

MARCH 2021

Terence L. Greene
619-702-4308
tgreene@sdgllp.com

Elizabeth Donovan
619-702-4322
edonovan@sdgllp.com

Ross M. Poole
619-702-4307
rpoole@sdgllp.com

Cassandra Bolten
619-702-4333
cbolten@sdgllp.com

California Enacts New Retroactive COVID-19 Paid Sick Leave Requirements

California continues to burden businesses with COVID-19 related legislation. The latest hit to employers imposing yet another round of COVID-19 related paid leave obligations is called 2021 COVID-19 Supplemental Paid Sick Leave ("2021 CPSL").

Impacted Employers

The 2021 CPSL obligations set forth in the new law apply to all employers with 26 or more employees.

Effective Dates

The new law takes effect on March 29, 2021; however, it is retroactive to January 1, 2021 (more information on this below). The 2021 CPSL requirements are presently scheduled to automatically expire on October 1, 2021. The only exception is when an employee begins using available 2021 CPSL on or before September 30, 2021 and the absence continues beyond the law's expiration date. In those cases, an employee's absence would continue to be covered by 2021 CPSL until the leave period ends or the employee's 2021 CPSL has been exhausted.

Mandatory Posting Requirements

Employers are required to post the new 2021 CPSL poster in a conspicuous place that is accessible to employees. The mandatory poster is available [here](#). For employers with employees who do not frequent the workplace (such as employers who have shifted to remote work), the poster can be distributed by electronic means, such as email.

Absences Covered by 2021 CPSL

Absences covered by 2021 CPSL are similar to those that were contained in the original Families First Coronavirus Response Act ("FFCRA"), but are broader because they include vaccination related absences. The categories of absences covered by 2021 CPSL are:

- Employee is subject to a quarantine or isolation period related to COVID-19 as defined by federal, state, or local orders or guidelines.
- Employee is advised by a health care provider to self-quarantine due to concerns related to COVID-19.



- Employee is experiencing COVID-19 symptoms and seeking a medical diagnosis.
- Employee is caring for a family member who is subject to a quarantine or isolation order or guideline or who has been advised to self-quarantine by a health care provider due to concerns related to COVID-19.
- 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 .
- Employee is attending an appointment to receive a COVID-19 vaccine.
- Employee is experiencing symptoms related to a COVID-19 vaccine that prevent the employee from being able to work or telework.

Duration of 2021 CPSL Leave

Full-Time Employees: Full-time employees or employees who worked or were scheduled to work an average of at least 40 hours per week in the two weeks before the leave is taken are entitled to 80 hours of 2021 CPSL.

Part-Time Employees With A Regular Schedule: Part-time employees with a normal weekly schedule receive the total number of hours they are normally scheduled to work over two weeks.

Part-Time Employees With A Varying Schedule (Employed 15 days or more): A variable hourly employee who has worked for an employer for 15 days or more is entitled 14 times the average number of hours the covered employee worked each day for the employer in the six months preceding the date the employee took 2021 CPSL. The calculation is as follows: Total hours worked during prior six month period / total days employed during prior six month period (not just days worked) x 14. If the variable schedule calculation results in an average work schedule of at least 40 hours per week, the variable-scheduled covered employee would be considered full-time and entitled to 80 hours of 2021 CPSL.

Part-Time Employees With A Varying Schedule (Employed 14 days or fewer): A variable hour employee who has worked for an employer for 14 days or fewer is entitled to 2021 CPSL equal to the numbers of hours they worked in the preceding two weeks.

2021 CPSL Rate of Pay

Employees taking 2021 CPSL must be paid the highest of the following rates, subject to the daily and total caps:

- The employee's regular rate of pay for the workweek in which the leave is taken;
- A rate calculated by dividing the 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;
- The State minimum wage; or
- The local minimum wage.

2021 CPSL is capped at \$511 per day and \$5,110 total per worker.



Use Limitations

There are no limitations on use. Employees alone determine how many 2021 CPSL hours they need to use for a covered absence.

No Documentation or Certification is Permitted in Most Circumstances

Employees can use 2021 CPSL immediately when the law takes effect (and retroactively to January 1) by making an oral or written request. Employers cannot ask employees to provide certification or documentation to substantiate their need for 2021 CPSL.

The only exception to this rule is when the employer has information which indicates that the covered employee is not requesting 2021 CPSL for a covered purpose. However, in those instances, the reasonableness of requesting certification or documentation will be subject to review, so we recommend that employers exercising this exception do so cautiously and only when credible evidence is available.

Paystub Requirements

Like ordinary statutory paid sick leave, 2021 CPSL information must be displayed on employee paystubs or in another written notice provided to employees each payday. 2021 CPSL cannot be grouped together with ordinary paid sick leave – it must be a separate line item.

Retroactive Payments and Credits

As stated above, 2021 CPSL requirements are retroactive to January 1, 2021. That means that employers may need to pay employees who took a leave for reasons covered by 2021 CPSL between January 1, 2021 and March 28, 2021, if the leave was not paid, or if it was paid at an amount less than what is required pursuant to 2021 CPSL.

Retroactive payments are not automatically triggered. Employees must make a written or oral request to receive a retroactive payment for a covered absence between January 1, 2021 and March 28, 2021. Once a request is made, employers have until the payday for the next full pay period to make the retroactive payment.

In some circumstances, employers can receive credit for payments made to employees after January 1, 2021 for COVID-19 related absences. To qualify for the credit, the payment made to employees must meet all of the following criteria:

- The leave taken by the employee and paid by the employer must have been for one of the qualifying reasons under 2021 CPSL;
- To pay for this other supplemental benefit, the employer did not require the covered employee to use any other paid leave or paid time off available to the employee under a policy that is not specific to COVID-19, or vacation time; and



- The employer paid for the leave taken at a rate equal to or greater than what is required under the 2021 CPSL.

Pursuant to these criteria, employers who have voluntarily provided employees with FFCRA leave since January 1, 2021 may be eligible to credit employee FFCRA leave to an employee's 2021 CPSL.

If the employer paid for the leave taken at a lesser rate than what is required under the 2021 CPSL, the employer may voluntarily make a retroactive payment to make up the difference between what was paid and what is required pursuant to 2021 CPSL, or must make the payment if a covered employee makes a written or oral request for it on or after March 29, 2021.

Interaction with Cal-OSHA Covid-19 Emergency Temporary Standards

Cal-OSHA COVID-19 Emergency Temporary Standards and Cal-OSHA Aerosol Transmissible Diseases Standards require employers to maintain an employee's earnings when an employee is excluded from the workplace due to COVID-19 exposure. In those cases, employers may require an employee to first exhaust 2021 CPSL before making exclusion payments.

Interaction with Other Types of Paid Leave

With the exception of the Cal-OSHA requirements described above, employees get to choose whether they will use 2021 CPSL or some other type of paid or unpaid leave benefit that may be available to them. In other words, 2021 CPSL is in addition to, not in lieu of, ordinary statutory paid sick leave, vacation, or other forms of PTO.