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LEGAL UPDATE

April 7, 2021

To: Superintendents, Member School Districts (K-12)
From: Nancy L. Klein, Senior Associate General Counsel 
Subject: Supplemental Paid Sick Leave for Qualifying Reasons Related to COVID-19 (SB 95) – Model Notice Available
Memo No. 11-2021 REVISED

Note: Changes from the original Legal Update are highlighted in yellow for your convenience.

Beginning March 29, 2021, Labor Code section 248.2 requires employers with more than 25 employees to provide Supplemental Paid Sick Leave (SPSL) to employees who are *unable to work or telework* for any of the following Qualifying Reasons (QR):

1. Employee is subject to a COVID-19 quarantine or isolation period as specified in an order or guideline by the California Department of Public Health (CDPH), federal Center for Disease Control (CDC) or a local health officer with jurisdiction over the workplace.¹
2. Employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. Employee is attending an appointment to receive a COVID-19 vaccine.
4. Employee is experiencing symptoms related to a COVID-19 vaccine that prevent the employee from being able to work or telework.
5. Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
6. Employee is caring for a family member² who is subject to an order or guidelines described in QR 1 or 2, above.

¹ The California Department of Industrial Relations has clarified that the “order or guidelines must be specific to the covered employee’s circumstances. A general stay-at-home order would not count.” [DIR FAQs](https://www.dir.ca.gov/dlse/COVID19Resources/FAQ-for-SPSL-2021.html) (https://www.dir.ca.gov/dlse/COVID19Resources/FAQ-for-SPSL-2021.html)

² “Family member” means any of the following:

- (1) A **child**, which for purposes of this article means a biological, adopted, or foster child, stepchild, legal ward, or a child to whom the employee stands in loco parentis. This definition of a child is applicable regardless of age or dependency status.
- (2) A biological, adoptive, or foster parent, stepparent, or legal guardian of an employee or the employee’s spouse or registered domestic partner, or a person who stood in loco parentis when the employee was a minor child.
- (3) A spouse.
- (4) A registered domestic partner.
- (5) A grandparent.



7. Employee is caring for a child³ whose school, place of care is closed or otherwise unavailable for reasons related to COVID-19 *on the premises*. (Lab. Code 248.2(b)(1))

NOTE: SPSL is a new statutory leave entitlement that is in addition to leave previously provided under the Families First Corona Virus Response Act, which expired December 31, 2020.

LEAVE ALLOTMENT

The number of SPSL hours a “covered employee”⁴ is entitled to is based on the number of hours the employee works or is scheduled to work. (Lab. Code 248.2(b)(2))

- Full-Time/40-Hour Employees: Up to 80 hours for covered employees who are full time or scheduled to work at least 40 hours per week in the two weeks preceding the date the employee took SPSL leave.
- Less than 40-Hour Employees: The total number of hours the covered employee is normally scheduled to work for the employer over two weeks.
- Employees with a Variable Schedule for Six or More Months: 14 times the average number of hours the covered employee worked each day in the six-month period preceding the date the covered employee took SPSL.
- Employees with a Variable Schedule for More than 14 Days and Less than Six Months: The average number of hours the covered employee worked over the entire period the covered employee has worked for the employer.
- Employees with a Variable Schedule for 14 or Fewer Days: The total number of hours the covered employee works a variable schedule over a period of 14 or fewer days. (Lab. C. 248.2(b)(1))

SPSL is in addition to paid leave an employee is entitled to receive under the Health Workplaces Healthy Families Act. (Lab. C. 248.2(b)(2)(D))

RIGHT TO IMMEDIATE USE OF SPSL

Covered employees are entitled to use SPSL immediately upon “oral or written request” before use of other paid or unpaid leave provided by the employer. (Lab. C. 248.2(b)(2)(e) and (4))
 Employers are not permitted to require a health care provider’s certification before allowing an employee to use SPSL, but if the employer acquires information that the employee requested SPSL for an invalid purpose, a *reasonable* inquiry for supporting documentation may be made.⁵
 When covered employees are excluded from the workplace pursuant to the Title 8 Emergency Temporary Standards due to COVID-19 exposure in the workplace⁶, an employer may require

(6) A grandchild.

(7) A sibling.

(Lab. C. 245.5(c), 248.2(b)(1)(F) – Kin Care Definitions)

³ See f.n. 1, paragraph 1. “Child” is not restricted by age or require that a child over 18 be incapable of self-care.

⁴ “Covered employee” means an employee who is unable to work or telework for an employer because of one of the QRs. (Lab. C. 248.2(a)(3))

⁵ [DIR FAQs \(https://www.dir.ca.gov/dlse/COVID19Resources/FAQ-for-SPSL-2021.html\)](https://www.dir.ca.gov/dlse/COVID19Resources/FAQ-for-SPSL-2021.html)

⁶ “COVID-19 exposure” means being within six (6) feet of a COVID-19 Case for a cumulative total of 15 or more minutes within a 24-hour period.



covered employees to first exhaust their SPSL to satisfy the employer's Title 8 obligation to continue compensation and benefits during the exclusion period. (Lab. C. 248.2(b)(5))

RATE OF COMPENSATION

Non-Exempt Employees: SPSL must be compensated at the *highest* of:

1. The covered employee's regular rate of pay for the work week the covered employee uses SPSL,
2. The rate calculated by dividing the covered employee's total wages, not including overtime, by the employee's total hours worked in full pay periods of the prior 90 days of employment,
3. The state minimum wage,
4. The local minimum wage to which the covered employee is entitled.

Exempt Employees: The rate calculated in the same manner as the employer calculates other forms of paid leave. (Lab. Code 248.2(b)(3)(A))

MAXIMUM COMPENSATION

Employers are not required to pay more than \$511 per day or \$5,110 in the aggregate to a covered employee. (Lab. Code 248.2(b)(3)(C))

A covered employee who has reached the maximum compensation under section 248.2 may elect to use other available paid sick to receive full compensation. (Lab. C. 248.2(b)(3)(C))

OTHER EMPLOYER-PROVIDED SUPPLEMENTAL BENEFITS

If an employer has paid an employee another supplemental benefit for leave taken after January 1, 2021, for one of the QRs, at a rate at least equal to the rate required under section 248.2, the employer may count the hours of the other supplemental benefits toward the total number of SPSL hours the employer is required to provide. (Lab. C. 248.2(c)) Some districts and county offices of education have provided such supplemental benefits by policy or memorandum of understanding with exclusive representatives. If the rate paid was not at least equal to the rate required by section 248.2, see RETROACTIVE APPLICATION, below.

EFFECTIVE PERIOD / RETROACTIVE APPLICATION OF SECTION 248.2

Section 248.2 went into effect on March 29, 2021, and is retroactive to January 1, 2021.

If an employer did not compensate an employee who took leave after January 1, 2021, for one of the specified QRs, at a rate at least equal to the rate required by section 248.2, "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." (Lab. C. sec. 248.2(e)(2)(A)) Payment is due "on or before the payday for the next full pay period after the oral or written request of the covered employee." (Lab. C. 248.2(e)(2)(C))

The number of hours paid retroactively "shall count toward the total hours of [SPSL] that the employer is required to provide [under section 248.2]." (Lab. C. 248.2(e)(2)(B))



Section 248.2 expires on September 30, 2021, “except that a covered employee taking [SPSL] at the time of expiration...shall be permitted to take the full amount of [SPSL] to which the covered employee otherwise would have been entitled.” (Lab. C. sec. 248.2(f))

NOTICE TO EMPLOYEES/RECORD KEEPING

Employers are required to display a poster in a conspicuous location of employees’ rights to accrue, request, and use paid sick days, the amount of sick days, and the terms of use of paid sick days. **The California Labor Commissioner has issued a model notice,⁷ See attached copy.** For employees who do not frequent the workplace notice may be given by email.

Employers are also required to “keep for at least three years records documenting the hours worked and paid sick days accrued and used by an employee...” (Lab. Cod. 247.5) As SPSL is an entitlement to leave that is distinct from other sick leave available to local educational agency employees, employers should maintain a record of accrued and used SPSL that is separate from records of other types of sick leave.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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⁷ [Model Notice](https://www.dir.ca.gov/dlse/2021-COVID-19-Supplemental-Paid-Sick-Leave.pdf) (<https://www.dir.ca.gov/dlse/2021-COVID-19-Supplemental-Paid-Sick-Leave.pdf>)

2021 COVID-19 Supplemental Paid Sick Leave

Effective March 29, 2021

Covered Employees in the public or private sectors who work for employers with more than 25 employees are entitled to up to 80 hours of COVID-19 related sick leave from January 1, 2021 through September 30, 2021, immediately upon an oral or written request to their employer. If an employee took leave for the reasons below prior to March 29, 2021, the employee should make an oral or written request to the employer for payment.

A covered employee may take leave *if the employee is unable to work or telework for any of the following reasons:*

- Caring for Yourself: The employee is subject to quarantine or isolation period related to COVID-19 as defined by an order or guidelines of the California Department of Public Health, the federal Centers for Disease Control and Prevention, or a local health officer with jurisdiction over the workplace, has been advised by a healthcare provider to quarantine, or is experiencing COVID-19 symptoms and seeking a medical diagnosis.
- Caring for a Family Member: The covered employee is caring for a family member who is subject to a COVID-19 quarantine or isolation period or has been advised by a healthcare provider to quarantine due to COVID-19, or is caring for a child whose school or place of care is closed or unavailable due to COVID-19 on the premises.
- Vaccine-Related: The covered employee is attending a vaccine appointment or cannot work or telework due to vaccine-related symptoms.

Paid Leave for Covered Employees

- 80 hours for those considered full-time employees. Full-time firefighters may be entitled to more than 80 hours, caps below apply.
 - For part-time employees with a regular weekly schedule, the number of hours the employee is normally scheduled to work over two weeks.
 - For part-time employees with variable schedules, 14 times the average number of hours worked per day over the past 6 months.
- Rate of Pay for COVID-19 Supplemental Paid Sick Leave: Non-exempt employees must be paid the highest of the following for each hour of leave:
 - Regular rate of pay for the workweek in which leave is taken
 - State minimum wage
 - Local minimum wage
 - Average hourly pay for preceding 90 days (not including overtime pay)
- Exempt employees must be paid the same rate of pay as wages calculated for other paid leave time.

Not to exceed \$511 per day and \$5,110 in total for 2021 COVID-19 Supplemental Paid Sick leave.

Retaliation or discrimination against a covered employee requesting or using COVID-19 supplemental paid sick leave is strictly prohibited. A covered employee who experiences such retaliation or discrimination can file a claim with the Labor Commissioner's Office. Locate the office by looking at the [list of offices on our website](http://www.dir.ca.gov/dlse/DistrictOffices.htm) (<http://www.dir.ca.gov/dlse/DistrictOffices.htm>) using the alphabetical listing of cities, locations, and communities or by calling 1-833-526-4636.

This poster must be displayed where employees can easily read it. If employees do not frequent a physical workplace, it may be disseminated to employees electronically.



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