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## BLOGS

COVID-19;Leave

# More COVID-19 Leave Legislation on the Books in California – FAQ

Here we go again... California has passed new legislation (Senate Bill 95) requiring a larger group of employers to provide paid leave for many more COVID-19-related reasons than previously allowed.

### **Q: Who must provide the SB 95 leave?**

A: California employers (including public entities) with more than 25 employees nationally.

### **Q. Who is eligible for the SB 95 leave?**

A. "Covered employees" is defined as California-based employees who are unable to work or telework for one of the qualifying reasons.<sup>[1]</sup>

### **Q. What reasons qualify for the SB 95 leave?**

A. There are more qualifying reasons than required by previous legislation. Covered employees may take paid leave if they are unable to work or telework due to any of the following reasons:

1. They are "subject to a quarantine or isolation period related to COVID-19" as defined by an order or guidelines of the California Department of Public Health, the U.S. Centers for Disease Control and Prevention, "or a local health officer who has jurisdiction over the workplace."
2. A health care provider has advised the covered employee to self-quarantine because of COVID-19-related concerns.
3. The covered employee "is attending an appointment to receive" a COVID-19 vaccine.
4. The covered employee "is experiencing symptoms related to a COVID-19 vaccine that prevent the employee from being able to work or telework."
5. The covered employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis.
6. "The covered employee is caring for a family member... who is subject to an order or guidelines described" in qualifying reason (1), or who a health care provider has advised to self-quarantine, as described in qualifying reason (2). For purposes of this provision, family members include spouse, registered domestic partner, parent (including parents-in-law), child (regardless of age or dependency), grandparent, grandchild, and sibling.
7. The covered 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."



**Q. Can an employer require employees to provide documentation to substantiate the need for SB 95 leave?**

A. SB 95 does not contain language allowing employees allowing employers to ask for documentation. Unless the state labor department changes its 2020 position, employers might only be able to ask for reasonable supporting verification or documentation if they have evidence that an employee is abusing their entitlement to leave.

**Q. How much SB 95 leave is required for full-time employees?**

A. Full time covered employees (who are not firefighters) are entitled to 80 hours of leave.

A covered employee is “full time” if the employer considers the employee to work full time or the “covered employee worked or was scheduled to work, on average, at least 40 hours per week for the employer in the two weeks preceding the date the covered employee took COVID-19 supplemental paid sick leave.”

A covered employee who is a firefighter and who was scheduled to work more than 80 hours for the employer in the two weeks preceding the date the covered employee takes this leave is entitled to an amount equal to the total number of hours that the covered employee was scheduled to work for the employer in those two preceding weeks.

**Q. How do employers calculate the amount of SB 95 leave for part-time employees?**

A. Part-time covered employees generally are entitled to the amount that correlates with the number of hours the employee regularly works over 2 weeks. The amounts are calculated as follows:

- “If the covered employee has a normal weekly schedule, the total number of hours the covered employee is normally scheduled to work for the employer over two weeks.”
- “If the covered employee works a variable number of hours, 14 times the average number of hours the covered 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 covered employee has worked for the employer over a period of fewer than six months but more than 14 days, this calculation shall instead be made over the entire period the covered employee has worked for the employer.”
- “If the covered employee works a variable number of hours and has worked for the employer over a period of 14 days or fewer, the total number of hours the covered employee has worked for that employer.”

**Q. Is SB 95 leave in addition to regular paid sick leave that an employer must provide under the Healthy Workplaces, Healthy Families Act?**

A. Yes.

**Q. Is SB 95 leave in addition to paid leave employers voluntarily provide employees?**

A. Yes.

**Q. Is SB 95 leave in addition to paid leave required by local ordinances?**

A. Yes.

**Q. Can an employer require an employee to use other paid leave, unpaid leave or time off before using SB 95 leave?**

A. No. Employees may choose the number of hours to use and when to use it, up to the number of hours for which the employee is eligible.

**Q. Can an employer require employees to use SB 95 leave?**





A. The employer can require that an employee exhaust SB95 leave before paying exclusion pay under the California Division of Occupational Safety and Health (Cal-OSHA) COVID-19 Emergency Temporary Standards (ETS) or Cal-OSHA Aerosol Transmissible Diseases Standard. Otherwise, the employee may choose the number of hours of SB 95 leave to use and when to use it, up to the number of hours for which the employee is eligible.

**Q. When is the law effective?**

A. It's effective March 29, but retroactive to January 1, 2021.

**Q. Do employers get any credit for leave voluntarily provided pursuant to the Families First Coronavirus Response Act (FFCRA) or local law after January 1, 2021?**

A. Yes. The law authorizes an employer to credit the hours of other paid leave the employer provided to employees on or after January 1, 2021, for absences taken for the same COVID-19 qualifying reasons, so long as the amount paid for the other leave is equal to or more than the amount that would have been required under SB 95. For example, if an employer already extended and the employee used 8 hours of leave taken under the FFCRA or a local law on or after January 1, 2021, and the employer paid the employee for the leave in an amount equal to or greater than the amount the employee would receive under SB 95, the full-time employee would be entitled to 72, not 80, hours of SB 95 leave.

If the employee was paid less than the amount required by SB 95, and the employee requests that the employer pay the difference, employers must do so and the leave previously provided would be credited against the amount of SB 95 leave required.

In light of the tax credits employers with less than 500 employees can receive for voluntarily providing leave that was required by the FFCRA, such employers should seriously consider whether to voluntarily provide such leave if they are not already doing so.

**Q. Do employers get any credit for leave provided to the FFCRA in 2020?**

A. No. Employers may not credit paid leave they provided employees for COVID-19–related reasons in 2020.

**Q. How do employers handle SB 95 leave that was taken for qualifying reasons between January 1, 2021 and March 29, 2021?**

A. Covered employees who took unpaid leave for qualifying reasons between January 1, 2021 and March 29, 2021 can ask to use SB 95 leave and employer must pay the employee for it.

Employers must provide retroactive payment for qualifying leave taken since January 1, 2021 once the employee makes an oral or written request for such payment. Employers must make this payment on or before the payday for the next full pay period after the employee makes the oral or written request.

Covered employees who took paid leave for qualifying reasons can ask to use this leave and the employer must replenish the hours of paid leave used for the qualifying reason.

**Q. What rate of pay does an employer use to determine the amount due for SB 95 leave?**

A. For nonexempt employees, the employer must pay the higher of:

- the employee's "regular rate of pay for the workweek in which" the leave was taken, regardless of whether the employee worked overtime in that workweek;
- "the covered employee's total wages, not including overtime premium pay, [divided] by the employee's total hours worked in the full pay periods of the prior 90 days of employment";
- the California minimum wage; or



- the local minimum wage.

Exempt employees must be paid the same amount of wages they would receive for other forms of paid leave time.

Wages are capped at \$511 per day and \$5,110 in the aggregate for each covered employee. Employees who max out because of the pay caps must be permitted to use other available paid leave they have so they are fully compensated during the absence.

**Q. Do employers have to include information on the employee's wage statement?**

A. Yes. The employee's wage statement must separately list the hours of SB 95 leave available. If used, the employee's wage statement must separately list the rate of pay and wages paid for SB 95 leave. The paystub requirement is not enforceable until the next full pay period following the date that the law takes effect (March 29, 2021).

For part-time, variable hour employees (part-time employees who don't have a regularly set schedule), SB 95 allows employers to meet their paystub obligations by performing an initial calculation of leave available and indicating "(variable)" next to that calculation, which employers will need to update when employees request to use SB 95 leave.

In addition, if an employer makes payments for leave employees used before SB 95 took effect, the retroactive payment must be on the paystub for the pay period during which payment is made.

**Q. Do covered employers have to post notice of SB 95 leave entitlements?**

A. Yes. Covered employers must post a notice of the COVID-19 SPSL requirements in a conspicuous place in the workplace. A model notice can be found [here](#). "[I]f an employer's covered employees do not frequent a workplace, the employer may satisfy the notice requirement ... by disseminating notice through electronic means," such as email.

**Q. How long must employers offer SB 95 leave?**

A. Employers must offer SB 95 leave through September 30, 2021. If an employee is using SB 95 leave on September 30, however, and the absence would continue without interruption past September 30, the employee gets to continue using available SB 95 leave for that absence.

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[1] In addition, the law applies to "providers" of "authorized in-home supportive services ... to an eligible recipient." "In-home supportive services" is defined by the [California Welfare and Institutions Code](#). The requirements for "providers" will not be outlined in this piece.