

## California Enacts COVID-19 Supplemental Paid Sick Leave Law Retroactive to January 1, 2021

April 5, 2021

On March 19, Governor Gavin Newsom signed SB 95 into law, which provides for supplemental paid sick leave for reasons related to COVID-19. This new leave is in addition to paid sick leave already required by law or policy. The new law creates California Labor Code Section 248.2, with respect to supplemental paid sick leave to employers generally and firefighters, and California Labor Code Section 248.3, with respect to providers of in-home support services or waiver personal care services. This alert focuses on the requirements of California Labor Code Section 248.2 with respect to employers generally.

California had previously enacted AB 1867, which provided supplemental paid sick leave to employees of private employers with 500 or more US employees. AB 1867 expired with the expiration of the Emergency Paid Sick Leave Act established by the Families First Coronavirus Response Act on December 31, 2020.

While the sick leave benefits required by SB 95 may look similar to those required under AB 1867 or the Emergency Paid Sick Leave Act, they are more expansive in a number of key ways, including with respect to the reasons available for supplemental paid sick leave, the methods for determining compensation while using supplemental paid sick leave, and the retroactive applicability of the law.

SB 95 went into effect on March 29, 10 days after it was signed into law by Gov. Newsom and will remain in effect through September 30, 2021.

### **Which employers are covered by Labor Code Section 248.2?**

All private employers that employ more than 25 employees are covered by Labor Code 248.2 and must provide supplemental paid sick leave for certain COVID-19-related reasons to its employees.

### **Which employees are covered by Labor Code Section 248.2?**

A “covered employee” means any employee who is unable to work or telework for an employer because of a qualifying reason (addressed in the following section).

### **For what reason can an individual take supplemental paid sick leave?**

A covered employee of a covered employer is entitled to supplemental paid sick leave if they are unable to work or telework due to any of the following reasons:

1. The covered employee is subject to a quarantine or isolation period related to COVID-19 as defined by an order or guidelines of the State Department of Public Health, the federal Centers for Disease Control and

Prevention or a local health officer who has jurisdiction over the workplace. If the covered employee is subject to more than one of the foregoing, the covered employee shall be permitted to use COVID-19 supplemental paid sick leave for the minimum quarantine or isolation period under the order or guidelines that provides for the longest such minimum period.

2. The covered employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
3. The covered employee is attending an appointment to receive a vaccine for protection against contracting COVID-19.
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 symptoms of COVID-19 and seeking a medical diagnosis.
6. The covered employee is caring for a family member who is subject to an order or guidelines described in (1) or who has been advised to self-quarantine, as described in (2).
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.

For purposes of SB 95, a “child” is defined as a biological, adopted or foster child, stepchild, legal ward or a child to whom an employee stands in loco parentis, regardless of age or dependency status.

A “family member” is defined as: (1) a child (as defined above); (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; (6) a grandchild; or (7) a sibling.

The reasons why an employee may be eligible for supplemental paid sick leave under SB 95 are much broader than under AB 1867 and the Emergency Paid Sick Leave Act, and also do not require that an employee leave their home or other place of residence to perform work in order to be eligible for supplemental paid sick leave. Instead, if an employee is unable to work *or telework* for any of the reasons listed above, they would be eligible for supplemental paid sick leave under SB 95.

The new law also clarifies the interaction between this supplemental paid sick leave law and the Cal/OSHA Emergency Temporary Standards. If, under the Emergency Temporary Standards, an employer is required to maintain an excluded employee’s earnings due to COVID-19 exposure, employers may require employees to exhaust their supplemental paid sick leave under SB 95.

## **How much supplemental paid sick leave does a covered employee receive?**

Covered employees considered full time or who worked or were scheduled to work on average at least 40 hours per week for the covered employer in the two weeks preceding the date the covered employee takes supplemental paid sick leave are entitled to 80 hours of supplemental paid sick leave. For part-time covered employees, the amount of supplemental paid sick leave available is determined as follows:

- Covered employees with a normal weekly schedule are entitled to supplemental paid sick leave equal to the total number of hours they are normally scheduled to work over two weeks.
- Covered employees with a variable schedule are entitled to supplemental paid sick leave equal to 14 times the average number of hours worked each day in the 6 months preceding the date they take supplemental paid sick leave. If the covered employee has worked for fewer than six months, but more than 14 days, this calculation is instead made over the entire period of employment.
- Covered employees with a variable schedule, but who have worked for the covered employer for 14 days or fewer, are entitled

to supplemental paid sick leave equal to the total number of hours that they have worked for the covered employer.

The total number of hours of COVID-19 supplemental paid sick leave to which a covered employee is entitled *is in addition to any paid sick leave that may be available under state or local law*. A covered employer cannot require a covered employee to use any other paid leave or unpaid leave, paid time off or vacation time provided by the covered employer before allowing them to use COVID-19 supplemental paid sick leave or in lieu of COVID-19 supplemental paid sick leave.

### **Are employees compensated for supplemental paid sick leave in the same manner as regular paid sick leave?**

No. For non-exempt covered employees, each hour of supplemental paid sick leave must be calculated and compensated at a rate equal to *the highest of the following*:

1. Calculated in the same manner as the regular rate of pay for the workweek in which the covered employee uses supplemental paid sick leave, whether or not they actually work overtime during that week;
2. Calculated by dividing the covered employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment;
3. The state minimum wage; or
4. The local minimum wage to which the covered employee is entitled.

The rate of pay for supplemental paid sick leave for exempt employees is to be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

Notwithstanding the above, like under AB 1867, *a covered employer is not required to pay more than \$511 per day or \$5,110 in the aggregate to a covered employee for supplemental paid sick leave*.

### **What if an employer already provided additional supplemental sick leave benefits in 2021?**

Under SB 95, if an employer pays or paid a covered employee a *supplemental* benefit for leave taken on or after January 1, 2021, for one of the reasons listed above for which supplemental paid sick leave is available under SB 95, and compensated the employee in an amount equal or greater to the amount of compensation under SB 95 to which the employee would have been entitled, then the covered employer may count the hours of the other paid benefit or leave toward the total number of hours of supplemental paid sick leave that the covered employer is required to provide.

The law is clear that time off under California's regular paid sick leave law or AB 1867 *do not count* for purposes of this offset. However, the offset may include leave provided pursuant to any federal or local law in effect or that became effective on or after January 1, 2021, if the leave was provided for any of the reasons listed above for which supplemental paid sick leave is available under SB 95.

### **How does supplemental paid sick leave apply retroactively?**

As noted, SB 95 is retroactive to January 1, 2021. For any leave taken for a qualifying reason listed above prior to the effective date of SB 95 and on or after January 1, 2021, if a covered employer did not compensate the covered employee in an amount equal to or greater than the amount required under SB 95, *upon the oral or written request of the employee*, the employer must provide a retroactive payment that provides for that compensation on or before the payday for the next full pay period after the oral or written request. For any such retroactive payment, the number of hours of leave corresponding to that retroactive payment *will*

count toward the total number of hours of supplemental paid sick leave required to be provided by SB 95. This may include unpaid leave previously taken for a reason for which supplemental paid sick leave may be taken under SB 95.

## Do employers have to provide notice of this supplemental paid sick leave law?

Yes. Employers must display a poster explaining the nature of the supplemental paid sick leave law. If employees do not frequent a physical workplace, the notice may be disseminated to employees electronically. [View the DLSE poster.](#)

In addition, as with regular paid sick leave, covered employers must also provide notice in the covered employee's wage statement showing the amount of available COVID-19 supplemental paid sick leave each pay period. This must be a separate line item from regular paid sick leave on the wage statement. For employees who work a variable schedule, an employer can satisfy the paystub requirement by performing an initial calculation of the supplemental paid sick leave available to the employee and indicating "(variable)" next to the number of hours indicated on the paystub.

## What does this mean for covered employers?

Effective March 29, 2021, covered employers will need to comply with the provisions of SB 95 with respect to supplemental paid sick leave. This will require covered employers to provide notice to employees of the supplemental sick leave available to them (which can be accomplished by sending a copy of the poster to employees via email) and to provide supplemental paid sick leave for qualifying reasons. The Department of Industrial Relations has also published [FAQs with respect to Labor Code Section 248.2](#). Employers should keep in mind that this supplemental benefit is in addition to, and not in lieu of, any other paid sick leave benefits that the employee is entitled to by law or policy.

If you have any questions about these requirements, please reach out to a member of the Cooley employment team.

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## Key Contacts

Frederick Baron Palo Alto	fbaron@cooley.com +1 650 843 5020
Ann Bevitt London	abevitt@cooley.com +44 (0) 20 7556 4264

Wendy Brenner Palo Alto	brennerwj@cooley.com +1 650 843 5371
Leslie Cancel San Francisco	lcancel@cooley.com +1 415 693 2175
Helenanne Connolly Reston	hconnolly@cooley.com +1 703 456 8685
Joshua Elefant Palo Alto	jelefant@cooley.com +1 650 843 5572
Joshua Mates San Francisco	jmates@cooley.com +1 415 693 2084
Gerard O'Shea New York	goshea@cooley.com +1 212 479 6704
Lois Voelz Palo Alto	lvoelz@cooley.com +1 650 843 5058
Summer Wynn San Diego	swynn@cooley.com +1 858 550 6030

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