



# SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

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## LEGAL UPDATE

February 11, 2022

**To: Superintendents, Member School Districts (K-12)**

**From: Nancy L. Klein, Senior Associate General Counsel**

**Subject: New 2022 “Supplemental Paid Sick Leave” for Qualifying  
Reasons and Supplemental Paid Sick Leave based on Positive  
COVID-19 Test  
Memo No. 08-2022**

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Effective **February 19, 2022, to September 30, 2022**, Assembly Bill 84 (“AB 84”) requires employers with 26 or more employees to provide paid leave to employees who are *unable to work or telework* for specified reasons related to COVID-19 quarantine or isolation orders, vaccinations, symptoms, and positive tests, as described below.

**Employees may make retroactive claims for paid leave based on one or more specified reasons between January 1, 2022, and February 18, 2022, inclusive.**

AB 84 establishes two banks of leave: one for the same Qualifying Reasons (“QR”) that were in effect under the 2021 Supplemental Paid Sick Leave (“SPSL”) law and the second for employees unable to work or telework due to their own or a family member’s positive COVID-19 test. Employers may require an employee to provide documentation to substantiate the employee or family member’s positive test results, or symptoms related to a vaccination or booster, if symptoms persist in excess of three days.

As with 2021 SPSL, employees taking leave pursuant to AB 84 on September 30, 2022, are entitled to take the remainder of the full amount of leave for which they qualify, notwithstanding the expiration of AB 84.

### **I. BANK ONE: SUPPLEMENTAL PAID SICK LEAVE for QUALIFYING REASONS**

From February 19, 2022, to September 30, 2022, employers with more than 25



employees must provide SPSL for an *employee who is unable to work or telework* for any of the following Qualifying Reasons (“QR”):

1. Employee is subject to a quarantine or isolation period related to COVID-19 as defined by the California Department of Public Health (CDPH), federal Center for Disease Control (CDC) or a local health officer with jurisdiction over the workplace.<sup>1</sup>
2. Employee has been advised by a health care provider to isolate or quarantine due to COVID-19.
3. Employee is attending an appointment for the employee or a “family member”<sup>2</sup> to receive a COVID-19 vaccine or a vaccine booster that prevents the employee from being able to work or telework.
4. Employee is experiencing symptoms related to a COVID-19 vaccine that prevent the employee from being able to work or telework.

*Note: An employer may limit the total SPSL taken for this QR to three (3) days unless the employee provides verification from a health care provider that the employee or family member is continuing to experience symptoms related to the vaccine or booster. The three-day period includes the time used pursuant to QR 3 to attend an appointment for a COVID-19 vaccine or booster.*

5. Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
6. Employee is caring for a family member who is subject to an order or guidance described in QR 1 or has been advised to isolate or quarantine as described in QR 2.
7. Employee is caring for a child<sup>3</sup> whose school, place of care is closed or otherwise unavailable for reasons related to COVID-19 *on the premises*.

Upon written or oral request, an employer must make SPSL available for immediate use.

Note that employees who utilized their maximum amount of leave under the 2021 SPSL are eligible for this leave, as long as they qualify.

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<sup>1</sup> The California Department of Industrial Relations clarified in relation to 2021 SPSL that the “order or guidelines must be specific to the covered employee’s circumstances. A general stay-at-home order would not count.” [DIR FAQs](https://www.dir.ca.gov/dlse/COVID19Resources/FAQ-for-SPSL-2021.html) (https://www.dir.ca.gov/dlse/COVID19Resources/FAQ-for-SPSL-2021.html)

<sup>2</sup> “**Family member**” means any of the following:

(1) A **child**, which for purposes of this article means a biological, adopted, or foster child, stepchild, legal ward, or a child to whom the employee stands in loco parentis. This definition of a child is applicable regardless of age or dependency status.

(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.

(7) A sibling.

(Lab. C. 245.5(c), 248.2(b)((1)(F) – Healthy Families Healthy Workplaces Act Definitions)

<sup>3</sup> See f.n. 1, paragraph 1. “Child” is not restricted by age or require that a child over 18 be incapable of self-care.



## II. BANK TWO: SUPPLEMENTAL PAID SICK LEAVE BASED ON POSITIVE COVID-19 TEST (“PT-SPSL”)

A. From February 19, 2022, to September 30, 2022, employers with more than 25 employees must provide paid leave for an employee who is *unable to work or telework* for either of the following Positive Test Qualifying Reasons (“PT-QR”):

1. The employee tests positive for COVID-19, or
2. The employee’s “family member” for whom the employee is providing care tests positive for COVID-19.

An employer’s obligation to provide PT-SPSL is subject to documentation of testing as specified in Section II.B., below.

### B. Documentation to Support PT-SPSL Claims

1. **Employee:**

**Positive Test:** An employer may require an employee to provide documentation of the employee’s positive test result. An employer is not required to provide PT-SPSL if the employee refuses to provide such documentation.

*Note: An employer may also require the employee to (a) submit to a diagnostic test on or after the fifth day after the employee initially tested positive and (b) provide documentation of the diagnostic test results. Employer must make the diagnostic test available at no cost to the employee.*

2. **Family Member:** If an employee requests PT-SPSL based on a family member’s positive test, employer may require the employee to provide documentation of the positive test results *before paying the additional leave.*
3. **Retroactive Claims:** Employees may request retroactive PT-SPSL for leave taken between January 1, 2022 and February 18, 2022. An employer may require an employee to provide documentation of a positive COVID-19 test during the relevant period for retroactive PT-SPSL and SPSL claims.

### C. Exhaustion of SPSL is not required to qualify for PT-SPSL

Employees are not required to exhaust SPSL to qualify for PT-SPSL. The right use to PT-SPSL is based on the occurrence of a PT-QR and subject to documentation of a positive COVID-19 test.



### **III. RATE OF PAY and RETROACTIVE PAYMENTS**

#### **A. For Non-Exempt Employees**

1. For employees who work a regular schedule; the employee's regular rate of pay for the week in which employee used SPSL or PT- SPSL, or
2. For employees who work at variable hours and/or variable rates; divide the employee's total wages (excluding OT pay) by the employee's total non-overtime hours worked in the full pay periods occurring within the prior 90 days of employment.

#### **B. For Exempt Employees**

Calculate SPSL and PT-SPSL compensation in the same manner as employer calculates wages for other forms of paid leave.

#### **C. Compensation Cap for SPSL and PT- SPSL**

1. Employers are not required to pay more than \$511/day or \$5,110 total for both SPSL and PT-SPSL.
2. An employee who has reached the compensation cap may elect to use other available paid leave to receive full compensation.

#### **D. Retroactive SPSL and PT-SPSL Claims**

1. Upon the oral or written request of an employee, employer must provide retroactive payment for SPSL / PT- SPSL on or before the payday for the next full pay period, or provide credit for other leave taken by the employee for a QR or PT-QR.
2. An employer may require an employee to provide documentation of a positive COVID-19 test during the relevant period for retroactive SPSL and PT-SPSL claims. See Sections II.B.1. and II.B.2., above.

### **IV. LEAVE ENTITLEMENTS / MAXIMUM ENTITLEMENT**

Covered employees are eligible for one bank of hours for SPSL and a separate bank of hours for PT-SPSL. The maximum is a total of 40 hours of SPSL and 40 hours for PT-SPSL. An employee's specific entitlement is determined by employee's full-time or part-time status as described below.

#### **A. For Full-Time Employees:**

Forty (40) hours, if either: (1) the employer considers the employee to work full time, or (2) the 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 employee took leave.



**B. For Part-Time Employees:**

1. For a part-time employee with a “normal weekly schedule”, the total number of hours the employee is normally scheduled to work in one week.
2. For a part-time employee with a “Variable Schedule of Hours” who has been:
  - a. *Employed at least six months*, seven times the average number of hours the employee worked each day in the six months preceding the date the employee took leave for a QR or PT-QR;
  - b. *Employed less than six months but more than seven days*, seven times the average number of hours the employee worked over the entire period of employment,
  - c. *Employed seven or fewer days*, the total number of hours the employee has worked for the employer.

**C. Right to Use SPSL and PT-SPSL**

1. An employee may determine how many hours of SPSL or PT- SPSL to use up to the maximum entitlement.
2. An employer “shall...make [SPSL] available for immediate use..., upon the oral or written request of the ...employee to the employer.”
3. Payment for PT-SPSL is subject to documentation if requested by employer. (See Section II.B.)

**D. Offset**

If the employer made another supplemental benefit for leave taken on or after January 1, 2022 with compensation at least equal to what is required under AB 84, for any of the QRs or PT-QRs, the employer may count those hours toward the employee’s leave entitlement under AB 84. See Section IV.

*Note, some schools entered into memoranda of understanding with their labor units extending the 2021 SPSL; this may qualify as an “offset” for the 2022 SPSL and PT-SPSL, if it was in effect on or after January 1, 2022, and provided compensation at least equal to what is set forth above. We encourage clients to contact legal counsel to discuss this further.*

**E. Interaction with other Available Leave**

1. Exclusion Pay: SPSL and PT- SPSL does not limit an employer’s obligation to provide Exclusion Pay under the Emergency Temporary Standards (Title 8-ETS) when an employee contracts COVID-19 or has a workplace close contact.
2. Paid Sick Days: SPSL and PT- SPSL are in addition to an employee’s rights to Paid Sick Days under the Healthy Workplaces, Healthy Families Act.
3. An employer cannot require an employee to use other paid leave, including Paid Sick Days and Exclusion Pay, for a QR or PT-QR prior to using SPSL or PT- SPSL.



## V. NOTICE REQUIREMENTS

**A. General Notice** – The state labor department will publish a model poster that employers must display conspicuously in the workplace and provide (e.g., via email) a copy to employees who do not frequent the workplace.

**B. Employee Notice of Leave Use**

1. The employer must provide all employees with written notice that sets for the amount of SPSL and PT-SPSL they used through the pay period in which it was due to be paid.
2. The notice may be provided on an employee's itemized wage statement or in a separate writing provided on the designated pay date with the employee's payment of wages.
3. The employer must specify zero hours if the employee has not used any SPSL or PT-SPSL.
4. This notice requirement goes into effect the next full pay period (March, 2022) following the effective date of AB 84.

Please contact our office with questions regarding this Legal Update or any other legal matter.

*The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.*

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