



CORONAVIRUS INDUSTRY ALERT

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CA COVID-19 SUPPLEMENTAL PAID SICK LEAVE FAQ

For Construction Employers

Revised February 11, 2022

DISCLAIMER:

This set of FAQs is intended to provide general information about the California COVID-19 Supplemental Paid Sick Leave law (SB 114) and legal issues relating to it. It should not be relied upon as legal advice. Please consult an attorney if you need legal advice on specific situations. We will continue to revise this FAQ as new information becomes available.

The [Labor Commissioner's web page](#) will be updated soon.

Background

On February 9, 2022, California Governor Gavin Newsom signed [Senate Bill 114 \(SB 114\)](#), effective immediately. The law creates a new set of COVID-19 Supplemental Paid Sick Leave (SPSL) requirements for employers with 26 or more employees under new Labor Code Section 248.6. The requirements are similar to those under last year's SB 95 but with some notable differences, so read through the details below carefully.

FREQUENTLY ASKED QUESTIONS

What, When & Who

1. *When do we have to start providing this new SPSL to employees?*

On February 19, 2022, and also retroactively to January 1, 2022 upon request.

2. *How long is this SPSL effective?*

Through September 30, 2022; any continuous leave begun on or continuing beyond that date is also covered.

3. *Is this a continuation of the previous California COVID-19 SPSL (SB 95)?*

No, this is a new set of leave that is available to employees for COVID-related reasons.

4. *Which employers are covered by this law?*

Employers with **26 or more employees**. In determining your employee count, the conservative approach is to go by the number of employees nationwide at the time an employee requests leave.

5. *Which employees can receive SPSL?*

Leave is available **immediately to all employees**, regardless of length of employment or status (full-time or part-time; exempt or non-exempt), or whether or not they belong to a union. It applies only to employees, not to bona fide independent contractors.

6. *Can we negotiate a collective bargaining agreement (CBA) waiver for our union employees?*

No. SB 114 does not allow a collective bargaining waiver of COVID-19 SPSL. Also, existing paid sick leave waivers in the UCON CBAs do not apply to this law.

Employee Eligibility for Leave

7. When are employees entitled to SPSL payments?

There are two “buckets” of leave that may be available, **up to 40 hours each for full-time employees:**

A – Up to 40 hours

Employees are entitled to 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 themselves or a family member for a COVID-19 vaccine (including boosters)*;
4. Experiencing symptoms related to a COVID-19 vaccine (including boosters) 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, spouse or registered domestic partner) 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.

* #3 and #4 above can be limited by the employer to 3 days or 24 hours total per vaccine or booster, unless the employee provides verification from a health care provider of continued symptoms related to the vaccine or booster.

B – Up to 40 hours

An employee may request additional leave if they or a family member for whom they are providing care tests positive for COVID-19. They are not required to first exhaust leave under A above, but employers can request documentation before authorizing and paying this additional type of leave:

- If the leave is for the employee, the employer can require documentation of a positive test. Additionally, the employer may require the employee to submit to another diagnostic test on or after the fifth day after the positive test; the employer must make that test available at no cost to the employee.
- If the leave is for a family member, the employer may require documentation of the family member’s positive test results.

8. How do we categorize absences that could qualify as both A and B, either partially or totally?

The law does not address this issue, so employers will need to look to the California Labor Commissioner for guidance. We will update this FAQ as more guidance becomes available.

9. Do employees have to provide any notice? And do we automatically owe retroactive pay?

Employees should make an oral or written request. From February 19, 2022 onward, employers are recommended to ask employees if they wish to use SPSL if the employer knows that their absence is for any of the above reasons. However, ultimately the employee gets to decide when to use SPSL and how many hours they want to use.

For retroactive leave that occurred between January 1, 2022 and February 19, 2022, employers only need to take action if an employee makes an oral or written request.

10. Can we ask employees to prove that they were eligible with a medical certification and/or proof of a positive COVID test?

No, for the first 40 hours (A). 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. Employers **can** request proof of positive COVID tests as described above in Question #7 for additional leave (B).

11. What is acceptable for proof of a positive COVID test?

The statute does not define what types of tests are acceptable. For employees who are requesting retroactive pay or new leave under B above, employers will need to accept the test that the employee has used, unless the Labor Commissioner provides other guidance. For cases where the employer is requiring an additional test on or after day five, the employer can choose what test to administer since the employer is paying for it.

12. If an employee is experiencing symptoms but gets no medical diagnosis and requests SPSL, are we required to pay for that time off?

Yes. 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.

13. Does it matter where the employee got COVID?

No. However, if the employee contracted COVID due to a workplace exposure, they are subject to pay under the Cal/OSHA ETS, not under SPSL.

14. Does it matter whether or not the employee (or their family member) is symptomatic?

Only for certain reasons under A above. For B, the only requirement is a positive COVID test, not any symptoms.

15. If the employee is taking leave to get vaccinated or help a family member get vaccinated, can we require proof of that?

No, it is not allowed under this law.

16. Can a past employee come back and request retroactive pay if they worked for us after January 1, 2022 but left or were terminated prior to February 19, 2022?

Yes. Since they were a covered employee under this law during their time of employment, they can request retroactive pay for any of the allowed reasons, and for up to the number of hours that they would be entitled to. However, if the employee does not make the request, or does not provide the necessary documentation for leave under B, there is no obligation to pay.

Payments to Employees

17. How many total hours of SPSL payments can employees receive?

The number of hours of COVID-19 SPSL payments depends upon the employee’s schedule. The following criteria and calculations apply to A and B separately – the number of hours are for **each** type of leave, A and B.

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 **40 hours** of SPSL.
2. **Part-Time:** Employees with a normal weekly schedule are entitled to SPSL hours equal to the total number of hours the employee is normally scheduled to work over one week;
3. **Variable Hours:** If an employee works a variable number of hours, the employee is entitled to SPSL equal to 7 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 7 days, 7 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 7 or fewer days, the employee is entitled to 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.

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

Non-Exempt Employees: Each hour of 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.)

Exempt Employees: 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.

19. Does the hourly rate for COVID-19 SPSL payments include fringe benefits for union employees?

SB 114 does not require the payment of any fringe benefits to the union Trust Funds. 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.

UCON is currently negotiating MOUs with our union partners concerning what fringe benefits will need to be paid, if any, in connection with SB 114 SPSL payments. Absent a clear agreement, employers may be subject to payment of full fringe benefit packages to the Trust Funds under the terms of their CBAs.

SPSL Interactions with Other Types of Paid Leave

20. Can we make employees use other paid or unpaid leave before taking SPSL?

No. AB 114 prohibits an employer from requiring an employee to use any other leave unrelated to COVID before the employee uses COVID-19 SPSL. For example, employees cannot be required to use vacation, PTO or non-COVID sick leave (such as California Paid Sick Leave) before using COVID-19 SPSL.

21. Can we make employees use SPSL first when we have to exclude them from the workplace because of a work-related case or exposure under the Cal/OSHA COVID-19 Emergency Temporary Standard (ETS)?

No. Employers cannot require employees to use SPSL when an employee must be excluded from the jobsite due to workplace COVID-19 exposure and is entitled to exclusion pay. (See [Cal/OSHA ETS FAQ on Exclusion Pay and Benefits](#) for more details on exclusion pay.)

22. What if the employee collected unemployment (UI) or disability (SDI) in 2022 before this new SPSL went into effect?

The amount of paid leave employees already received in 2022 before the law takes effect might qualify as an offset that wholly or partially satisfies an employer's 2022 SPSL obligations. Under the law, if an employer pays an employee another *supplemental* benefit for leave taken on or after January 1, 2022 that 1) is payable for the law's covered reasons and 2) compensates employees in an amount equal to or greater than the amount of pay the law requires, an employer may count those hours toward the number of hours of SPSL it must provide an employee under the new law. If the employer paid the employee at a pay rate lower than what SPSL requires, then the employer would true up (i.e., increase retroactively) the pay to what the law would have required (had it been in effect when the employee took leave in 2022), such that the leave qualifies for the offset. If a payment is made due to an employee's oral or written true-up request, payment must be made on or before the payday for the next full pay period after the request.

23. What if they were paid by workers' compensation before this new SPSL went into effect?

Workers' compensation benefits would mean a workplace exposure, so it would fall under Cal/OSHA ETS exclusion pay and not SPSL.

24. What if they were one of our non-union employees who used company-provided sick leave or PTO in 2022 for a COVID-related reason now covered under SPSL?

If the employer paid an amount equal to or greater than what 2022 SPSL requires and an employee requests that 2022 SPSL be applied to the prior absence, the employer must apply (or "credit") 2022 SPSL to that absence, rather than using the other benefit that was applied to the absence. The employer would then need to credit back the other type of leave that was used, as offsets or credits are not available from other types of non-COVID leave.

Compliance & Enforcement

25. Do we need to provide any information to employees about the new SPSL?

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 will be providing 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 and documenting this.

26. What do we need to put on employees' paystubs?

Beginning at the next full pay period after the law took effect, paycheck stubs need to identify the amount of COVID-19 SPSL used and paid for that pay period, separate from any other sick leave or PTO. If no leave is taken for that pay period, the paystub needs to show zero hours taken. **Your payroll department or payroll service should make sure that they have updated their paystub forms to comply with the law.** 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 for other types of supplemental leave payments should ensure that the paystubs reflect such offsets.
- Manual calculations will need to be made for part-time employees who work variable hours whenever the 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.

27. How will SB 114 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 AB 114 can be enforced through California's unfair competition laws and through other statutes.

28. Do CBA grievance and arbitration procedures apply if an employee has a complaint about how SPSL was handled?

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.

29. 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, 2022?

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