

California Revives COVID-19 Supplemental Paid Sick Leave Through September 2022

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On February 9, Governor Newsom signed SB 114, reviving the mandate that California employers provide supplemental paid sick leave (SPSL) for COVID-19-related absences, which previously expired on September 30, 2021. This “new and improved” 2022 COVID-19 Supplemental Paid Sick Leave (2022 SPSL) differs from its 2021 predecessor by:

- Providing additional qualifying reasons for leave (including to accompany family members to vaccine appointments and care for family members recovering from vaccine-related symptoms);
- Creating two separate 40-hour leave banks (one of which is specifically designated for when an employee or their family member tests positive for COVID-19);
- Allowing employers the option to require employees who test positive for COVID-19 to submit to COVID-19 testing;
- Permitting employees to request retroactive credit for paid time off used for a qualifying SPSL reason and instead debit their SPSL amounts; and,
- Prohibiting employers from requiring employees to exhaust SPSL prior to paying exclusion pay benefits under the Cal/OSHA COVID-19 Emergency Temporary Standards.

SB 114 went into effect on February 19, and applies retroactively to January 1, meaning employers may designate COVID-19-related leave already taken this year as 2022 SPSL. The law remains effective through September 30.

Who Is Covered?

Like its 2021 predecessor, the 2022 SPSL law applies to both public and private employers with 26 or more employees, including those with collective bargaining agreements.

Amount of Leave

Although both versions of the law provided up to 80 hours of leave, the allocation of leave under the 2022 law

differs from the 2021 version. Full-time employees may receive up to 80 hours of leave in two distinct 40-hour leave banks: 40 hours reserved only for when an employee or a family member tests positive for COVID-19, and an additional 40 hours for all other qualifying SPSL reasons. As such, employers should consider developing internal codes to track these different SPSL buckets for purposes of timekeeping and payroll.

Generally speaking, a full-time employee is one who worked, or was scheduled to work, at least 40 hours per week in the two weeks preceding their leave.

For non-full-time employees:

- Those with a normal work schedule receive an amount of leave equal to the total number of hours typically worked in one week (for each leave bank).
- Those working a variable schedule and who have been employed for at least six months receive seven times the average number of hours worked each day in the six months preceding leave (for each leave bank).
- Those working a variable schedule and who have been employed between eight days and six months receive seven times the average number of hours worked each day over the employee's entire period of employment (for each leave bank).
- Those working a variable schedule and who have been employed for seven days or less receive leave hours equal to the total number of hours worked (for each leave bank).

Qualifying Reasons for Leave

While the qualifying reasons for leave are similar to the 2021 law, the 2022 SPSL expands on these reasons by allowing employees to accompany family members to vaccine appointments and to care for family members recovering from vaccine-related symptoms. However, employers may limit an employee's use for vaccine-related qualifying reasons to three days (or 24 hours) absent a doctor's note. New changes from the 2021 SPSL are indicated in **bold** below.

The first 40-hour bank of SPSL may only be used when an employee or a family member they are caring for tests positive for COVID-19. When using this bank, employers may require documentation of the positive test result (either diagnostic or an over-the-counter rapid test) for the employee or family member.

The second 40-hour bank may be used for all other qualifying reasons not involving a positive COVID-19 test, including when:

- The employee is subject to a federal, state, or local quarantine or isolation period related to COVID-19;
- The employee is advised by a health care provider to self-quarantine due to concerns related to COVID-19;

- The employee is attending an appointment **for themselves or a qualifying family member** to receive a COVID-19 **or booster** vaccine*;
 - ***May be limited to three days or 24 hours unless the employee provides a doctor’s note.**
- The employee is experiencing symptoms related to a COVID-19 **or booster** vaccine*;
 - ***May be limited to three days or 24 hours unless the employee provides a doctor’s note.**
- **The employee is caring for a qualified family member who is experiencing symptoms related to a COVID-19 or booster vaccine***;
 - ***May be limited to three days or 24 hours unless the employee provides a doctor’s note.**
- The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- The employee is caring for a family member who is subject to a quarantine or isolation order, or who has been advised to self-quarantine by a health care provider due to COVID-19 concerns; or,
- The employee is caring for a child whose school or place of care is closed or otherwise unavailable on the premises for reasons related to COVID-19.

Like the 2021 SPSL, a qualifying family member includes a child, parent, spouse, registered domestic partner, grandparent, grandchild, or sibling. Unless otherwise noted, employers may generally not require that an employee provide medical certification in order to take SPSL.

Required Testing

The 2022 SPSL authorizes employers to require testing for employees who test positive for COVID-19. If an employee tests positive for COVID-19, employers have the option to require that employees submit to a COVID-19 test on or after the fifth day following the initial test result. If an employer chooses to require testing, it must provide the testing at no cost to the employee. Employers may cease any further SPSL payments to employees who refuse to submit to testing, or refuse to provide their test results. Although not addressed by the law, employers should ensure that they appropriately compensate employees for any required testing in order to comply with all applicable wage and hour laws. For example, an employer may consider providing a rapid test during work hours or compensating an employee for time spent attending a diagnostic testing appointment.

Rate of Pay

Under the 2022 SPSL, employers must pay nonexempt (typically, hourly) employees either: (1) the employee’s regular rate of pay for the workweek in which leave is taken; or (2) a rate equal to the employee’s total wages (such as including base hourly rate, shift differentials, bonuses, and commissions, but excluding overtime premiums) divided by the total non-overtime hours worked in the pay periods of the preceding 90 days of

employment. For exempt (typically, salaried) workers, SPSL is calculated in the same way wages are calculated for other forms of paid leave. Regardless of exempt status, employers are not required to pay more than \$511 per day or \$5,110 overall. Like the 2021 SPSL, employees may use other available paid leave or paid time off to achieve full compensation during SPSL.

Offsetting Previously Provided Leave

Employers that already provided paid leave for a qualifying reason from January 1 to February 19 may be able to offset their obligations under the law if:

1. The employee took paid leave for a covered reason;
2. The employer did not require the covered employee to use any other paid leave or time off available (including vacation) that is not specific to COVID-19; and,
3. The employer paid for the leave taken at a rate equal or greater to the amount required under SPSL.

If an employee took unpaid leave or time off for a qualifying reason from January 1 to February 19, the employee may make an oral or written request that the employer provide “retroactive” leave equivalent to the amounts owed under SPSL. The employer must provide the retroactive SPSL pay by the payday of the next full pay period following the employee’s request. If an employee requests “retroactive” pay for the 40-hour bank reserved for COVID-19 positive reasons only, the employer may require documentation of the positive test result. Employers also may offset SPSL obligations by voluntarily paying the difference if the retroactive leave was taken at a lesser rate than what is required under SPSL, regardless of whether an employee makes a request. However, in order to receive credit for any voluntary retroactive payments, employers must pay the difference by the payday for the first full pay period after February 19. Any voluntary retroactive payments made after this deadline will not count as an offset.

Retroactive Credits for Previously Provided Leave

Another significant change to the 2022 SPSL is the ability for employees to receive retroactive credit for leave taken for a SPSL qualifying reason. Employees who used another type of leave from January 1 to February 19 for a qualifying SPSL reason may request to be credited for any previously used leave and instead take leave from SPSL. For example, if an employee previously used accrued vacation for a qualifying reason under SPSL from January 1 to February 19, the employee may request to be credited back those vacation hours and to instead have the employer deduct the amount from the employee’s 2022 SPSL. Employees are entitled to this credit even if their prior time off was paid at a rate higher than what is required under SPSL. In most instances, employers presumably paid the employee’s regular rate of pay, which may exceed the \$511 daily cap for SPSL. Employers may not recoup the difference for any payments that exceed this cap when an employee requests retroactive credit. Fortunately, employers must only restore any previously used time upon request by the employee.

Interaction With Other Laws

As a reminder, the 2022 SPSL is a separate, supplemental benefit than paid sick leave provided under California's Healthy Workplaces, Healthy Families Act. Employers may not require employees to use any other paid or unpaid leave, paid time off, or vacation time before using, or in lieu of, the 2022 SPSL.

Unlike the 2021 version, employers may not require that an employee first exhaust the 2022 SPSL before providing exclusion pay benefits under the Cal/OSHA COVID-19 Emergency Temporary Standards (e.g., when the employee cannot enter the workplace due to work-related COVID-19 exposure). This change is more favorable to employees because Cal/OSHA exclusion pay benefits are paid at the employee's full rate of pay and are not subject to any daily or aggregate cap like SPSL benefits. Further, there is no limit to how many times an employee can receive Cal/OSHA exclusion pay benefits. Exclusion pay benefits can also extend up to 10 days depending on the circumstances, which exceeds the 80 hours potentially available under SPSL. As such, in circumstances where both benefits are available, employees will likely opt to receive Cal/OSHA exclusion pay benefits over using SPSL.

Notice and Wage Statement Requirements

Employers must display the Department of Industrial Relations' (DIR) [poster](#) conspicuously in the workplace or, for remote workers, electronically (such as by email).

Like the 2021 law, employers must include information about SPSL on employee paystubs or any other written notices provided on a regular payday. However, unlike the 2021 version (which required that paystubs reflect the SPSL balance), the 2022 law requires employers to list the amount of SPSL that an employee has used through the applicable pay period. As a reminder, the 2022 SPSL hours used must be displayed separately from regular paid sick leave, but the law does not require that employee paystubs differentiate between the two types of SPSL banks (e.g., COVID-19 positive, all other qualifying reasons).

Special Cases

Like the 2021 law, the 2022 SPSL contains special provisions that apply to specified in-home support service providers and personal waiver care service providers, as well as unique provisions for firefighters.

The new law is codified at Labor Code sections 248.6 and 248.7.

The DIR has also posted [FAQs](#) on the 2022 SPSL. For more information, please consult with a [Troutman Pepper Labor and Employment Law attorney](#).

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