on paystub reporting obligations
- Develop a strategy for documenting and responding to “retroactive” payment requests

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Questions? We are here to help.

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