



LAW UPDATE LABOR AND EMPLOYMENT

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CALIFORNIA SUPPLEMENTAL PAID SICK LEAVE IS BACK — WHAT DO WE NEED TO KNOW?

On February 9, 2022, Governor Newsom signed into law the 2022 COVID-19 Supplemental Paid Sick Leave Bill (SB 114).¹ While this bill has many similarities to last year's Supplemental Paid Sick Leave legislation, there are many important differences.

When does the new law become effective?

SB 114 became law when signed by Governor Newsom on February 9, 2022. However, the requirement to provide the COVID-19 Supplemental Paid Sick Leave (SPSL) as described in the new Labor Code section 248.6 takes effect 10 days later on February 19, 2022.

Is the law retroactive?

Yes. The law is retroactive to January 1, 2022. An employee may make a request for retroactive application either orally or in writing. If an employee does make an oral request, it is recommended to confirm that request in writing for documentation purposes.

Are school districts and county offices of education covered by this legislation?

Yes, if they have more than 25 employees.

Who are the covered employees and family members?

Labor Code section 248.6 covers all employees. It also allows employees to use 2022 SPSL to care for family members. "Family member" is defined to include child, grandchild, grandparent, parent, sibling, spouse, or registered domestic partner. The definition of child applies regardless of age or dependency status.

¹ https://leginfo.legislature.ca.gov/faces/billPdf.xhtml?bill_id=202120220SB114&version=20210SB11497ENR; this adds section 248.6 to the Labor Code.

How long will the law be in effect?

The requirement to provide SPSL under this law remains in effect through September 30, 2022. A covered employee already taking SPSL at the time the law expires must be allowed to finish their leave.

How much leave does this law provide?

Similar to prior COVID-19 leave laws, this law allows for up to 80 hours of paid leave. The biggest difference from prior COVID-19 leave laws is that this law establishes two different banks of 40 hours of leave for different purposes and with different requirements. Leave must be provided if the employee is otherwise qualified for the leave and is unable to work or telework.

Bank 1 - COVID-19 Leave for Qualifying Reasons

In this first leave bank, an employee is allowed to take up to 40 hours of leave provided the need for the leave is for the qualifying reasons listed below:

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 Department of Public Health, the federal Centers for Disease Control and Prevention, or a local public health officer who has jurisdiction over the workplace.
2. The employee has been advised by a health care provider to isolate or quarantine due to COVID-19.
3. the employee is attending an appointment for themselves or a family member to receive a vaccine or a vaccine booster for protection against COVID-19;
4. The employee is experiencing symptoms, or caring for a family member experiencing symptoms, related to a COVID-19 vaccine or vaccine booster 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 guidance described above or who has been advised to isolate or quarantine, as described above.
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.

Leave for Vaccinations

With respect to SPSL for purposes of receiving a vaccination or vaccine booster, the SPSL can be limited to three days or 24 hours unless the employee provides verification from a health care provider that the employee or their family member is continuing to experience symptoms related to a COVID-19 vaccination or vaccine booster. This time limitation includes the time

taken to actually receive the vaccination or booster. It is important to note the leave for vaccination or booster is for **each** vaccination or booster. This means it is possible an employee could exhaust the first-time bank with vaccination symptoms.

Bank 2 - Positive COVID-19 Tests

The second bank of time available to employees is up to 40 hours of leave if the employee tests positive for COVID-19, or if a family member for whom the employee is providing care tests positive for COVID-19. With this leave bank, the employer can require the employee to provide the positive test result to confirm that the employee qualifies for the leave. Similarly, the employer may also require the employee to provide the family member's positive test result if the employee is requesting leave to provide care for that family member. This new law specifically provides that if an employee refuses to produce the initial positive test result for themselves, or their family member, the employer has no obligation to provide SPSL in this category of leave.

There is a further provision that allows employers to require employees to test for COVID-19 on or after day five following the initial positive test. This provision correlates with the existing isolation guidance from the California Department of Public Health, as well as the Cal-OSHA Emergency Temporary Standards (ETS), which allows employees who test negative for COVID-19 on or after day five and do not present any symptoms to end their isolation periods and return to work.

It should be noted that if a test is required on or after day five, the employer must provide the test at no cost to the employee. Given the restrictions of the Cal-OSHA ETS regarding home testing for COVID-19, it would be advisable to require employees to utilize approved methods for verification of test results for this required testing.

What is the relationship between Bank 1 and Bank 2?

While the qualifying reasons are quite similar, Bank 1 and Bank 2 operate separately and independently from each other. Employers cannot require employees to exhaust the leave in Bank 1 before using the leave in Bank 2. The leave designation is at the employee's election. It is critical that the employer maintain careful records to track which bank has been utilized and in what amount.

How does this apply to part-time employees or employees on a variable schedule?

A specific method is provided to determine the amount of leave for employees who work part time or have variable schedules. This method should be familiar as it is the same method from last year's version of SPSL:

- For an employee with a normal weekly schedule, their eligible leave is the total number of hours the employee is normally scheduled to work for the employer over one week.

- If an employee works variable hours, their eligible leave is seven times the average number of hours the employee worked each workday over the last six months preceding the SPSL. If the employee has worked less than six months, the employer calculates the average hours over the entire employment period and multiplies the daily average by seven.
- If an employee works variable hours and has only worked seven days or fewer, the employee will receive an amount of SPSL equivalent to the total number of hours worked for the employer.

How is the amount of compensation determined?

Under this legislation, the compensation paid for SPSL is determined based on the employee’s exemption status and their rate of pay.

- Nonexempt employees: compensation is based on employee’s regular rate of pay **or** the employee’s total wages less any overtime premium pay.
- Exempt employees: employers must calculate compensation for SPSL just as they would calculate other forms of paid leave time.

This law caps the amount of leave required to be paid at \$511 per day and \$5,110 in the aggregate. If an employee’s regular compensation exceeds that amount, the employee can supplement that SPSL maximum cap with other accrued paid leaves to remain in a fully-paid status.

Is there a notice requirement?

Employers are required to provide written notice regarding the amount of SPSL an employee has **used** through the pay period. This is an important distinction from last year’s version of SPSL. This can be done by listing the SPSL amount separately on an itemized paystub or including a separate written statement on paydays. Please note this requirement is not enforceable until the first full pay period following February 19, 2022. In addition, retroactive payments (or credit to leave) must be on the paystub for the pay period during which the payment (or credit to leave) was made. The Labor Commissioner’s office may provide more clarity on the paystub requirements once it has posted FAQs on the new version of SPSL.

Is there a posting requirement?

The Labor Commissioner is required to make a model poster available within seven days of the enactment of SB 114. Once the poster is available, employers are required to conspicuously display the poster and should also distribute the poster electronically (i.e., by email and/or on the employee portion of your website). We recommend checking the Labor Commissioner’s COVID-

19 Guidance and Resources website for updates, including FAQs and workplace postings, to make sure you are in compliance with the posting requirement.²

How does this relate to “exclusion pay” under the Cal/OSHA ETS?

Employers are not allowed to require employees to use either bank of SPSL before an employee is entitled to exclusion pay due to exposure to COVID-19 in the workplace. SB 114 specifically provides: “An employer **shall not** require a covered employee to first exhaust their COVID-19 supplemental paid sick leave under this section before satisfying any requirement to provide paid leave for reasons related to COVID-19 under any Cal-OSHA COVID-19 Emergency Temporary Standards.”

This means that an employee exposed in the workplace can be required to utilize their accrued sick leave (provided they have a paid sick leave balance in excess of the maximum statutory leave under Labor Code section 246), but would have to be put on administrative leave to remain in paid status at the expiration of their sick leave for purposes of exclusion pay. An employee cannot be required to reduce their sick leave below the amounts required under Labor Code section 246.³

What if there is an MOU or CBA that continued a form of COVID-19 leave?

If you have an existing MOU or CBA that continued a form of COVID-19 leave into 2022, it is possible that time could be offset against the retroactive leave obligations created by SB 114. Please consult with Schools Legal Service for an analysis as needed in this circumstance.

Our office is available to assist with any questions related to the SPSL or other COVID-19 matters. Please reach out as needed for assistance.

--Abby Auffant

Education Law Updates are intended to alert Schools Legal Service clients to developments in legislation, opinions of courts and administrative bodies and related matters. They are not intended as legal advice in any specific situation. Consult legal counsel as to how the issue presented may affect your particular circumstances.

² <https://www.dir.ca.gov/dlse/COVID19resources/>

³ <https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html>