



# California to Enact New COVID-19 Supplemental Paid Sick Leave Requirement

Insights

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The California Legislature just approved a measure that dramatically extends and expands a requirement for employers to provide supplemental paid sick leave to employees impacted by COVID-19. Among other things, this new requirement applies to employers with more than 25 employees and establishes a new “bank” of COVID-19 related sick leave for covered employees for 2021 – even if they were previously provided such leave in 2020. This legislation, passed today, will go into effect 10 days after being signed by Governor Newsom, and every indication is that he will sign this measure immediately. Because this new paid sick leave mandate will also apply retroactively back to January 1, 2021, it will create some real logistical and compliance challenges for California employers. What do you need to know about this sweeping new paid sick leave law?

**[Ed. Note: Governor Newsom signed the measure into law on March 19. Therefore, the paid sick leave requirement will take effect on March 29, 10 days after the date of enactment.]**

## How We Got Here

Last year, in the midst of the pandemic, Governor Newsom issued an Executive Order that provided supplemental paid sick leave to certain food sector workers. The California Legislature subsequently enacted legislation (AB 1867) to extend this requirement to all hiring entities (regardless of industry) that employed 500 or more employees in the United States.

Notably, that legislation expired on December 31, 2020 – along with the federal Families First Coronavirus Response Act (FFCRA) that primarily applied to employers of less than 500 employees. Since that time, labor advocates have pushed the legislature and the governor to extend and expand the supplemental paid sick leave requirement – and to do so immediately through “early budget action.” The legislature responded and fast-tracked legislation in such a way to ensure it will go into effect 10 days after enactment.

## What Employers Are Covered?

The previous food sector worker Executive Order and the subsequent statewide legislation applied to hiring entities that have 500 or more employees nationwide. However, this new requirement

applies to public and private employers with **more than 25 employees**. Therefore, this new requirement will apply to many more employers in California than the prior mandate.

## Who Qualifies for the Leave? And For What Reasons?

Covered employees who work for an employer with more than 25 employees are entitled to COVID-19 supplemental paid sick leave.

However, there is a notable difference under the new legislation. Previously, supplemental paid sick leave was required only for employees who leave the home to perform work. The new requirement instead applies to employees who are “unable to work or telework” due to one of the qualifying reasons. Potentially, this requirement is broader than its predecessor as it could apply to employees working from home if they are unable to do so because of one of the qualifying reasons.

As for the “qualifying reasons,” the new law generally maintains two of the previous qualifying reasons contained in the prior legislation. Therefore, an employee who satisfies one of the following conditions may qualify for leave:

1. The worker is subject to a quarantine or isolation “period” related to COVID-19 (note: this language is somewhat different from AB 1867 because it provides that this quarantine or isolation “period” is defined by an order or guidelines by the state, the CDC, or local public health authorities); or
2. The worker is advised by a health care provider to self-quarantine or isolate due to concerns related to COVID-19.

Notably, the new requirement deletes the third qualifying reason that was contained in AB 1867 for situations where the employee is “prohibited from working by the hiring entity due to health concerns related to the potential transmission of COVID-19.” This elimination is likely due to the fact that the Cal/OSHA Emergency Temporary Standard (discussed below) now generally requires employers to “continue earnings” for employees who are excluded from the workplace as COVID-19 cases or who have COVID-19 exposure at work.

Moreover, such employees are likely now covered under the broadened language regarding being subject to a quarantine “period” contained in Qualifying Reason # 1 (above). However, the new law specifies that, if an employee is subject to more than one quarantine or isolation period, they shall be permitted to use the supplemental paid sick leave under the order or guidelines that provides for the longest minimum period.

Most significantly, the new legislation adds **five additional** qualifying reasons for paid sick leave as follows:

1. The employee is attending an appointment to receive a vaccine for protection against contracting COVID-19.

COVID-19;

2. The employee is experiencing symptoms related to a COVID-19 vaccine that prevent the employee from being able to work;
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. The employee is caring for a family member (minor or adult child, parent, spouse, domestic partner, grandparent, grandchild, or sibling) who is subject to a quarantine or isolation period, or who has been advised to self-quarantine; or
5. The employee is caring for a child (regardless of age) whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19 on the premises.

Therefore, the new legislation significantly expands the qualifying reasons for the paid sick leave to include things like vaccinations, caring for others and school/childcare closures, similar to the qualifying reasons we previously saw under the FFCRA.

### **How Much Leave is Available?**

Like the legislation enacted last year, a worker considered to be “full-time” by the employer is entitled to 80 hours of COVID-19 supplemental paid sick leave. An employee who worked or was scheduled to work, on average, at least 40 hours per week in the two weeks before they received supplemental paid sick leave is similarly entitled to 80 hours of leave.

Part-time employees are eligible for variable leave amounts based upon hours worked. A worker who has a normal weekly schedule is entitled to paid leave hours equaling the total number of hours they are scheduled to work over two weeks. An individual who works a variable number of hours is eligible for leave time equal to 14 times the average number of hours the individual worked each day in the six months before the leave date. The calculation for a worker employed less than six months is generally made over the entire period of employment.

### **New “Bank” of Leave for 2021**

The new legislation does not extend the effective date of last year’s AB 1867. Instead, this is an entirely new mandate with an entirely new “bank” of applicable paid sick leave.

Therefore, this means that employers with 500 or more employees who already paid out supplemental paid sick leave in 2020 are required to provide an additional “bank” of leave for covered employees for 2021. In addition, smaller employers (those with more than 25 employees) who were not previously covered by AB 1867 will be covered by this new requirement and obligated to provide the applicable amounts of paid sick leave.

### **What is the Hourly Rate for the Leave?**

The rate of pay for this new supplemental paid sick leave differs from the methodology that was provided under AB 1867. For nonexempt employees, the paid sick leave shall be paid at the highest

of the following rates:

- The rate calculated in the same manner as the regular rate of pay for the workweek in which the covered employees uses sick leave, whether or not the employee actually works overtime in that workweek;
- The rate calculated by dividing the employee's total wages (not including overtime) by the employee's total hours worked in the full pay periods of the prior 90 days of employment;
- The state minimum wage; or
- The local minimum wage to which the employee is entitled.

For exempt employees, the rate of pay shall be calculated in the same manner as the employer calculates wages for other forms of paid leave. The amount of COVID-19 supplemental paid sick leave is capped at \$511 per day and \$5,110 total per worker (unless these same limits in the federal FFCRA are extended).

### **Interaction with Other Leaves**

Employers who already provide COVID-19 specific supplemental paid sick leave for leave taken after January 1, 2021 that is available for the same reasons and paid at the same rate may count those hours towards the supplemental paid sick leave obligation. For example, leave provided under the FFCRA or local ordinances for reasons overlapping with California's supplemental paid sick leave may run concurrently.

In addition, an employer may not require that a worker use other paid or unpaid leave before the worker uses COVID-19 supplemental paid sick leave or in lieu of COVID-19 supplemental paid sick leave. COVID-19 supplemental paid sick leave will be in addition to any paid sick leave that may be available to the worker under Labor Code section 246.

### **Interaction with “Continued Earnings” Under the Cal/OSHA Emergency Temporary Standard**

As most employers are aware, in November Cal/OSHA adopted an Emergency Temporary Standard (ETS) that, among other things, requires employers to “continue earnings” for employees who are excluded from the workplace as COVID-19 cases or exposures.

The new paid sick leave legislation states that an employer may require an employee to first exhaust their COVID-19 supplemental paid sick leave in order to satisfy the “continued earnings” obligation of the ETS. This is a welcome clarification for employers.

### **Notice and Paystub Requirements**

Like the previous legislation, employers are required to provide notice of their rights to supplemental paid sick leave, and the Labor Commissioner is directed to prepare a model notice

template within seven days of the effective date of this bill. Employers may provide electronic notice for employees who do not frequent a workplace.

The COVID-19 supplemental paid sick leave must also be reflected on itemized wage statements. However, unlike AB 1867 the new legislation provides some important clarifications:

- The COVID-19 supplemental paid sick leave must be set forth separately from regular paid sick days.
- For employees that have part-time and variable schedules (and therefore variable leave entitlements), the new law specifies that the employer satisfies the wage statement obligation by doing an initial calculation of leave available and indicating “(variable)” next to that calculation on the initial and subsequent wage statements. This should alleviate the burden of employers having to make this complicated calculation each pay period. However, an employer must update this calculation on the wage statement when an employee requests to use leave or requests their payroll records under Labor Code Section 247.5.

Like AB 1867, the new legislation specifies that wage statement requirement is not enforceable until the next full pay period after the date this legislation takes effect.

### **When Does the Law Take Effect?**

As a budget measure with an “urgency statute,” this new legislation takes effect right away. However, this bill specifies that the requirement to provide paid sick leave takes effect 10 days after the enactment of the legislation.

**[Ed. Note: Governor Newsom signed the measure into law on March 19. Therefore, the paid sick leave requirement will take effect on March 29, 10 days after the date of enactment.]**

### **Retroactivity**

In an interesting twist, the new law also provides that it “shall apply retroactively to January 1, 2021” (or the expiration of AB 1867 and the federal FFCRA). The new law states that this retroactivity is “in order to protect the economic well-being of covered employees who took leave” after the expiration of AB 1867 and the FFCRA. However, this is where compliance really gets tricky.

The new law sets forth a process for retroactive payments as follows:

- If an employee previously took leave on or after January 1, 2021 that otherwise would have qualified under COVID-19 supplemental paid sick leave and the employer did not provide paid leave (or did not compensate at the required level) then ***upon the oral or written request of the employee***, the employer shall provide the covered employee with a retroactive payment that provides for such compensation.

- For such retroactive payments, the number of hours of leave corresponding to the amount of the retroactive payment shall count towards the total number of hours of COVID-19 supplemental paid sick leave that the employer is required to provide to the covered employee under the new mandate.
- This retroactive payment shall be paid on or before the payday for the next full pay period after the oral or written request of the covered employee and must be reflected on the corresponding wage statement.

This could still be quite a challenge for many employers. As the California Chamber of Commerce and others have pointed out, this retroactive application could create an “administrative nightmare” for companies in the middle of a crisis. “Unless a business meticulously tracked the reasons for which an employee was out over the past few months, which they are not currently required to do under California law, it will be difficult for an employer to question any request for retroactive payment.”

Employer groups have also expressed concern about the liability employers could face based on this retroactive mandate. It is unclear if an employee who believes they are now owed wages from January or February could argue that this mandate now also triggers penalties under the Labor Code. At the very least, this is a question that will likely take costly litigation to resolve.

### **When Does It Expire?**

The new requirement will expire on ***September 30, 2021***. However, an employee taking leave at that time the law expires will be permitted to take their full amount of leave. Of course, that is unless the legislature extends it or enacts an entirely new mandate, as they have done here.

### **Additional Note**

The new legislation also contains special provisions applicable to firefighters and In-Home Supportive Services (IHSS). Employers who employ or retain firefighters or IHSS providers should review these additional, specific provisions carefully.

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### **Conclusion**

As this new supplemental paid sick leave requirement takes effect very soon and applies to many employers throughout California, you should immediately consult with legal counsel now to implement the provisions of the bill. You should also recognize that many local jurisdictions have adopted and/or extended their own COVID-19 paid sick leave requirements. You should work with counsel to determine how such local requirements may interact and/or overlap with the new state mandate.



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