

California Enacts 2021 COVID-19 Supplemental Paid Sick Leave Law

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On March 19, 2021, California Governor Newsom signed Senate Bill No. 95 (“SB 95”) into law. SB 95 adds a new section 248.2 to the California Labor Code which requires employers to provide 2021 COVID-19 Supplemental Paid Sick Leave that is broader-reaching than the previous version that expired on December 31, 2020.

Under the new 2021 COVID-19 Supplemental Paid Sick Leave provisions, employers with more than 25 employees are required to provide up to two weeks of additional paid sick leave to employees who are not able to work or telework for expanded reasons related to COVID-19 between January 1, 2021 and September 30, 2021.

The California Department of Industrial Relations has published additional guidance on 2021 COVID-19 Supplemental Paid Sick Leave in the form of Frequently Asked Questions (“2021 FAQs”), and a side-by-side comparison of paid leave options under California law (both linked below).

It should be noted that SB 95 also adds a new section 248.3 to the California Labor Code which provides special COVID-19 supplemental paid sick leave requirements for employees of in-home supportive service providers and waiver personal care service providers. Those requirements are not addressed in this Compliance Update.

■ Period of Coverage

Effective March 29, 2021, employers are required to provide 2021 COVID-19 Supplemental Paid Sick Leave to covered employees during the period beginning January 1, 2021 and ending September 30, 2021. Refer below to the section entitled “Payment of Retroactive Benefits” for guidance on handling retroactive benefits for leave taken between January 1, 2021 and March 28, 2021.

There is an important exception to SB 95’s sunset date: If an employee is taking 2021 COVID-19 Supplemental Paid Sick Leave at the time the state law requirement to provide such leave expires, the employee must be allowed to continue and complete the full amount of paid leave.

■ Covered Employees

All public and private employers that employ more than 25 employees are required to provide 2021 COVID-19 Supplemental Paid Sick Leave to “covered employees.” It is not clear from the text of SB 95 whether for this purpose an employer counts all employees nationwide or only those who work within California. A “covered employee” is an employee who:

- is unable to work or telework for the employer because of a reason listed in the following section entitled “Reasons for Taking Leave,” and
- is working in California and subject to the Healthy Workplaces, Healthy Families Act of 2014.

■ Reasons for Taking Leave

An employer is required to provide 2021 COVID-19 Supplemental Paid Sick Leave to a covered employee if the employee is unable to work or telework for the employer because of any of the following reasons:

- **Caring for Self:** The covered employee is subject to a quarantine or isolation period related to COVID-19 (see note below), or has been advised by a healthcare provider to quarantine due to COVID-19, or is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- **Caring for a Family Member:** The covered employee is caring for a family member who is either subject to a quarantine or isolation period related to COVID-19 (see note below) or has been advised by a healthcare provider to quarantine due to COVID-19, or the employee is caring for a child whose school or place of care is closed or unavailable due to COVID-19 on the premises.
- **Vaccine-Related:** The covered employee is attending a vaccine appointment or cannot work or telework due to vaccine-related symptoms.

It should be noted that the quarantine or isolation period related to COVID-19 is the period defined by an order or guidelines of the California Department of Public Health, the federal Centers for Disease Control and Prevention, or a local health officer with jurisdiction over the workplace.



According to the 2021 FAQs, an employer may not deny 2021 COVID-19 Supplemental Paid Sick Leave to a covered employee based solely on a lack of certification from a health care provider. However, it may be reasonable in certain circumstances to ask for documentation before paying sick leave to an employee, when the employer has other information indicating that the employee is not requesting sick leave for a valid purpose. For example, if a covered employee informs the employer that the employee is subject to a local quarantine order and qualifies for 2021 COVID-19 Supplemental Paid Sick Leave, but the employer subsequently learns that the employee was out at a park, the employer could reasonably request documentation.

■ Number of Hours of Leave

The covered employee determines how many hours of 2021 COVID-19 Supplemental Paid Sick Leave to use, up to the total number of hours that the employee is entitled to take (as calculated below). When the covered employee makes an oral or written request to the employer to take 2021 COVID-19 Supplemental Paid Sick Leave, the employer is required to make the leave available to the employee for immediate use.

The total number of hours of 2021 COVID-19 Supplemental Paid Sick Leave that a covered employee is entitled to take is calculated as follows:

Covered Employee	Entitlement to 2021 COVID-19 Supplemental Paid Sick Leave
A covered employee who is an active firefighter and scheduled to work more than 80 hours for the employer in the two weeks preceding the leave	The total number of hours the covered employee was scheduled to work for the employer in the two weeks preceding the leave
Any other covered employee: <ul style="list-style-type: none"> • who is considered by the employer to work “full-time,” or • who worked (or was scheduled to work) an average of at least 40 hours per week for the employer in the two weeks preceding the leave 	80 hours
A covered employee who does not satisfy any of the above criteria	If the covered employee has a normal weekly schedule: <ul style="list-style-type: none"> • The total number of hours that the employee is normally scheduled to work for the employer over two weeks, but not more than 80 hours If the covered employee works a variable number of hours, and has worked for the employer for: <ul style="list-style-type: none"> • More than 14 days: 14 times the average number of hours that the employee worked each day for the employer in the six months preceding the leave (or the entire period worked for the employer, if less than six months), but not more than 80 hours • 14 days or fewer: the total number of hours the employee worked for the employer

■ Rate of Pay During Leave

2021 COVID-19 Supplemental Paid Sick Leave is paid at the following rate of pay (subject to limits set forth after the chart):

Covered Employee	Rate of Pay
A covered employee who is an active firefighter and scheduled to work more than 80 hours for the employer in the two weeks preceding the leave	The regular rate of pay to which the covered employee would be entitled as if the employee had been scheduled to work those hours, pursuant to existing law or an applicable collective bargaining agreement
A covered employee who does not satisfy the above criteria and who is classified as exempt under applicable wage-hour laws	Calculated in the same manner as the employer calculates wages for other forms of paid leave time
A covered employee who does not satisfy the above criteria and who is classified as nonexempt under applicable wage-hour laws	<p>The highest of the following rates:</p> <ul style="list-style-type: none"> • The employee's regular rate of pay for the workweek in which the covered employee uses the leave • The 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 • The state minimum wage • The local minimum wage

However, an employer is not required to pay more than \$511 per day or \$5,110 in the aggregate to a covered employee for 2021 COVID-19 Supplemental Paid Sick Leave taken by the employee. If this limit applies, the employee may utilize other paid leave available to the employee in order to be fully compensated for the leave taken by the employee.

Important Exception: If the employer pays another supplemental benefit to a covered employee for leave taken on or after January 1, 2021, the employer may count the hours of other paid benefit or leave towards the total number of hours of 2021 COVID-19 Supplemental Paid Sick Leave that the employer is required to provide to the employee, as long as all of the following requirements are met:

■ Coordination with Other Paid Leave

The employer is prohibited from requiring a covered employee to use any other paid or unpaid leave, paid time off, or vacation time provided by the employer before the employee uses 2021 COVID-19 Supplemental Paid Sick Leave or in lieu of such leave. For example, an employer cannot require covered employees to use State Disability Insurance (SDI) benefits before or in lieu of 2021 COVID-19 Supplemental Paid Sick Leave.

The total number of hours of 2021 COVID-19 Supplemental Paid Sick Leave available to a covered employee is in addition to any paid sick days that may be available to the employee under the Healthy Workplaces, Healthy Families Act of 2014.

- The other supplemental benefit is payable for one of the qualifying reasons listed above in the section entitled "Reasons for Taking Leave."
- To pay for the other supplemental benefit, the employer did not require the covered employee to use any other paid leave or paid time off available to the employee under a policy that is not specific to COVID-19, or vacation time.
- The other supplemental benefit compensates the employee at a rate of pay equal to or greater than the rate of pay for 2021 COVID-19 Supplemental Paid Sick Leave (as discussed above in the section entitled "Rate of Pay During Leave"). If the employer paid for the supplemental



benefit at a lesser rate than what is required for 2021 COVID-19 Supplemental Paid Sick Leave, then the employer may make a retroactive payment to make up the difference between what was paid and what is required for 2021 COVID-19 Supplemental Paid Sick Leave, to satisfy this “rate of pay” requirement.

The other supplemental benefit may include paid leave provided by the employer under any federal or local law in effect or that became effective on or after January 1, 2021, if the paid leave is provided to the covered employee under the law for any of the same reasons set forth above in the section entitled “Reasons for Taking Leave.”

The other supplemental benefit does not include paid sick days under California’s Healthy Workplaces, Healthy Families Act of 2014, California’s expired COVID-19 food sector supplemental paid sick leave law, or California’s expired COVID-19 supplemental paid sick leave law.

■ Payment of Retroactive Benefits

The requirement to provide 2021 COVID-19 Supplemental Paid Sick Leave applies retroactively to January 1, 2021 for covered employees who took leave for one of the qualifying reasons listed above in the section entitled “Reasons for Taking Leave.”

If a covered employee makes an oral or written request on or after March 29, 2021 for retroactive 2021 COVID-19 Supplemental Paid Sick Leave benefits, and the leave taken by the employee between January 1, 2021 and March 28, 2021 for a qualifying reason was:

- unpaid, the employer must provide the employee with retroactive 2021 COVID-19 Supplemental Paid Sick Leave benefits to cover the leave.
- covered by another supplemental benefit (as discussed under the above section entitled “Coordination with Other Paid Leave”) that did not compensate the covered employee in an amount equal to or greater than the amount of compensation for 2021 COVID-19 Supplemental Paid Sick Leave that the employee is entitled to receive, the employer must provide the employee with a retroactive benefit that provides for such additional compensation.
- covered by the employee’s regular paid sick or vacation days, the employer must provide the employee with

retroactive 2021 COVID-19 Supplemental Paid Sick Leave benefits for those days and restore the used sick or vacation days to the employee’s bank of available days.

The retroactive benefit must be paid on or before the pay date for the next full pay period after the covered employee’s oral or written request. For any retroactive payment of benefits, the number of hours of leave corresponding to the amount of the retroactive benefit will count towards the total number of hours of 2021 COVID-19 Supplemental Paid Sick Leave that the employer is required to provide to the covered employee.

The 2021 FAQs provide the following example of a retroactive benefit payment: If a covered employee had to take two hours off for a vaccine appointment on February 15, 2021, the employee can make an oral or written request to the employer to be paid for that time off in February, because it is a qualifying reason for taking 2021 COVID-19 Supplemental Paid Sick Leave. The oral or written request must be made on or after March 29, 2021 (the date when SB 95 is effective for employers). A request made before March 29 does not count. After the employee makes the request, the employer will have until the payday for the next full pay period to pay the retroactive 2021 COVID-19 Supplemental Paid Sick Leave.

■ Administrative Tasks for Employers

Posted Notice

The California Labor Commissioner has published a model notice (linked below) that employers must post in a conspicuous location in the workplace. If an employer’s covered employees do not frequent a workplace, the notice requirement may be satisfied by delivery through electronic means, such as by e-mail.

Notice of Available 2021 COVID-19 Supplemental Paid Sick Leave

The employer is required to provide each employee with written notice of the amount of 2021 COVID-19 Supplemental Paid Sick Leave available to the employee either on the employee’s itemized wage statement or in a separate writing on each payday, beginning with the next full pay period following March 29, 2021. The amount of available 2021 COVID-19 Supplemental Paid Sick Leave must be listed separately from the amount of other paid sick days or paid time off available to the employee.