

## **California Reenacts COVID-19 Supplemental Paid Sick Leave**

On January 25, 2022, Governor Gavin Newsom announced the legislature would reenact California’s COVID-19 supplemental paid sick leave law via SB 114 (adding Labor Code sections 248.6 and 248.7) (“2022 CA-SPSL”). Draft legislation was issued on February 2, 2022 and was signed on February 9, 2022 and becomes effective on February 19, 2022. The law is retroactive to January 1, 2022 and expires on September 30, 2022. However, an employee commencing a covered leave on or before September 30, 2022 shall be permitted to take the full amount of leave.

California’s Supplemental Paid Sick Leave efforts began on September 9, 2020, when California enacted a state-wide COVID-19 supplemental paid sick leave law to fill gaps left by the federal Families First Coronavirus Response Act (“FFCRA”) (“2020 CA-SPSL”). After the 2020 CA-SPSL expired on December 31, 2020, a new 2021 CA-SPSL (“2021 CA-SPSL”), enacted as Labor Code section 248.2, took effect on March 19, 2021. This law covered the period between January 1 and September 30, 2021.

Under 2022 CA-SPSL, two banks of leave are available to California employees who work for companies with greater than 25 employees and are unable to work or telework for any of the specified qualifying reasons.

The first category of leave provides up to 40 hours of paid leave for the following COVID-19 related reasons:

**Quarantine or Isolation:** The employee is subject to a quarantine or isolation period related to COVID-19 as defined by an order or guidelines of the State Department of Public Health, the federal Centers for Disease Control and Prevention, or a local health officer who has jurisdiction over the workplace.

**Advice from Health Care Provider:** The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

**Vaccine Appointment:** The employee is attending an appointment for him/herself or a family member to receive a COVID-19 vaccine or a vaccine booster (“booster”).

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**Vaccine Symptoms:** The employee is experiencing symptoms, or caring for a family member experiencing symptoms, related to a COVID-19 vaccine or booster that prevent the employee from being able to work or telework. For each vaccination or booster, an employer may limit the total paid leave to 24 hours (i.e., three days) unless the employee provides verification from a health care provider that the employee or the employee's family member is has experienced symptoms related to the vaccine or booster for more than 24 hours. The 24 hours of paid leave includes both the time used to obtain the vaccine or booster and time it takes for the employee or family member to recover.

**Medical Diagnosis:** The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

**Caring for a Family Member:** The employee is caring for a family member who is subject to a quarantine or isolation order or guidance or who has been advised to isolate or quarantine.

**School Closure Due to COVID-19:** 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.

The second category of 2022 CA-SPSL entitles an employee to the same amount of paid leave the employee qualified under the first category (up to 40 hours) if the employee tests positive for COVID-19, or a family member for whom the employee is providing care tests positive for COVID-19. Significantly, 2022 CA-SPSL authorizes the employer to require proof of a positive test in these two situations:

- If the employee tested positive, an employer may require the employee to submit to a diagnostic test on or after the fifth day after the initial test was taken and provide documentation of those results. The employer must make such tests available at no cost to the employee.
- If the employee requests to use additional leave because a family member for whom the employee is providing care 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.

The new law specifically provides that an "employer has no obligation to provide additional COVID-19 supplemental paid sick leave . . . for an employee who refuses to provide documentation of the results of the test . . . upon the request of the employer."

As with 2021 CA-SPSL, employees who are considered full time or work, on average, 40 hours a week, receive 40 hours of each type of leave, for a maximum of 80 hours of leave. Part-time employees receive a pro-rata share of leave based on their regular schedule. Employees with variable schedules receive leave based on their average hours worked over up to a six-month lookback period (depending on length of employment). Under 2022 CA-SPSL, the rate of pay is the same as California's regular paid sick leave pursuant to

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Labor Code section 246. Leave is to be paid at the regular rate during the pay period taken, or with a 90-day lookback (or, for exempt employees, their typical pay). Paid leave benefits are capped at \$511/day and \$5,110 aggregate for each employee.

Employers are required to issue retroactive payments to employees who took leave for a covered reason between January 1, 2022 and February 19, 2022 upon written or verbal request by an employee. The retroactive payment must be paid in the first full pay period after the request is made.

Employers must list on employee pays statements (or other written notices) the amount of leave an employee has used through the applicable pay period. If an employee has not used any leave, the employee's statement must list "zero." Paid leave hours used under 2022 CA-SPSL should be listed separately from regular paid sick leave balances.

A change with 2022 CA-SPSL is the interaction with exclusion pay pursuant to previously promulgated Cal/OSHA Emergency Temporary Standards ("ETS"). Employers are no longer permitted to require employees to first use and exhaust supplemental paid sick leave during periods the employee is entitled to exclusion pay under ETS. Previously, an employer was allowed to require an employee to use supplemental paid sick leave before being obligated to pay under Cal/OSHA's ETS. However, 2022 CA-SPSL states, "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 Emergency Temporary Standards." With certain exceptions, Cal/OSHA's ETS requires employers to continue to pay the earnings of employees who are excluded from the workplace as a COVID-19 case or close contact. This means California employers may be required to provide significantly more paid time off for employees because employees who are excluded under Cal/OSHA's ETS will be paid exclusion pay and maintain their full entitlement of 2022 CA-SPSL.

Notably, employers that have provided COVID-19 related leave for reasons covered by the new law in amounts equal to or greater than what the law requires can take credit for previously provided leave since January 1, 2022. This is particularly important in locations with their own supplemental paid sick leave ordinances that did not expire in September 2021.

Employers are required to post a notice informing employees of 2022 CA-SPSL rights and obligations. The Labor Commissioner will develop a model notice which can be used for this purpose. If employees do not frequent a workplace, the employer may provide notice through electronic means.

California employers need to be prepared to rapidly comply with this law, including the following:

- Prepare an updated policy.
- Ensure compliance with paystub requirements.

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- Post an appropriate notice of the new law's benefits and obligations.
- Develop a process to address leave requests (both current and retroactive).
- Remember not to request any other medical information or underlying diagnosis when requesting documentation to support the leave request.
- Recall that a company cannot require an employee to use 2022 CA-SPSL before paying exclusion pay.

*This is Pettit Kohn Ingrassia Lutz & Dolin PC's employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Ryan Nell, Shannon Finley, Rio Schwarting, Christopher Reilly, Tina Robinson, Zachary Rankin, Christine Robles, Brian Jun, Christine Dixon, or Jessica O'Malley at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Andrew Chung, Rachel Albert, Sevada Hakopian, or Catherine Brackett at (310) 649-5772.*

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