



STOKES WAGNER

ATTORNEYS AT LAW

ATLANTA • ITHACA • LOS ANGELES • PITTSBURGH • SAN DIEGO • SAN FRANCISCO

## California Expanded Supplemental COVID-19 Paid Sick Leave

On **September 9**, California Governor Gavin Newsom signed [AB 1867](#) immediately expanding supplemental paid sick leave ["SPSL"] for COVID-19-related reasons for employers who did not qualify for Families First Coronavirus Response Act ["FFCRA"] because of size. The new law, codified as Labor Code section 248.1 ["LC 248.1"], requires compliance by **September 19, 2020**.

Here is what you need to know:

### 1. Who does this apply to?

Private employers in the United States with 500 or more employees. LC 248.1 incorporates the definition of "Private Employers" as provided by Section 826.40(a)(1) and (2) of Title 29 of the Code of Federal Regulations to determine the number of employees that the hiring entity employs. Simply put, if a California employer was not required to provide FFCRA leave because it had more than 500 employees, then LC 248.1 will apply.

### 2. How much SPSL are employees entitled to?

Employers must provide SPSL to employees as follows:

- i. 80 hours for:
  1. Employees classified as full-time.
  2. Employees who worked or were scheduled to work, on average, at least 40 hours per week in the two weeks preceding the date the employee took SPSL.
- ii. If an employee does not qualify for the above, then they are entitled to the following:
  1. If the employee has a normal weekly schedule, they are entitled to the total number of hours the employee is normally scheduled to work for the property over two weeks.

Questions? Contact Stokes Wagner.

2. If the employee works a variable number of hours, they are entitled to 14 times the average number of hours the employee worked each day in the six months preceding the date the employee took SPSL.
  3. If the employee has worked for less than six months but more than 14 days, this calculation shall instead be made over the entire period the employee has worked for the property.
  4. If the employee works a variable number of hours and has worked for the hiring entity for 14 days or fewer, they are entitled to the total number of hours the employee has worked for the property.
3. At what rate is SPSL paid?

The higher of the following:

- i. The employee's regular rate of pay for employee's last pay period, including any applicable collective bargaining agreement.
- ii. The state minimum wage.
- iii. The local minimum wage to which the covered worker is entitled.

The regular rate of pay includes service charges, automatic gratuities, commissions, and other non-discretionary bonuses.

The maximum amount the employer is required to pay mirrors the FFCRA: \$511 per day, with a cap of \$5,110.

4. Are furloughed employees eligible for SPSL?

No. The obligation to provide SPSL only arises where the employee cannot work because they are:

1. Subject to a federal, state, or local quarantine or isolation order related to COVID-19;
  2. Advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; and/or
  3. Prohibited from working by the employer due to health concerns related to the potential transmission of COVID-19.
5. Our employees have been furloughed for the last 6 months, how does this impact their SPSL entitlement?

A furloughed employee's SPSL entitlement may be affected by their full- or part-time status and/or the number of hours worked since their return from furlough.

If the employee is classified as full-time and they are returned to work and request SPSL, they are entitled to 80 hours, regardless of how long they have been back to work.

Employees not classified as full-time, who were on furlough would be eligible for the amounts based on whether they have [1] returned to their normal weekly schedule for over two weeks, [2] worked variable hours, [3] worked less than 6 months but more than 14 days; or [4] worked less than 14 days. [See Question No. 2 above.]

6. Does the law expire?

Yes. The requirement to provide SPSL sunsets on December 31, 2020 or upon the expiration of any federal extension of the Emergency Paid Sick Leave Act established by the Families First Coronavirus Response Act, Public Law 116-127, ***whichever is later***.

7. Does SPSL roll-over?

It depends on when the SPSL is requested by the employee. Employees taking SPSL at the time of its expiration, must be allowed to take the full amount they are entitled to.

For example, assuming SPSL sunsets on December 31, 2020, if an employee requests the leave on December 31, 2020, and they are entitled to 80 hours, the employee must be allowed to use the SPSL through 2021. However, if the same employee requests SPSL on January 1, 2021, and the requirement to provide SPSL has expired, the employee is no longer entitled to SPSL.

8. Does the law create any requirements for our pay check stubs?

Yes. The paystub requirement here is the same as the Healthy Workplaces Health Families Act of 2014 (i.e. the [CA Paid Sick Leave statute](#)) paystub standard. This means employers must provide employees with written notice of the amount of SPSL available. Employers must also retain records documenting the hours worked, leave provided and leave used by an employee for 3 years.

9. Can the employer require the employee use vacation or regular [state or local] paid sick leave before SPSL?

No. Employers have to designate the leaves based on what the employee tells them. Employers should advise the employee of the various sick leaves and allow the employee to tell them what they want to use. Employers are expressly prohibited from requiring employees to use other paid or unpaid leave, paid time off or vacation time before they use SPSL or in lieu of SPSL. Note that SPSL requirements run concurrently with other types of leave other than regular paid sick leave.

10. I had an employee ask me for COVID related leave in August, and I let them know we are not subject to FFCRA and their leave would be unpaid, do I have to go back to this employee and pay them SPSL?

No. If an employee met one of the eligibility requirements in August, and they were not provided FFCRA because the employer has 500 or more employees, the employer does not need to go back and pay the employee the 80 hours [or their equivalent entitlement.] If however, the employee became eligible for this leave in October, for example, they would be entitled to the SPSL then.

On the other hand, if the employee met one of the eligibility requirements in August, and the employer provided SPSL even though it was not required to do so under FFCRA, then that sick pay can be counted retroactively towards the \$5,110 total. In other words, if an employer provided SPSL relating to COVID-19 on its own volition on or after March 4, 2020, and prior to the enactment of AB 1867 [September 9, 2020], then such sick pay may be retroactively counted toward the \$5,110 total.

If you have any questions on how this new law will affect you, please reach out to your Stokes Wagner representative.

---

THIS DOCUMENT PROVIDES A GENERAL SUMMARY AND IS FOR INFORMATIONAL/EDUCATIONAL PURPOSES ONLY. IT IS NOT INTENDED TO BE COMPREHENSIVE, NOR DOES IT CONSTITUTE LEGAL ADVICE. PLEASE CONSULT WITH COUNSEL BEFORE TAKING OR REFRAINING FROM TAKING ANY ACTION.

**Questions?** Contact Stokes Wagner.