

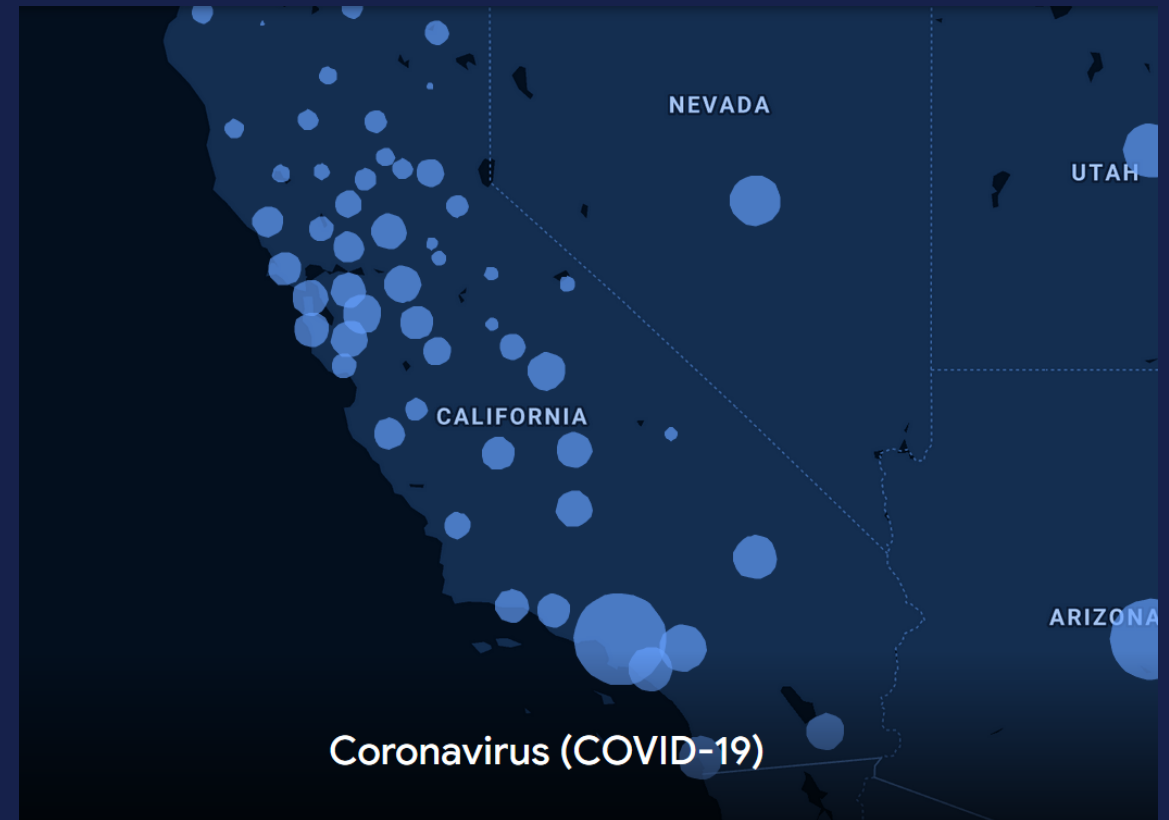


ZALLER LAW GROUP, PC



# Planning Restaurant Operations For Potential Increases in COVID-19 Cases

July 1, 2020



## Speakers

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Anthony Zaller



Anne McWilliams



Michael Thompson



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# Topics

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- **Breaking News re Indoor Dining**
- **Complying with paid sick leave laws**
  - **Federal/State/Local**
- **Considerations for operators if there is a pause in reopening or renewed shut down on a state or local level**
- **COVID-19 testing and what to do if employee tests positive**
  - **Best practices for testing**
- **Required PPE and best practices**

# State and Local Reopening Update

- What is going on at the state level?



1. Gov. Newsom Orders Dine-In Restaurants (Among Others) to Close in 19 Counties.
2. Bars Ordered to Close In Several Counties.
3. State Department of Public Health Issues Workplace Outbreak Guidance for Employers.

# Slow It Down: Key Considerations for Employers in Case of A Pause or Renewed Shutdown

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- Key Issues:
  1. Paid Sick Leave Laws (federal, state and local)
  2. Furlough v. Layoff
  3. WARN/Cal-WARN
  4. Teleworking



## COVID-19 Emergency Sick Leave Laws

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	<u>Families First Coronavirus Response Act</u>	<u>California Supplemental Sick Leave</u>	<u>City of Los Angeles Supplemental Sick Leave Order</u>
Employer Size	Less than 500	500 or more	Over 500 in LA, or 2,000 nationally
Qualifying persons	All employees	Food Service Workers	All employees
Qualifying reasons	Six	Three	Four
Expires	December 31, 2020	Stay-at-home order lifted	2 weeks after the local emergency lifted

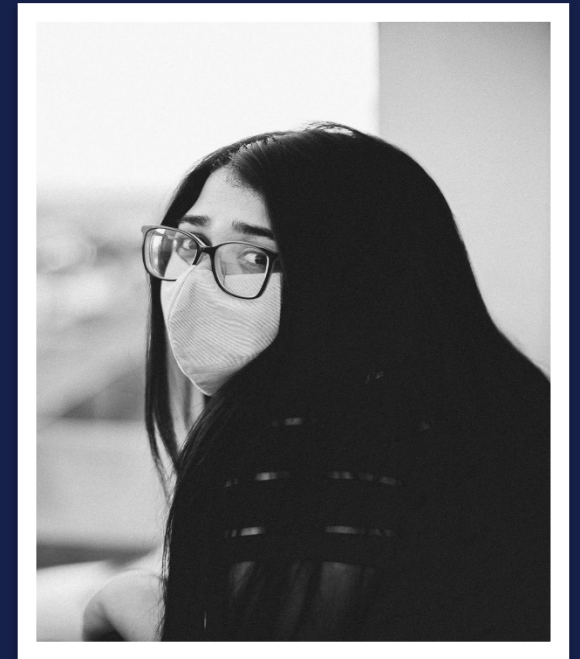
## Emergency Paid Sick Leave Act (EPSLA)

Covered Employees: All employees.

Covered Employers: Employers with fewer than 500 employees.

Amount of Leave:

- Full time employees: 80 hours of paid leave
- Part-time employees: Average number of hours worked over a two-week period.
  - If employee works a variable schedule, it is the average number of hours they worked per day over the previous six months.



# Six Covered Reasons Qualifying For Paid Sick Leave Under the EPLSA

Employee is **unable to work or telework** because the employee is...

1. Subject to a federal/state/local quarantine or isolation order relating to COVID-19.
2. Advised by a health-care provider to self-quarantine due to concerns related to COVID-19.
3. Experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. Caring for an individual who subject to paragraphs (1) or (2).
5. Caring for a son or daughter of such an employee if the school or place of care for the son or daughter has been closed, or the childcare provider is unavailable due to COVID-19 precautions.
6. Experiencing any other substantially similar condition specified by the Secretary of Health & Human Services in consultation with the Secretary of Treasury and Secretary of Labor.

## Emergency Paid Sick Leave Act (EPSLA)

### Amount of Pay:

- Reasons 1-3: Regular rate of pay
  - Cap: \$511 per day | \$5,100 total
- Reasons 4-6: Two-thirds of regular rate of pay
  - Cap: \$200 per day | \$2,000 total



## Recordkeeping

### Information to obtain from employee:

[Collect this information regardless of whether leave is granted or denied]

- (1) Name of employee
- (2) Dates for which leave is requested
- (3) Reason for leave
- (4) Statement from the employee that he or she is unable to work because of the stated reason

\*\* Check with your accountant regarding any additional documentation/recordkeeping needed to claim tax credit

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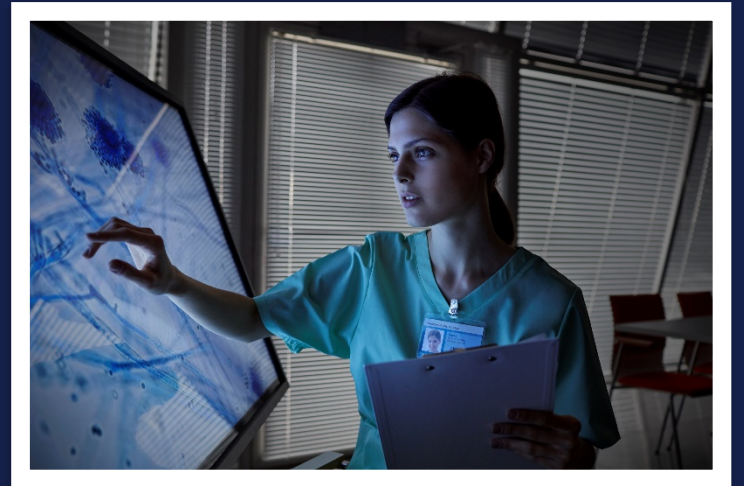


## Recordkeeping (continued)

Reason-specific information to obtain from employee:

Reasons 1 and 4 (quarantine or isolation order): Name of the government entity that issued the order

Reason 2 and 4 (advised to self-quarantine): Name of health care provider



\*\* Check with your accountant regarding any additional documentation/recordkeeping needed to claim tax credit \*\*

## **Questions and Issues**

### **How does summer affect Reason 5 eligibility (school/childcare)?**

- Summer schools and camps qualify as “place(s) of care”
- Employee must show child’s actual or planned enrollment pre-closure
  - ✓ Submission of application or deposit before closure
  - ✓ Attendance in 2018 or 2019 (if still qualified in 2020)
  - ✓ Other circumstances indicating planned enrollment

### **What information is needed in addition to proof of enrollment?**

- (1) Statement that employee is unable to work due to need; (2) name of the child; (3) name of the school or place of care; and (4) statement that no other person is available to care for the child.

## **More Questions and Issues**

### **What if the employee is furloughed due to lack of work?**

- Employee is not eligible for FFCRA leave.

### **What if the workplace is forced to close?**

- Not a qualifying reason for leave
- Employees already on leave must be paid for leave used before closure.

### **What if an employee has been teleworking without issue but now requests to take leave?**

- Employee is entitled to use leave regardless of prior nonuse; no need to show changed circumstances so long as employee qualifies.

Covered Employers: Employers with 500 or more employees.

Covered Employees: One of these:

1. Wage Orders 3, 8, 13, or 14;
2. Hiring Entity operates a food facility
3. Worker delivers food from a food facility

Amount of Leave:

- Full time employees: 80 hours of paid leave
- Part-time employees: Regular number of hours worked over a two-week period.



Food Service Worker is unable to work because:

1. Worker is subject to a Federal, State, or local **quarantine or isolation** order related to COVID-19
2. Worker is **advised by a health care provider** to self-quarantine or self-isolate due to concerns related to COVID-19
3. Worker is **prohibited from working by the employer** due to health concerns related to the potential transmission of COVID-19



# Slow It Down: Key Considerations for Employers in Case of A Pause or Renewed Shutdown

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- *Furloughs*
  - A furlough is are mandatory, unpaid temporary (partial or complete) leave of absence.
  - Furloughed employees are expected to return to work following the absence.
  - A furloughed worker remains an “employee” (i.e., on payroll) of the company.
  - lo

# Slow It Down: Key Considerations for Employers in Case of A Pause or Renewed Shutdown

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- *Furloughs – Legal Implications*

- ☐ Notice: Furloughs should be communicated in writing, *prior* to the furlough period.
- ☐ Insurance Benefits Coverage: Will furloughed employees continue to qualify and be deemed “active” participants in employer-sponsored group health plans?
- ☐ COBRA Notices: If and when group coverage ends, could furloughed employees be eligible for continued coverage under COBRA?
- ☐ Payment of Final Wages(?): Employees without a **specific return date** within the normal pay period may be owed earned wages at the time of the furlough date.
- ☐ WARNing: Be mindful of WARN and Cal-WARN requirements.
- ☐ lo

# Slow It Down: Key Considerations for Employers in Case of A Pause or Renewed Shutdown

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- *Layoffs*
  - A layoff occurs when there is a termination of the employment relationship; a separation of employment for reasons other than work performance.
  - Legal Implications:
    1. Payment of final wages. Lab. Code § 201.
    2. Termination Packet (legally required documents):
      - ☐ Notice to Employee as to Change in Employment Relationship.
      - ☐ Unemployment Pamphlet, Form DE-2320.
      - ☐ COBRA Notices.
      - ☐ Health Insurance Premium Payment (HIPP) Program, Form DHCS 9061.

# Slow It Down: Key Considerations for Employers in Case of A Pause or Renewed Shutdown

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- *WARNing: Federal and Cal-WARN Issues*
  - Fed-WARN and Cal-WARN both require employers to give employees and state/local government 60 days notice before certain business closures or mass layoffs.
  - Civil penalties and pay-in-lieu for violations.
  - Governor Newsom Executive Order modified Cal-WARN in light of COVID-19 – *not a total suspension!*
  - Critical to analyze potential coverage and seek counsel if in doubt.

# Slow It Down: Key Considerations for Employers in Case of A Pause or Renewed Shutdown

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- Federal WARN: When does it apply?

*Step 1: Are you a qualifying employer?*

- 100 or more full-time employees; or
- 100 or more employees and aggregate 4,000 non-overtime hours per week

*Step 2: Did you order a plant closing or mass layoff?*

*Step 3: Do any exceptions apply?*

# Slow It Down: Key Considerations for Employers in Case of A Pause or Renewed Shutdown

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- Federal WARN: Exceptions
  - Actively seeking capital or business to avoid/postpone shutdown and giving notice would preclude transaction
  - Business circumstances that were not reasonably foreseeable
  - Natural disaster (such as flood, earthquake, or drought)

# Slow It Down: Key Considerations for Employers in Case of A Pause or Renewed Shutdown

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- Cal-WARN: When does it apply?

*Step 1: Is your facility a covered establishment?*

- Employed 75 or more persons over past 12 months
- Includes full-time and part-time employees
- Includes current and former employees

*Step 2: Did you order a mass layoff, termination, or relocation?*

*Step 3: Do any exceptions apply?*

# Slow It Down: Key Considerations for Employers in Case of A Pause or Renewed Shutdown

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- Cal-WARN: Exceptions
  - “Physical Calamity.”
  - Gov. Newsom Executive Order N-31-20 – Excuses shortened notice if several conditions are met:
    - Employer gives the written notices required;
    - Notice given “as soon as practicable” and includes brief statement on basis for reduced notice;
    - Caused by COVID-19 related business circumstances that were not reasonably foreseeable;
    - Notice includes specified statement regarding unemployment.

# Slow It Down: Key Considerations for Employers in Case of A Pause or Renewed Shutdown

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- Cal-WARN: Notice to Whom?
  1. Affected Employees
  2. Employment Development Department
  3. Local Workforce Investment Board
  4. Chief elected official of city and county for covered establishment

# Slow It Down: Key Considerations for Employers in Case of A Pause or Renewed Shutdown

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- *Teleworking – Legal Implications:*
  - ❑ Wage and hour considerations: accurate timekeeping, overtime, compliance with meal and rest breaks, reimbursement of business expenses (cell phone, Internet, other equipment)
  - ❑ OSHA: Workplace safety and health regulations
  - ❑ Discrimination, harassment and retaliation laws still apply



# California Dept. of Public Health – June 16, 2020 Guidance for Outbreaks In Workplaces

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California Department of Public Health

June 16, 2020 Notice to Employers

Subject: Responding to COVID-19 in the  
Workplace

Available here: [https://www.cdph.ca.gov/  
Programs/CID/DCDC/Pages/COVID-19/  
Workplace-Outbreak-Employer-  
Guidance.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Workplace-Outbreak-Employer-Guidance.aspx)



# California Dept. of Public Health – June 16, 2020 Guidance for Outbreaks In Workplaces

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1. Prepare for identification of COVID-19 outbreaks in workplace:
  - Social distancing, training and procedures
  - Locate local health department: <https://www.cdph.ca.gov/Pages/LocalHealthServicesAndOffices.aspx>
2. “Employers should prepare to share information with the LHD and other stakeholders.”
  - Does not set out when employers need to share information.
  - The LHD in jurisdiction may have specific criteria for outbreak reporting
    - Los Angeles – requires reporting for three or more confirmed cases: <http://publichealth.lacounty.gov/media/Coronavirus/docs/business/PreventOutbreaksWorkplace.pdf>

# California Dept. of Public Health – June 16, 2020 Guidance for Outbreaks In Workplaces

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## 3. Understand requirements for reporting cases to Cal/OSHA.

- Any serious injury, illness, or death occurring in any place of employment or in connection with any employment must be reported by the employer to the local Cal/OSHA district office immediately. For COVID-19, this includes inpatient hospitalizations and deaths among employees.
- Employers should report serious injury, illness, and death, including hospitalization and death from COVID-19, even if work-relatedness is uncertain.
- Cal/OSHA prefers calls by phone but will also accept email reports (Cal/OSHA Accident Report inbox). Details on reporting, contact information for district offices, and the Title 8 section 342 requirement are available online.

# California Dept. of Public Health – June 16, 2020 Guidance for Outbreaks In Workplaces

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4. Identify additional employee cases and close contacts of cases to control spread in the workplace.
  - Testing of employees
  - Contact tracing
5. Notification and management of employees.
6. Determine when it is appropriate for cases and contacts to return to work. (see handout)
7. Perform more frequent cleaning and disinfection, as well as deep/enhanced cleaning and disinfection after employees with COVID-19 have been at work.

# California Dept. of Public Health – June 16, 2020 Guidance for Outbreaks In Workplaces

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8. Employers should regularly check for and follow new and updated guidance on their specific industry from the following sources:

## Governor's Office Resilience Roadmap

- [Guidance for most industries](#)
- [Guidance for other industries allowed to open in some counties](#)

## Cal/OSHA

- [General Industry guidance](#)
- [Guidance for specific industries](#)

## CDC

- [Landing page for workplaces](#)
- [Landing page for industry specific worker safety guidelines](#)

# State and Local Reopening Update

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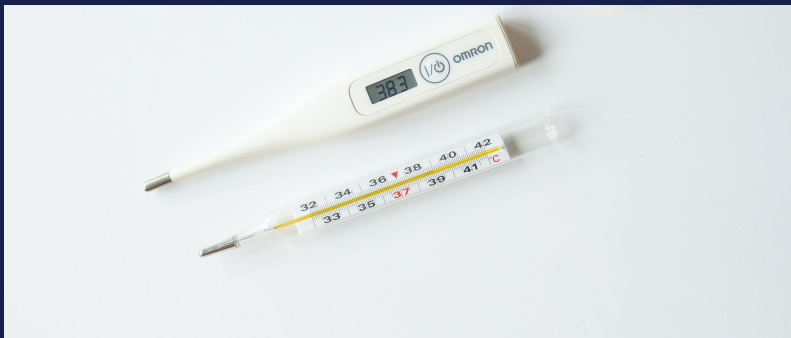
- What is going on at the local level?
  1. Los Angeles County:
    - [Employee screening guidance.](#)
    - [Responding to COVID-19 in the workplace guidance.](#)
    - [Revised Restaurant Opening for On-Site Dining Protocol.](#)
  2. San Diego County: 06/30/20 Order of the Health Officer.
    - Effective today, July 1, 2020
    - Bars: Unless the establishment serves alcoholic drinks as part of a meal, all bars, wineries, distilleries, and breweries must close. Further, *all other restaurants*, bars, wineries, distilleries and breweries must be closed from **10:00 p.m. to 5:00 a.m.**



# EEOC Guidance: COVID-19 Testing In The Workplace



- The Rules:
  1. Screening Employees for COVID-19 Symptoms Before Entering the Workplace: Yes.
  2. Taking An Employee's Temperature: Yes.
  3. Require *Viral* Test Before Allowing Employees to Re-Enter the Workplace: Yes.
  4. Require *Antibody* Test Before Allowing Employees to Re-Enter the Workplace: According to the new EEOC Guidance, no.



# EEOC Guidance: COVID-19 Testing In The Workplace



- The New Guidance:
  - Employers cannot require employees to undergo *antibody* testing prior to permitting them to return to work.
  - Why?
    - According to the EEOC, an antibody test constitutes a “medical examination” under the Americans with Disabilities Act.
    - An antibody test fails to meet the ADA’s “job related and consistent with business necessity” standard for medical examinations.
  - The EEOC’s guidance derives from the CDC’s interim guidelines, which provide that antibody testing should *not* be used to make decisions about returning persons to the workplace.
  - The EEOC will continue to closely monitor CDC’s recommendations (and so will we!).

# CDC Guidance Return To Work Timeline for Essential Workers Who Tested Positive for COVID-19

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Employee tested positive, with symptoms and stayed at home

- Tested:
  1. No fever,
  2. respiratory symptoms improved, and
  3. two negative tests in a row, at least 24 hours apart
- Not Tested:
  1. No fever for 3 days,
  2. respiratory symptoms improved, and
  3. at least 10 days have passed since symptoms first appeared



# CDC Timeline for Cleaning and Disinfecting after Essential Worker Tests Positive for COVID-19

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- If it has been less than 7 days since the sick employee used the facility, clean and disinfect all areas used by the sick employee following the CDC cleaning and disinfection recommendations.

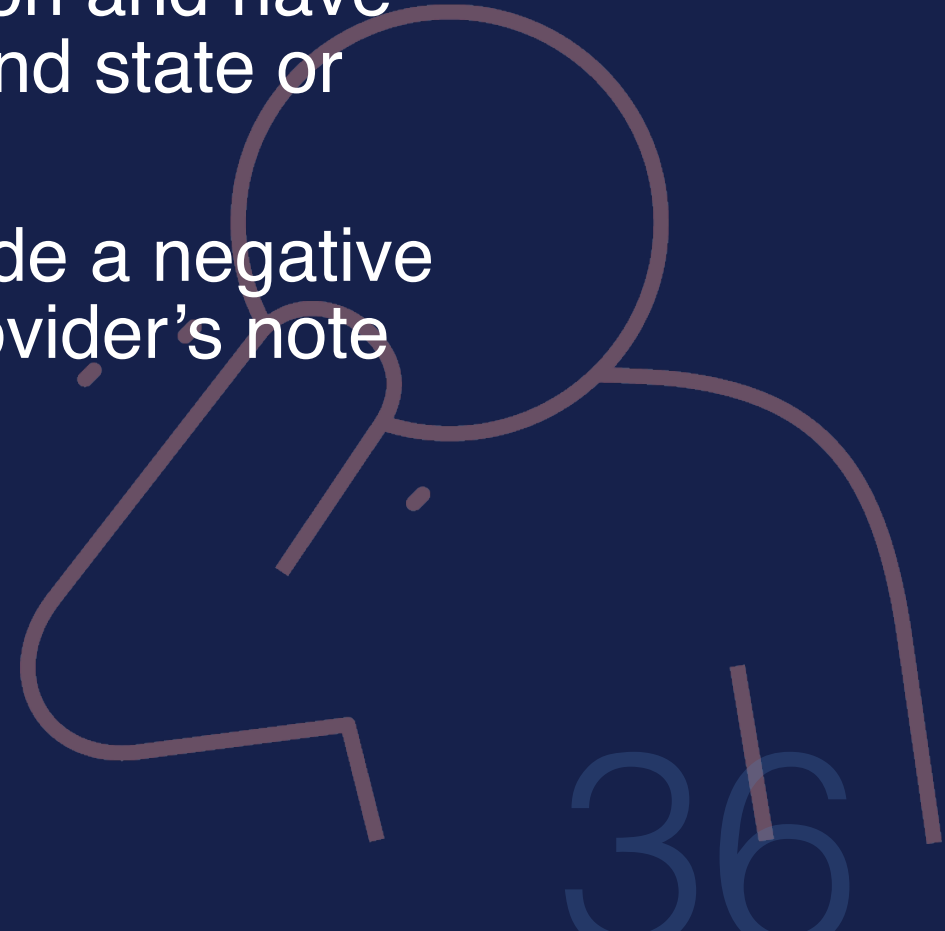


- Wait 24 hours, or as long as feasible, before cleaning and disinfecting.
- If it has been 7 days or more since the sick employee used the facility, additional cleaning and disinfection is not necessary. Continue routinely cleaning and disinfecting all high-touch surfaces in the facility.

# CDC Guidance For When Employees May Return To Work

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- Employees should not return to work until they meet the criteria to discontinue home isolation and have consulted with a healthcare provider and state or local health department.
- Cannot require sick employee to provide a negative COVID-19 test result or healthcare provider's note to return to work.



# CDC Guidance For When Employees May Return To Work

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May return to work when they have met one of the following sets of criteria:

Option 1: If no test, employee may return after these three conditions have been met:

1. The employee has had no fever for at least 72 hours (that is, 3 full days of no fever without the use medicine that reduces fevers) AND
2. respiratory symptoms have improved (for example, cough or shortness of breath have improved) AND
3. at least 10 days have passed since their symptoms first appeared

# CDC Guidance For When Employees May Return To Work

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Option 2: If employee will be tested, employee may return after these three conditions have been met:

1. The employee no longer has a fever (without the use of medicine that reduces fevers) AND
2. Respiratory symptoms have improved (for example, cough or shortness of breath have improved) AND
3. They received two negative tests in a row, at least 24 hours apart.

Taken from CDC Website: <https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html> (June 30, 2020)

# California Mandate: Face Cloth Coverings *Required in California*

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- Effective: 06/18/20
- What's required?
  - All people in California—subject to certain exceptions—**must** wear face coverings.



# California Mandate: Face Cloth Coverings *Required in California*

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- When is a face covering required?
  1. Inside of, or in line to enter, any indoor public space.
  2. When obtaining services from the health care sector.
  3. Waiting for or riding on public transportation or ride-sharing vehicle.

# California Mandate: Face Cloth Coverings

## Required in California

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- When is a face covering required (Cont'd)?
  4. While *engaged in work*, whether at the workplace (on-site) or performing work off-site if:
    - A. You interact in-person with a member of the public;
    - B. You work in any space visited by members of the public (even if no one is present at the time);
    - C. You work in any space where *food is prepared or packaged* for sale or distribution;
    - D. You work in or walk through common areas; or,
    - E. You are in any room or enclosed area where other people are present and unable to physically distance.

# California Mandate: Face Cloth Coverings *Required in California*

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- When is a face covering required (Cont'd)?
  5. While driving or operating any public transportation vehicle or ride-sharing vehicle.
  6. While outdoors in public spaces and when maintaining social distancing (6-feet apart) is *not* feasible.



# California Mandate: Face Cloth Coverings

## Required in California

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- The Exemptions: When is a face covering not required?
  - × Children (2 years or younger).
  - × Individuals with a medical or mental health condition or disability.\*
  - × Individuals who are hearing impaired, or who are communicating with a person who is hearing impaired.
  - × Individuals for whom wearing a face covering would create a *risk to the person related to their work* (as determined by federal, state or local regulators or workplace safety guidelines).
  - × When seated at a restaurant (or other food establishment).
  - × When engaged in outdoor work or recreation.
- \*This exemption is limited. If these individuals' jobs require them to have regular contact with others, then they should wear a "non-restrictive alternative . . . as long as their [medical or mental] condition permits it."

# PPE – California Regulations For Dine-In Restaurants

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- Note: Face coverings are not PPE (do not protect employee):
  - “Face coverings do not protect the wearer and are not personal protective equipment (PPE).”
- Employers should provide and ensure workers use all required protective equipment, including face coverings and gloves where necessary.
- Employers should consider where disposable glove use may be helpful to supplement frequent handwashing or use of hand sanitizer; examples are for workers who are screening others for symptoms or handling commonly touched items. Workers should wear gloves when handling items contaminated by body fluids.

## PPE – California Regulations For Dine-In Restaurants

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- Dishwashers should use equipment to protect the eyes, nose, and mouth from contaminant splash using a combination of face coverings, protective glasses, and/or face shields.
- Dishwashers must be provided impermeable aprons and change frequently.
- Reusable protective equipment such as shields and glasses should be properly disinfected between uses.

# PPE – California Regulations For Dine-In Restaurants

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- Face coverings are required where employees cannot maintain physical distancing including in kitchens, storage areas, etc.
- Face coverings are strongly encouraged for all employees, however, they are required for any employee (e.g., server, manager, busser, food runner, etc.) who must be within six feet of customers. All restaurant workers should minimize the amount of time spent within six feet of guests.

# PPE – California Regulations For Dine-In Restaurants

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Proper use of face coverings, including:

- Face coverings do not protect the wearer and are not personal protective equipment (PPE).
- Face coverings can help protect people near the wearer, but do not replace the need for physical distancing and frequent handwashing.
- Employees should wash or sanitize hands before and after using or adjusting face coverings.
- Avoid touching the eyes, nose, and mouth.
- Face coverings should be washed after each shift.



# Revisiting County-Specific Guidelines: Los Angeles County

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- 5 Major Measures (across all industries):
  - Workplace Policies and Practices to Protect Employee Health
  - Measures to Ensure Physical Distancing
  - Measures to Ensure Infection Control
  - Communication with Employees and the Public
  - Measures to Ensure Equitable Access to Critical Services]
- Mandatory Measures? Yes, but . . .



# Revisiting County-Specific Guidelines: Los Angeles County – Dine-In Restaurants

- **Workplace Policies and Practices to Protect Employee Health**
  - What benefits? Workers are provided information on employer or government sponsored leave benefits that the employee may be entitled to receive, which would make it financially easier to stay at home.
  - **Face shields** are provided and worn by wait staff and other employees when servicing customers that have removed their cloth face covering to eat and drink. The face shield is to be worn **in addition to the cloth face covering**.





# Revisiting County-Specific Guidelines: Los Angeles County – Dine-In Restaurants



- **Measures to Ensure Physical Distancing**
  - How many people? Indoor in-person capacity limited to 60% or less.
  - Come together: On-site seating at a table must be limited to no more than 6 people that “should” be members of “one household.”



# Revisiting County-Specific Guidelines: Los Angeles County – Dine-In Restaurants

- **Measures to Ensure Infection Control**
  - All encompassing PPE: Dishwashers are provided with equipment to protect their *eyes, nose and mouth* from contamination due to splash using a combination of face coverings, protective glasses and/or face shields. Dishwashers are provided impermeable aprons and required to change frequently.
  - Discretion to refuse service: Customers who refuse to wear a cloth face covering may be refused service and asked to leave.





# Revisiting County-Specific Guidelines: Los Angeles County – Dine-In Restaurants

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- **Communication with Employees and the Public**
  - Got to go! Signage is posted that notifies customers that while it may be common practices for diners to socialize after the meal, this *practice will be discouraged* during the pandemic.

## Revisiting City-Specific Guidelines: Los Angeles City

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- The City does not have local “guidelines” per se.
- Intended as “supplemental information” for businesses as they develop COVID-19 preparedness plans.
- It does **not** replace the Los Angeles County Public Health requirements *or* State guidance.
- What does this mean?
  - Review and consider the LA City recommendations; abide by the County’s guidelines.

# Stay Up-To-Date with Zaller Law Group

**BLOG:**

[www.californiaemploymentlawreport.com](http://www.californiaemploymentlawreport.com)

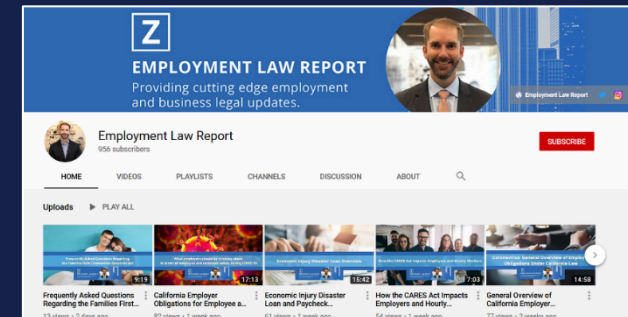
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