

NOW & NEXT

Labor & Employment Alert

FEBRUARY 15, 2022

California provides NEW COVID-19 paid sick leave for employees

By Bonnie Glatzer, Irene Scholl-Tatevosyan, and Sam Parrish

California governor signed Senate Bill (SB) 114, providing sick leave for COVID-19-related absences—here's what employers need to know.



What's the Impact

- / The new law provides up to 80 hours of COVID-19 paid sick leave (CPSL) for full-time employees
- / Beginning on February 19, 2022, a covered employer must make CPSL available for immediate use by eligible employees
- / Eligible employees may receive CPSL retroactive to January 1, 2022
- / The CPSL requirement expires September 30, 2022

On February 8, 2022, California Governor Gavin Newsom signed Senate Bill (SB) 114, providing covered California employees with up to 80 hours of supplemental paid sick leave for COVID-19-related absences, retroactive to January 1, 2022.

Who is covered?

Employers, including private employers, the state, political subdivisions of the state, and municipalities, with 26 or more employees are subject to the new law.

There are also special leave provisions for in-home supportive service providers and certain personal care service providers, subject to their own applicable hour requirements, and firefighters, subject to their own applicable hour requirements.

What benefits do covered employees receive?

The new law provides up to 80 hours of CPSL for full-time employees (pro-rata amount for other employees). The available CPSL is broken down into two 40-hour buckets:

- / Employers must provide up to 40 hours of CPSL to each employee unable to work or telework due to any of the following reasons:
 - Employee is attending a COVID-19 vaccine or vaccine booster appointment for themselves or a family member (defined to include a child, grandchild, grandparent, parent, sibling, registered domestic partner or spouse)
 - Employee is experiencing symptoms or caring for a family member experiencing symptoms related to a COVID-19 vaccine or vaccine booster
 - Employee is subject to, or caring for a family member subject to, a quarantine or isolation period related to COVID-19 (as ordered by a health care provider or by state/federal guidance)
 - Employee is caring for a child whose school or place of care is unavailable for reasons related to COVID-19
 - Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis
- / Employers must provide up to an additional 40 hours of CPSL if:
 - Employee tests positive for COVID-19
 - Employee is caring for a family member who tests positive for COVID-19

An employee may not be required to use other paid time off in lieu of this entitlement

This CPSL is in addition to any paid sick leave the employee has accrued or is entitled to under California's paid sick leave law (Labor Code Section 246). A covered employer may not require a covered worker to use any other paid or unpaid leave, paid time off, or vacation time provided by the employer before the covered worker uses CPSL or in lieu of CPSL. If, however, an employer pays for leave taken on or after January 1, 2022, that is payable for the COVID-19-related reasons set forth above and compensates employees in an amount equal to or greater than the amount of pay the law requires, an employer may use those credited hours to offset the number of CPSL hours owed a covered employee under the new law.

Note that an employer may not require an employee to exhaust their CPSL before receiving paid leave for reasons related to COVID-19 under any Cal-OSHA COVID-19 Emergency Temporary Standard.

Employers' right to request documentation

Generally, the new law does not allow employers to ask employees to provide verification or documentation to verify their need for leave. However, a covered employer can:

- / Require a covered employee who tests positive for COVID-19 to take another test after the fifth day following the positive test and provide documentation of those results—however, if the employer does so, the employer must make the test available at no cost to the employee
- / Require the covered employee to provide documentation of a family member's test result before paying CPSL
- / Refuse to provide CPSL if the employee refuses to provide documentation of a test result
- / Require a covered employee seeking retroactive CPSL to provide documentation of a positive COVID-19 test during the relevant period
- / Limit the CPSL an employee can use to recover from a vaccine or booster to three days or 24 hours unless a health care provider verifies the person has continuing symptoms from the vaccine or booster

Rate of pay when employees use leave

- / **Exempt employees:** Employers calculate CPSL in the same manner, they calculate wages for other forms of paid leave
- / **Non-exempt employees:** Employers will calculate CPSL (i) in the same manner as the regular rate of pay for the workweek (i.e., the rate used for overtime payments) or (ii) 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 or (iii) when the employer pays the employee "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
- / **Cap:** Regardless of exempt or non-exempt status, employers are not required to pay more than \$511 per day and \$5,110 in the aggregate to the employee for CPSL

Immediate use

Beginning on February 19, 2022, a covered employer must make CPSL available for immediate use by an eligible employee upon the oral or written request of the worker.

Retroactive application

If a covered employer already provided supplemental paid leave on or after January 1, 2022, but before February 19, 2022, for the uses specified above but did not compensate the employee in an amount equal to or greater than the amount of compensation for CPSL to which the employee is entitled, the employer may retroactively provide supplemental pay to the employee to satisfy the compensation requirement, in which case those hours may count towards the total number of CPSL hours required.

Wage statement requirement

Covered employers must update their wage statements to provide notice of the amount of paid sick leave **used** under this new law (reporting “zero hours” until used by the employee). The wage statement requirement becomes enforceable on the next full pay period after February 19, 2022.

Employer notice requirement

Employers must display a poster that explains the nature of CPSL. The labor commissioner will make available a model notice relating to CPSL for covered workers. The law permits notice by electronic means in lieu of posting at the workplace if a hiring entity’s covered workers do not frequent the workplace.

Enforcement

The labor commissioner may enforce the provisions. The labor commissioner or the attorney general may also bring a civil action to collect other legal or equitable relief if applicable, including reinstatement, back pay, the payment of sick days unlawfully withheld, and liquidated damages.

Expiration

The CPSL requirement expires September 30, 2022, unless an employee is using CPSL on September 30, 2022, and the covered absence continues past that date without interruption.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

Bonnie Glatzer

415-984-8333

bglatzer@nixonpeabody.com

Sam Parrish

213-629-6051

sparrish@nixonpeabody.com

Irene Scholl-Tatevosyan

213-629-6012

itatevosyan@nixonpeabody.com
