

GOVERNOR NEWSOM REINSTATES SUPPLEMENTAL PAID COVID SICK LEAVE

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Employment Law Reporter, Ervin Cohen & Jessup LLP

Although some employers might describe it as a bit like showing up to the end of the movie with lots of popcorn, yesterday Governor Gavin Newsom signed Assembly Bill 84 which serves to reinstate a form of supplemental paid sick leave (SPSL) for most California workers. The new law effectively replaces the prior version which expired on September 30, 2021, and will become effective on February 19, 2022. More importantly, AB 84 will be retroactive to January 1, 2022.

The new SPSL applies to employers with more than 25 employees. It requires that these employers provide COVID-19 paid sick leave to an employee that is unable to work or telework due to any of the following reasons:

- (A) 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. If the employee is subject to more than one such quarantine or isolation requirement, SPSL must be provided for the longest minimum quarantine or isolation period;
- (B) The employee has been advised by a health care provider to isolate or quarantine due to COVID-19;
- (C) The employee is attending an appointment for him or herself or a family member to receive a vaccine or a vaccine booster for protection against COVID-19;
- (D) (i) 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;
- (ii) For each vaccination or vaccine booster, an employer may limit the total COVID-19 supplemental paid sick leave to 3 days or 24 hours, which includes the time spent obtaining the vaccine or booster, unless the employee provides verification from a health care provider that the employee or family member is continuing to experience symptoms related to a COVID-19 vaccine or vaccine

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booster;

(E) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

(F) The employee is caring for a family member who is subject to an order or guidance described in subparagraph (A) or who has been advised to isolate or quarantine, as described in subparagraph (B); and

(G) 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;

AB 84 provides for a possible 80 hours of SPSL depending upon the circumstances, which is divided into two categories. [1] For reasons (A) through (G) above, full-time employees or employees who worked at least 40 hours per week in the two weeks prior to the leave are entitled to 40 hours of SPSL. Part-time employees will be entitled to SPSL based on that employee's normal weekly schedule. If the part-time employee works a variable schedule, then the SPSL will be established by seven times the average number of hours the employee worked each day for the employer in the six months preceding the date the employee took the leave. If the employee has worked for the employer for less than six months but more than seven days, this calculation must be made over the entire period the employee worked. If the part-time employee works a variable schedule has worked for the employer for seven days or fewer, then he or she will be entitled to a leave based on the total number of hours worked.

An employee is entitled to additional SPSL in an amount equal to the above (40 hours for full-time workers or for part-time employees, as described) if the employee, or a family member for whom the employee is providing care, tests positive for COVID-19. Employers are permitted to require the employee to submit to a diagnostic test on or after the fifth day after the initial test was taken and document the results, provided the test is made available at no cost to the employee. If the employee requests additional leave because a family member tests positive for COVID-19, the employer may require that the employee provide documentation of that family member's test results before paying the additional leave.

An employee is not required to exhaust his or her initial SPSL before using additional SPSL in the event the employee or a family member tests positive for COVID-19. The total maximum amount of SPSL which an employee may take is 80 hours. It is up to the employee to determine how many hours of SPSL to use. Employers cannot require an employee to use any other paid or unpaid leave, paid time off, or vacation time provided by the employer before the covered employee uses SPSL or in lieu of SPSL. Further, and unlike the prior version of SPSL, an employer may not require an employee to exhaust SPSL before providing any paid leave for reasons related to COVID-19 under any Cal-OSHA COVID-19 Emergency Temporary Standards. However, an employer that pays an employee another supplemental benefit for leave taken on or after January 1, 2022, that is payable for the reasons listed above and compensates the employee in an amount equal to or greater than the amount required by SPSL to which the employee is entitled may count the hours of the other paid benefit or leave towards the total number of hours of SPSL that the employer is required to provide. Such other supplemental benefit for leave taken does not include state paid sick leave, supplemental paid sick leave for COVID-19 provided to certain food sector workers under Labor Code section 248, supplemental paid sick leave for COVID-19

provided to certain emergency responders and health care workers under Labor Code section 248.1, or supplemental paid sick leave for COVID-19 provided to certain firefighters under Labor Code section 248.2, but may include paid leave provided by the employer pursuant to any federal or local law in effect or that becomes effective on or after January 1, 2022.

SPSL must be calculated and paid in one of the following ways for hourly workers: in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek; or by dividing the employee's total wages, not including overtime premium pay, by the employee's total non-overtime hours worked in the full pay periods occurring within the prior 90 days of employment; provided that, for nonexempt employees paid by piece rate, commission or other method that uses all hours to determine the regular rate of pay, total wages, not including overtime premium pay, shall be divided by all hours, to determine the correct rate of pay for SPSL. SPSL for employees exempt from overtime should be calculated in the same manner as the employer calculates wages for other forms of paid leave time. In any event, employers are not required to pay more than \$511 per day and \$5,110 in the aggregate for SPSL, unless federal legislation is enacted that increases these amounts beyond the amounts that were included in the Emergency Paid Sick Leave Act established by the federal Families First Coronavirus Response Act, in which case the new federal dollar amounts shall apply.

Employers are required to report the amount of SPSL that the employee has used through the pay period in which it was due to be paid on either the employee's wage statement or in a separate writing provided at the same time as the payment of wages. Until SPSL is used, employers are to list zero hours. The SPSL time reported must be listed separately from any state or local paid sick leave. The obligation to report SPSL commences on the next full pay period following the February 19, 2022.

An employee may request payment for any leave taken for the reasons listed above on or after January 1, 2022 for which the employer did not compensate the employee in an amount equal to or greater than the amount required for SPSL, and the employer must provide employee with a retroactive payment on or before payday for the next full pay period. The employer may require the employee to provide documentation of a positive COVID-19 diagnostic test, if applicable. If the employer did compensate the covered employee in an amount equal to or greater than the amount of compensation required for SPSL, then upon the oral or written request of the employee, the employee should be credited for any leave hours used for SPSL reporting purposes. Similarly, upon making any retroactive payment, the number of hours of leave corresponding to the amount of the retroactive payment should be counted towards the total number of hours of SPSL.

AB 84 is set to expire on September 30, 2022, except that an employee taking SPSL at that time must be permitted to take the full amount of SPSL to which that employee would have been entitled.

[1] Additional rules apply for providers of in-home supportive services and firefighters.

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