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California Reinstates COVID-19 Supplemental Paid Sick Leave Retroactive to January 1, 2022

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On February 9, 2022, California Gov. Gavin Newsom signed into law Senate Bill 114, which requires employers with 26 or more employees to provide supplemental paid sick leave to employees who are unable to work for reasons related to COVID-19. It also allows employees to use leave to care for family members. SB 114 creates new California Labor Code Sections 248.6 and 248.7.

In April 2021, California enacted SB 95, which similarly required employers to provide supplemental paid sick leave to employees, but expired on September 30, 2021. SB 114 reinstates the supplemental paid sick leave requirements but differs from SB 95 in several significant ways. This alert focuses on the requirements of SB 114 that apply to employers generally.

SB 114 will go into effect on **February 19, 2022**, but its requirements will apply retroactively to January 1, 2022, and will expire on September 30, 2022.

Which employers are covered by SB 114?

All private employers that employ more than **25 employees** must provide supplemental paid sick leave to their employees for certain COVID-related reasons.

Which employees are covered under SB 114?

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

For what reason can a covered employee take supplemental paid sick leave?

- A covered employee is entitled to supplemental paid sick leave if unable to work or telework due to any of the following reasons:
- The employee is subject to a quarantine or isolation period related to COVID-19 as defined by an order or guidance of the California Department of Public Health, the federal Centers for Disease Control and Prevention, or a local public health officer who has jurisdiction over the workplace. (If the employee is subject to more than one of the foregoing circumstances, the employee can use COVID-19 supplemental paid leave for the minimum quarantine or isolation period under the order or guidance that provides for the longest such minimum period.)
- The employee has been advised by a healthcare provider to isolate or quarantine due to COVID-19.
- The employee is attending (or accompanying a family member to) an appointment to receive a vaccine or a vaccine booster that prevents the employee from being able to work or telework.
- The employee is experiencing symptoms, or caring for a family member experiencing symptoms, related to a COVID-19 vaccine or booster that prevent the employee from being able to work or telework.
- The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
- The employee is caring for a family member who is subject to an order or guidance, or who has been advised to isolate or quarantine.
- The employee is caring for a child whose school or care provider is closed or otherwise unavailable for reasons related to COVID-19.

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 a child; 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; a spouse; a registered domestic partner; a grandparent; a grandchild; or a sibling.

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

Supplemental paid sick leave under SB 114 is divided into two categories, as outlined below.

SB 114 COVID-related sick leave reasons

In the first category, 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 before the date the employee takes supplemental paid sick leave), are entitled to 40 hours of supplemental paid sick leave for any COVID-related reason listed above. For part-time covered employees, the amount of supplemental paid sick leave available is determined as follows:

- 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 in one week.
- Employees with a variable schedule are entitled to supplemental paid sick leave equal to seven times the average number of hours worked each day in the six months preceding the date they take supplemental paid sick leave. If an employee has worked for the employer for less than six months, but more than seven days, this calculation is instead made over the entire period of employment.
- Employees with a variable schedule, but who have worked for the employer for seven days or less, are entitled to supplemental paid sick leave equal to the total number of hours that they have worked for the employer.

Positive COVID-19 test result

As for the second category, covered employees can take **additional supplemental paid sick leave of 40 hours** (or in the numbers above for part-time covered employees), if the employee, or a family member for whom the employee is providing care, tests positive for COVID-19. If the employee requests to use additional leave pursuant to this subparagraph because a family member for whom the employee is providing care tests positive for COVID-19, the employer may require that the employee provide documentation of that family member’s test results before paying the additional leave. Employers are not obligated to pay for any additional leave time if an employee refuses to provide documentation of the test results.

Additionally, if an employee tests positive for COVID-19, an employer may require the employee to submit to a diagnostic test – at no cost to the employee – on or after the fifth day after the initial positive test result and provide documentation of the test results.

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 such employees to use any other paid leave or unpaid leave, paid time off or vacation time provided by the employer before allowing them to use COVID-19 supplemental paid sick leave or in lieu of COVID-19 supplemental paid sick leave. Additionally, covered employees are not required to use supplemental paid sick leave before receiving exclusion pay under the Cal/OSHA COVID-19 Emergency Temporary Standards.

The total maximum amount of supplemental paid sick leave hours must not exceed 80 hours from January 1, 2022, to September 30, 2022.

Are there any limitations on the use of supplemental paid sick leave?

Yes. If a covered employee is taking supplemental paid sick leave because the employee or the employee's family member is experiencing symptoms related to the COVID-19 vaccine or booster, then the employee is limited to a total of supplemental paid sick leave of three days or 24 hours for each vaccination or booster, unless the employee provides verification from a healthcare provider that the employee or the family member is continuing to experience symptoms related to the COVID-19 vaccine or booster. This period includes time used to attend the appointment.

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

For nonexempt covered employees, each hour of supplemental paid sick leave must be calculated/compensated at a rate equal to one of the following:

- Calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick leave, whether or not the employee works overtime that week.
- Calculated 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 of the prior 90 days of employment provided that, for nonexempt employees paid 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, are divided by all hours, to determine the correct amount of COVID-19 supplemental paid sick leave.

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

Similar to SB 95, **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.**

Does SB 114 apply retroactively?

Yes. The requirements under SB 114 apply retroactively to January 1, 2022. If a covered employee took time off for any COVID-related reason under SB 114 and was not compensated by the employer – or was compensated in an amount less than what is required under SB 114 – then **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. If an employer makes a retroactive payment, the number of hours corresponding to the amount of the retroactive payment must count toward the total number of hours of COVID-19 supplemental paid sick leave that the employer is required to give to the employee.

If a covered employee took leave for any COVID-related reason under SB 114 between January 1, 2022, and the effective date, and was compensated in an amount equal to or greater than the amount of compensation for COVID-19 supplemental paid sick leave required under SB 114, then upon the oral or written request of the employee, the employee should be credited for any leave hours used for COVID-specific purposes, and the employer should be credited for providing those hours as COVID-19 supplemental paid sick leave.

Do employers have to provide notice of SB 114?

Yes. Employers must display a poster explaining the nature of the supplemental paid sick leave law. If employees do not have a physical workplace, the notice may be disseminated to employees electronically. The California Division of Labor Standards Enforcement will make publicly available a model notice setting forth the requirements under SB 114.

In addition, as with regular paid sick leave, covered employers must also provide notice in each covered

employee's wage statement showing the amount of available COVID-19 supplemental paid sick leave each pay period. The employer must list zero hours used if a worker has not used any COVID-19 supplemental paid sick leave.

What does this mean for covered employers?

Effective February 19, 2022, covered employers will need to comply with the provisions of SB 114 with respect to supplemental paid sick leave. They must 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 provide supplemental paid sick leave for qualifying reasons. The California Department of Industrial Relations will update its webpage, including FAQs with respect to the requirements under SB 114. 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 employees are 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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