

## Lawyer Insights

### California Passes Retroactive COVID-19 Sick Leave Requirements for 2021

*California's recently enacted COVID sick leave law will add to employers' struggle throughout the pandemic to balance safe workplaces with rising business costs, according to Emily Burkhardt Vicente and J. Drei Munar of Hunton Andrews Kurth.*

By Emily Burkhardt Vicente and J. Drei Munar  
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California employers have struggled throughout the pandemic to balance safe workplaces and employee welfare with rising business costs, particularly given the impacts of the state and local shutdown orders. California's recently enacted COVID sick leave law will add to those challenges. Retroactive to Jan. 1, certain employers must provide COVID-19 supplemental paid sick leave to their California employees under Senate Bill 95. The new sick leave entitlement extends until Sept. 30.

#### Who Is Covered by Supplemental Paid Sick Leave?

SB 95 covers all employers with more than 25 employees. Unlike California's prior COVID-19 sick leave law (Assembly Bill 1867), coverage under SB 95 is no longer limited to employees who were required to leave their homes to perform in-person work for an employer. Under the new law, coverage now extends to teleworkers as well.

Employees are entitled to take COVID-19 sick leave if they are unable to work due to any of the following reasons:

- They are subject to (or caring for a family member who is subject to) a federal, state, or local quarantine or isolation period.
- They have been advised (or are caring for a family member who has been advised) by a health care provider to self-quarantine.
- They are attending an appointment to receive a COVID-19 vaccine.
- They are experiencing symptoms related to a COVID-19 vaccine that prevent them from being able to work or telework.
- They are experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- They are caring for a child whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19 on the premises.

#### How Much Leave Is an Employee Entitled to?

Employees are entitled to 80 hours of paid sick leave if their employer considers them "full time" or if they were scheduled to or did work on average at least 40 hours per week in the two weeks preceding the date of the leave.

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Employees who are not full-time or did not average 40 hours are entitled to the following leave:

- Employees with a normal weekly schedule are entitled to leave equal to the total number of hours the employee is normally scheduled to work over two weeks.
- Employees working variable schedules are entitled to leave equaling 14 times the average number of hours they worked each day in the six months preceding the date of the leave. For employees who have worked fewer than six months but more than 14 days, this calculation must be made over the entire period the employee has worked for the employer.
- Employees working variable schedules who have worked for 14 or fewer days are entitled to leave equaling the total hours the employee has worked.

### **What Wage Rate Must Supplemental Sick Pay Be Paid Out at?**

For exempt employees, pay for COVID-19 sick leave must be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

For non-exempt employees, each hour must be compensated at a rate equal to the highest of the following:

- A rate calculated in the same manner as the regular rate of pay for the workweek in which the covered employee uses the leave.
- A rate calculated by dividing the employee's total wages, excluding overtime premiums, by their total hours worked in the full pay periods of the prior 90 days of employment.
- State minimum wage.
- Local minimum wage.

However, leave is capped per employee at \$511 per day and \$5,110 in total.

### **Are Employers Required To Comply With Any Notice Requirements?**

Yes. Employers must post a notice in the workplace summarizing the right to COVID-19 sick leave. Also, employers must include notice of the amount of leave available on an employee's wage statement or in a separate writing provided on the designated pay date with the employee's payment of wages. The law further provides:

- The COVID-19 sick leave must be set forth separately from regular paid sick days.
- For employees with part-time/variable schedules, employers can provide an initial calculation of leave available and indicate "(variable)" next to that calculation. The calculation should be updated on the wage statement when an employee requests to use leave or requests their payroll records.

### **How Does Supplemental Sick Leave Interact With Benefits Under Other Laws?**

Leave under SB 95 is provided in addition to paid sick leave available under California Labor Code §246 and that was provided for under the prior AB 1867. The law prohibits employers from requiring an

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employee to use any other paid/unpaid leave, paid time off, or vacation time before using COVID-19 sick leave or in lieu of COVID-19 sick leave.

Under the Cal-OSHA COVID-19 Emergency Temporary Standards (ETS), employers must maintain an employee's earnings when an employee is excluded from the workplace due to COVID-19 exposure. SB 95 expressly permits an employer to require employees to first exhaust their COVID-19 sick leave before providing exclusion pay under ETS.

Also, an employer may be able to offset the new leave with other supplemental benefits previously provided. For the offset to apply, however, the other benefits (1) must be payable for the same reasons as those provided under SB 95, and (2) must compensate the employee in an amount equal to or greater than the amount provided under SB 95. Leave taken under Labor Code §246 and AB 1867 do not count towards the offset. However, the offset may include paid leave provided by the employer pursuant to any federal or local law in effect as of Jan. 1, 2021, if this leave was provided for an SB 95-eligible reason.

In light of this new sick pay requirement, California employers should review their policies, wage statements and workplace notices to assess whether any updates or changes need to be made to comply with the new law.

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