

CALIFORNIA'S 2022 COVID-19 SUPPLEMENTAL PAID SICK LEAVE – WHAT EMPLOYERS NEED TO KNOW

Insights
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Responding to pressure from labor amidst the Omicron variant, on February 9, 2022, Governor Newsom signed [Senate Bill \(SB\) 114](#). The law is effective immediately and retroactive to January 1, 2022. An employer's obligation to provide new 2022 California supplemental paid sick leave does not begin until February 19, 2022 (ten days after the bill was signed). While the new legislation is similar to [California's prior SPSL \(SB 95\)](#), which expired September 30, 2021, there are some notable differences this time around. What do California employers need to know about this new supplemental paid sick leave requirement, and how should you prepare?

Which Employers Does the New Law Apply To?

Like SB 95, the new law applies to employers with "more than 25 employees." Smaller employers will not be covered but may be covered by local supplemental paid sick leave ordinances.

When Will the New Law Be Effective?

The new law is enacted as a budget bill – [SB 114](#) – which allows the legislature to act more quickly and allows it to go into effect earlier. SB 114 goes into effect February 19, 2022 (10 days after it is signed by the governor). SB 114 applies retroactively to January 1, 2022 – which may require employers to make retroactive payments for leave taken dating back to the first of the year upon the oral or written request of an employee.

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How Long Will the Law Be in Effect?

SB 114 will be in effect through September 30, 2022. However, an employee taking leave as of that date shall be permitted to take their full amount of leave. Keep an eye on this date because the legislature could vote to extend SPSL further. **[Ed. Note: It appears likely the SPSL requirements will be extended through the end of the year. [You can read more here.](#)]**

How Much Leave Does the Law Provide?

Like SB 95, the new law provides up to 80 hours of SPSL for full-time employees. However, SB 114 is different in that it establishes two “buckets” of up to 40 hours of leave for different purposes and with different requirements.

Bucket # 1 – Up to 40 Hours for COVID Qualifying Reasons

The first category of leave provides for up to 40 hours of SPSL for a number of COVID-19 related reasons. These correspond generally with the qualifying reasons that previously applied under SB 95. Leave must be provided if the employee is unable to work or telework for any of the following reasons:

- 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.
- The employee has been advised by a healthcare provider to isolate or quarantine due to COVID-19.
- 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.
- 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.
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- The employee is caring for a family member who is subject to an order or guidance described above or who

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has been advised to isolate or quarantine, as described above.

- 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.

SB 114 imposes a potential limitation on the leave that must be provided for vaccine or boosters. Specifically, an employer may limit the total leave to three days or 24 hours. If more leave is requested by the employee, the employer may require that an employee provide verification from a healthcare provider that the employee or their family member is continuing to experience symptoms related to a COVID-19 vaccine or vaccine booster.

The potential three-day or 24-hour limitation applies to each vaccine or vaccine booster and includes the time used to obtain the vaccine or vaccine booster.

Bucket # 2 – Up to an Additional 40 Hours for Positive COVID-19 Tests

The second category of SPSL entitles an employee to the same amount of leave they qualified for 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, SB 114 authorizes the employer to require proof of a positive test in such situations.

- First, 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. SB 114 specifically states that the employer shall make such a test available at no cost to the employee.
- Second, if the employee requests to use additional leave because a family member for whom they are 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.

SB 114 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."

How Much Leave Must Be Provided to Part Time Employees or Those with Variable Schedules?

SB 114 provides a specific method for calculating the amount of eligible leave for employees who work part time or have variable schedules. This methodology tracks the process that was utilized under the previous SB 95:

- If the employee has 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 the employee works a variable number of hours, they are entitled to seven times the average number of hours the employee worked each day for the employer in the six months preceding the date the covered employee took COVID-19 supplemental paid sick leave. If the employee has worked for the employer over a period of fewer than six months but more than seven days, this calculation shall instead be made over the entire period the employee has worked for the employer.
- If the employee works a variable number of hours and has worked for the employer over a period of seven days or fewer, the employee is entitled to the total number of hours the covered employee has worked for that employer.

Employers should note that this methodology determines the amount of leave the employee is entitled to under Bucket # 1. As discussed above, the employee would then also be eligible for the same amount of leave under Bucket # 2.

How Do You Calculate the Regular Rate of Pay?

The regular rate of pay is different under SB 114 compared to its prior iteration. Under the prior SB 95, employers had to utilize the rate of pay that was the *highest* under several different calculations. SB 114 instead defines regular rate of pay more in line with the methodology under regular paid sick leave, which allows employers to choose among a number of methods.

For nonexempt employees, the regular rate of pay is determined by one of the following:

- Calculated 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
- Calculated 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 amount of COVID-19 supplemental paid sick leave.

SPSL for exempt employees is calculated in the same manner as the employer calculates wages for other forms of paid leave time. Like the prior law, the new legislation caps the amount of leave required to be paid at \$511 per day and \$5,110 in the aggregate.

What Are the Retroactive Requirements?

SB 114 is retroactive to January 1, 2022. So, if an employee took leave dating back to the first of the year for one of the qualifying reasons that was either unpaid by the employer or not paid at the same level required by SB 114, the employee may make an oral or written request for retroactive payments.

A similar process was included in the prior SB 95, so employers should generally be familiar with this process. Retroactive payments must be paid on or before the payday for the next full pay period after the request is made.

In addition, SB 114 provides that an employer may require an employee to provide documentation of a positive test if the employee requests retroactive leave for a positive test or caring for a family member with a positive test.

How Does SPSL Interact with Cal/OSHA Exclusion Pay?

An unwelcomed change under SB 114 involves how SPSL interacts with "exclusion pay" under Cal/OSHA's ETS. Employers are no longer allowed to require employees to first use and exhaust their SPSL during periods the employee is entitled to exclusion pay.

Previously, an employer was allowed to require an employee to use SPSL before being obligated to pay exclusion pay under Cal/OSHA's ETS. However, SB 114 takes the opposite approach. The legislation 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 COVID-19 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 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 SPSL.

How Does SB 114 Interact with Local SPSL Ordinances?

Employers should be aware that there are several local jurisdictions in California with their own SPSL ordinances that did not expire last September. SB 114 provides that an employer may count leave provided under one of these local ordinances toward their obligation under SB 114 as long as the leave was provided for the same reasons and compensates the employee in an amount equal to or greater than the amount of compensation for COVID-19 SPSL under SB 114.

Is There a Notice Requirement?

Employers are required to post a notice about SPSL similar to the notice employers post regarding regular paid sick leave under Labor Code Section 247. SB 114 requires the Labor Commissioner to develop a model notice within seven days of the enactment of the new law. In addition, SB 114 provides that if employees do not frequent a workplace, the employer may provide the notice through electronic means, such as by e-mail.

What Paystub Requirements Apply?

Thankfully, SB 114 takes a different paystub approach from the prior SPSL version. Rather than list the eligible hours, the legislation requires employers to instead list the amount of SPSL the employee has used through the applicable pay

period. If an employee has not used any SPSL, the employer shall list zero hours on the paystub. This should reduce the burden on employers from having to make complicated calculations each pay period (as required under the prior law). In addition, SB 114 says SPSL hours used should be listed separately from regular paid sick days.

Are Tax Credits Available to Pay for This?

Not directly. While the governor and legislative leaders have talked up tax credits being part of the agreement to bring back SPSL, the referenced tax credits are not directly tied to SPSL, nor do they provide “dollar for dollar” reimbursement like under the federal FFCRA.

The agreement restores net operating loss deductions for corporate and individual taxpayers with business income of \$1 million or more, which had been paused for tax years 2020, 2021 and 2022 and extended by three years. The state will also lift a \$5-million limit on several other business tax credits (including for research and development) for those same tax years. Not all businesses are eligible for these tax credits.

So while the state is bringing back some tax credits that may provide general relief for some businesses in the state, there is not a direct tax credit that reimburses employers specifically for their SPSL costs.

Next Steps

Be prepared to quickly comply with this new requirement. To do so, below are some recommended steps:

- Prepare an updated policy.
- Plan for the paystub requirement.
- Keep an eye out for the notice that will be posted by the Labor Commissioner’s office.
- Have a process in place to handle leave requests (both new and retroactive).
- Evaluate the number of retroactive or true-up payments you may need to make.
- Remember not to request any other medical information or underlying diagnosis when requesting documentation to

support the leave request.

- Remember that you cannot use SPSL before paying exclusion pay.

Conclusion

We will monitor developments related to paid sick leave and provide updates as warranted, so make sure that you are subscribed to [Fisher Phillips' Insights](#) to get the most up-to-date information direct to your inbox. If you have further questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in any one of [our six California offices](#).