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## Questions and Answers re 2021 California COVID-19 Supplemental Paid Sick Leave and Exclusion Pay

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### **Background:**

On March 18, 2020, Congress passed the Families First Coronavirus Response Act (FFCRA). This federal law required employers to provide employees with two forms of paid leave: (i) extended emergency paid sick leave (EPSL), and (ii) emergency FMLA paid leave. The FFCRA expired on December 31, 2020. The City chose to voluntarily extend FFCRA benefits that had not been exhausted by December 31, 2020 and permitted employees to use that leave until March 31, 2021. Leave available under FFCRA has expired, is no longer available, and does not roll over.

On March 19, 2021, California enacted the 2021 COVID-19 Supplemental Paid Sick Leave (the “SPSL law”) to provide paid sick leave for seven qualifying reasons. The SPSL law provides a new 80-hour bank of supplemental paid sick leave (“SPSL”), with some exceptions. The statutory requirements under the SPSL law went into effect March 29, 2021, but it is retroactive to January 1, 2021, and will remain in effect until September 30, 2021.

The questions and answers below are to help you understand the requirements and obligations applicable to the City of Turlock (the City) under the SPSL law and its interaction with exclusion pay/COVID-19 admin pay under Cal-OSHA’s Emergency Temporary Standards.

### **1.**

**Question: What happens if someone had time left from leave allowed under the now expired FFCRA? Is there carryover under SB 95, the California Supplemental Paid Sick Leave Law?**

**Answer:** No, the SPSL law is new. It requires employers to provide a new bank of 80 hours for qualifying reasons. The benefits under the FFCRA expired on December 31, 2021. The City exercised the option of extending the benefits thereunder until March 31, 2021. The leave or hours that were available under the FFCRA have now expired and employees cannot carry over any unused leave.

2.

**Question: Is a qualifying reason for SPSL the need to care for a child due to a school closure or place of care closure, as it was under the FFCRA?**

**Answer:** No, the SPSL law does not include this as a qualifying reason. The FFCRA provided leave to “care for a child under 18 years of age ... if the school or place of care has been closed or the child care provider is unavailable due to a public health emergency.” A public health emergency was defined as “an emergency with respect to COVID-19 declared by a Federal, State, or local authority.”

In contrast, the SPSL law specifically states that SPSL may be taken if the 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.”

As such, the language in the SPSL law is specific and to qualify for leave, the school closure or closure of the place of care must be due to “COVID-19 on the premises.” In addition, the Labor Commissioner agrees with the interpretation that leave under this qualifying reason must be due to COVID-19 on the premises, as provided by the following example.

**What does it mean for a child’s school or place of care to be closed or unavailable due to COVID-19 on the premises?**

This means that a child’s classroom in school or place of care has been closed after concern that a person who had been present on the school or daycare premises on or after January 1, 2021, was exposed to, or had contracted, COVID-19. This does not include caring for a child whose school or daycare was closed before January 1, 2021. If the school or daycare was closed on or after January 1, 2021, it must have been due to a closure, or partial closure, making the care unavailable due to COVID-19 on the premises.

3.

**Question: What type of leave may employees use if their child’s school remains on a hybrid model or the employee elects to have their child attend school remotely?**

**Answer:** We can discuss specific situations, but an employee would not be eligible for SPSL due to a hybrid model or because the employee chooses not to send the child back to school. The employee has the option of requesting vacation time or accrued personal time off.

4.

**Question: If an employee is exposed to COVID-19 but the exposure was not work related, is the employee eligible for exclusion pay/COVID-19 admin leave under Cal-OSHA’s Emergency Temporary Standards (ETS)?**

**Answer:** If the City can demonstrate that an employee’s COVID-19 exposure is not work related, exclusion pay/COVID-19 admin pay is not required.

**Example: What if an employee who was exposed via their family at home and exposure is unrelated to work?** In this example, the employee would not be eligible for exclusion pay/COVID-19 admin leave, but might still be eligible for the SPSL. The employee may also be eligible to take other sick leave or other leave available under the City’s policies.

5.

**Question: If there is no information showing that the employee is requesting SPSL for a valid purpose, can the employer require certification from a health care provider before allowing a covered employee to take SPSL?**

**Answer:** No. An employer may not deny an employee SPSL based solely on a lack of certification from a health care provider. A covered employee is entitled to take SPSL immediately upon the covered employee’s oral or written request. The leave is not conditioned on medical certification.

Although an employer cannot deny SPSL solely for lack of a medical certification, it may be reasonable in certain circumstances to ask for documentation before paying the SPSL when the employer has other information indicating that the covered employee is not requesting SPSL for a valid purpose.

For example, if a covered employee informs an employer that the covered employee is subject to a local quarantine order or recommendation, has to stay home, and qualifies for SPSL, but the employer subsequently learns that the covered employee was out at a park, the employer could reasonably request documentation.

6.

**Question: When must an employer exclude employees from work?**

**Answer:** Employers must exclude from work employees who 1) are COVID-19 cases, or 2) have had COVID-19 exposure from the workplace.

“COVID-19 case” means a person who: Has a **positive COVID-19 test**; Is subject to a **COVID-19-related order to isolate**, issued by a local or state health official; or Has **died due to COVID-19**, as determined by a local health department.

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**Question: Must an employer pay an employee while the employee is excluded from work due to a work related exposure?**

**Answer:** If the employee is able and available to work, the employer must continue to provide the employee's pay and benefits. As authorized by the Cal-OSHA regulation and the SPSL law, the City will require the employee to exhaust SPSL before the employee receives exclusion pay/COVID-19 admin leave. The obligation to pay exclusion pay does not apply if the employee's exposure was not work-related.

**8.**

**Question: Does an employer have to “maintain an employee’s earnings, seniority, and all other employee rights and benefits, including the employee's right to their former job status, as if the employee had not been removed from their job” if the employee is unable to work because of his or her COVID-19 symptoms?**

**Answer:** No, if an employee is unable to work because of his or her COVID-19 symptoms, then he or she would not be eligible for exclusion pay/COVID-19 admin leave or the benefits under Cal-OSHA's ETS. The employee, however, may be eligible for other benefits, such as SPSL, other sick leave or Workers' Compensation. If an employee is sick and cannot perform his work, they do not qualify for exclusion pay. Exclusion pay is meant to compensate the employee who would otherwise be able to work but was forced to leave the workplace due to a workplace exposure.

**9.**

**Question: If the employee's COVID-19 exposure is unrelated to work what leave bank should the City use?**

**Answer:** The employee can request unused SPSL or other accrued leave. The City is not obligated to and will not provide exclusion pay/COVID-19 admin leave if it can demonstrate that the exposure was unrelated to work. (See above.)

**10.**

**Question: If an employee refused to be vaccinated and was exposed to COVID-19 in the workplace, must the City pay exclusion pay?**

**Answer:** Yes. However, as indicated above, the City will require employees to exhaust their SPSL before the City pays exclusion pay/COVID-19 admin leave.

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**11.**

**Question: Once an employee is vaccinated, must the Cal-OSHA Emergency Temporary Standards (ETS) still be followed for vaccinated persons?**

**Answer:** Yes. All prevention measures must continue to be implemented. The City's obligations are the same whether or not the employee has been vaccinated.

**12.**

**Question:** The employee is caring for a family member who is experiencing symptoms related to a COVID-19 vaccine that prevent them to take care of their children or themselves. Is the employee able to use to the new SPSL for this time off?

**Answer:** No, because this is not a qualifying reason under the SPSL law. The employee was not the one who received the vaccine. See Qualifying Reason No. 6.

**13.**

**Question:** Will the City take an offset from any COVID-19 related leave that it provided to an employee during January 1, 2021 through March 28, 2021?

**Answer:** No, the City is not exercising the option to take an offset against the SPSL available under SPSL law for leave taken during 1, 2021 through March 28, 2021.

**14.**

**Question:** How many hour of leave is a part-time employee, working a variable schedule, entitled to?

**Answer:** The new SPSL law does not provide an answer for every scenario, but provides the following guidelines.

If the employee works a regular or consistent schedule, the employee is entitled to SPSL leave equal to the total number of hours the employee is consistently scheduled to work over two weeks.

A part-time City employee eligible for SPSL is entitled to a prorated amount (based on 80 hours) of SPSL benefits.

If the employee has worked 6 months or more and works a variable number of hours, the employee is entitled to SPSL leave equal to 14 times the average number of hours the covered employee worked each day for the employer in the six months preceding the date the covered employee took COVID-19 supplemental paid sick leave.

If the employee has worked less than 6 months but more than 14 days and works a variable number of hours, the employee is entitled to SPSL leave equal to 14 times the average number of hours the employee worked each day since working for the employer.

If the employee has worked less 14 days or less and works a variable number of hours, the employee is entitled to SPSL leave equal to the total number of hours the covered employee has worked for that employer.

See the following chart as an example for a variable schedule for an employee who has worked a variable schedule during the past six months:

- First, the City will determine the average number of hours the employee worked each day for the City over the six months before the date of SPSL benefit use.
- Second, the City will multiply the average by 14. The product will be the employee’s bank of SPSL benefits.

<b>Total Number of Hours Worked During 6-Month Period</b>	<b>Hours (per week) x 26.09 weeks = Average weekly hours</b>
<b>Total Number of Days in 6-Month Period</b>	<b>182 days</b>
<b>Average Number of Hours Worked Each Day in 6-Month Period</b>	<b>Average weekly hours ÷ 182 days = number hours per day</b>
<b>SPSL Available</b>	<b>Number hours per day x 14 = Leave hour available</b>

Below is an example of the calculation where such a new covered employee has worked for a total of two days—one day for 1 hour and a second day for 6 hours over the past two weeks:

<b>Total Number of Hours Worked During the Two-Week Period</b>	<b>7 hours</b>
<b>Total Number of Days in a Two-Week Period</b>	<b>14 days</b>
<b>Average Number of Hours Worked Each Day in the Two-Week Period</b>	<b>7 hours ÷ 14 days =.5 hours</b>
<b>SPSL Entitlement</b>	<b>.5 hours x 14 =7 hours</b>

15.

**Question:** How should an employer calculate and list SPSL on paystubs for part-time variable scheduled covered employees?

**Answer:** An employer with variable-scheduled part-time covered employees will have to calculate the amount of COVID-19 Supplemental Paid Sick Leave available based on when a covered employee requests it. For the itemized wage statement or separate writing requirement, employers who have a variable-scheduled covered employee would be required to calculate the initial amount of SPSL available and put (variable) next to it on the itemized wage statement or separate writing.