

WEBINAR: **Employment Issues Upon Re-Entry to the Workplace**

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Re-Opening for Business

Shelter-in-Place Orders
Social Distancing Protocols
CDC Recommendations

Which Order(s) Do I Follow?

Multiple Layers of Authority:

- Federal Recommendations – President can apply pressure, but states have power to regulate commerce within state borders
- Governor Newsom’s Executive Order March 19
- City or County “Shelter in Place” or “Stay at Home” Ordinances and Emergency Orders from Health Officers

Comply with MOST restrictive/specific order for each location.

CA Executive Order N-33-20 (3/19/2020)

- Coalition has formed with Nevada, Washington, Oregon and Washington for phased reopening.
- CA's shelter-in-place in effect "until further notice", except for businesses in 16 "critical infrastructure sectors".

When Will CA Order Lift?

- 6 criteria before return to "normal"
- 4-phase approach announced 4/28:
 - Full shelter-in-place (now)
 - Lower risk (curbside retail, schools, daycare)
 - "Weeks" away; counties can begin to relax restrictions based on local conditions
 - Higher risk (gym, nail salons, barbers, movies, sports without spectators)
 - "Months away"
 - Everything else (concerts, live sports)

City and County Orders

- Generally *more stringent* in some respects than State Executive Order
- Key Employer Requirements:
 - Cease in-person operations and close to the public, unless the business is defined as an Essential Business by applicable order
 - May be more specific/categorically restrictive than state order
- Essential Businesses that are allowed to be open generally must:
 - practice social (physical) distancing
 - follow infection control precautions
 - Implement/post a compliant Social Distancing Protocol
 - Scale down non-essential operations to minimize employees working at the workplace

Highlight: 6 Bay Area Counties' Shelter-in-Place Order

- 4/27/20: Shelter-In-Place Order for Bay Area Extended to 5/31/2020
 - All provisions must be interpreted to effectuate the intent of maximizing # of people sheltering in place
 - Enforceable by fine or imprisonment
 - “Essential businesses” – definition stricter than State list of “critical infrastructure” businesses
 - Now excludes most commercial and residential construction; suppliers of products to enable people to work from home
 - Some restrictions will be eased for “low risk” activities soon

Highlight Other City/County Orders

- **Sacramento, Yolo:** in effect through May 1
 - Sacramento 4/7 updated order is more stringent than prior order
 - Police/sheriff to enforce - violation is “imminent threat” to public health.
- **Sonoma, San Diego:** in effect through May 3
- **Los Angeles County:** in effect through May 15
 - Enforceable by fine, imprisonment or both
- **Monterey, Napa:** until further notice
- **Orange County, Placer:** following state guidance
- *Orders are being updated weekly or more frequently*

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Social Distancing Protocols – Are They Required Or Recommended?

- Most City/County Orders now mandate that Essential Businesses prepare a “Social Distancing Protocol” that explains how the business is achieving objectives to reduce spread of C-19
 - Bay Area: deadline to comply is April 2, 2020
 - Los Angeles: deadline to comply is April 15, 2020
 - Sacramento: order does not list a deadline, but presumably immediately
- When non-essential businesses open, social distancing protocols likely will also be required or recommended to avoid a resurgence
- Post by entrance to any facility that is open to public *or employees*
- Provide a copy to each employee
- Execute the protocols

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Social Distancing Protocols - Contents

General requirements (as appropriate based on the type of facility) require that businesses specifically list what measures they have in place to protect employee and public health:

- A. Signage – at any entrance, provide to employees
- B. Measures to protect employee health
- C. Measures to prevent crowds from gathering
- D. Measures to keep people 6' apart
- E. Measures to prevent unnecessary contact
- F. Measures to increase sanitation

<p style="text-align: center;"><u>Appendix A: Social Distancing Protocol</u></p> <p>Business name: _____</p> <p>Facility Address: _____</p> <p>Approximate gross square footage of space open to the public: _____ Businesses must implement all applicable measures listed below, and be prepared to explain why any measure that is not implemented is inapplicable to the business.</p> <p>Signage</p> <p><input type="checkbox"/> Signage at each public entrance of the facility to inform all employees and customers that they should avoid entering the facility if they have a cough or fever; maintain a minimum six-foot distance from one another; sneeze and cough into a cloth or tissue or, if not available, into one's elbow; and not shake hands or engage in any unnecessary physical contact.</p> <p><input type="checkbox"/> Signage posting a copy of the Social Distancing Protocol at each public entrance to the facility.</p> <p>Measures To Protect Employee Health (check all that apply to the facility):</p> <p><input type="checkbox"/> Everyone who can carry out their work duties from home has been directed to do so.</p> <p><input type="checkbox"/> All employees have been told not to come to work if sick.</p> <p><input type="checkbox"/> Symptom checks are being conducted before employees may enter the work space.</p> <p><input type="checkbox"/> All desks or individual work stations are separated by at least six feet.</p> <p><input type="checkbox"/> Break rooms, bathrooms, and other common areas are being disinfected frequently, on the following schedule:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Break rooms: _____ <input type="checkbox"/> Bathrooms: _____ <input type="checkbox"/> Other: _____ <p><input type="checkbox"/> Disinfectant and related supplies are available to all employees at the following location(s): _____</p> <p><input type="checkbox"/> Hand sanitizer effective against COVID-19 is available to all employees at the following location(s): _____</p> <p><input type="checkbox"/> Soap and water are available to all employees at the following location(s): _____</p> <p><input type="checkbox"/> Copies of this Protocol have been distributed to all employees.</p> <p><input type="checkbox"/> Optional—Describe other measures: _____</p> <p>Measures To Prevent Crowds From Gathering (check all that apply to the facility):</p> <p><input type="checkbox"/> Limit the number of customers in the store at any one time to: _____ (or other enter _____, which allows for customers and employees to easily maintain at least six-foot distance from one another at all practicable times).</p> <p><input type="checkbox"/> Post an employee at the door to ensure that the maximum number of customers in the facility set forth above is not exceeded.</p> <p><input type="checkbox"/> Placing per-person limits on goods that are selling out quickly to reduce crowds and lines. Explain: _____</p> <p><input type="checkbox"/> Optional—Describe other measures: _____</p> <p style="text-align: center;"><small>Page 1 of 2</small></p>	<p style="text-align: center;"><u>Appendix A: Social Distancing Protocol</u></p> <p>Measures To Keep People At Least Six Feet Apart (check all that apply to the facility):</p> <p><input type="checkbox"/> Placing signs outside the store reminding people to be at least six feet apart, including when in line.</p> <p><input type="checkbox"/> Placing tape or other markings at least six feet apart in customer line areas inside the store and on sidewalks at public entrances with signs directing customers to use the markings to maintain distance.</p> <p><input type="checkbox"/> Separate order areas from delivery areas to prevent customers from gathering.</p> <p><input type="checkbox"/> All employees have been instructed to maintain at least six feet distance from customers and from each other, except employees may momentarily come closer when necessary to accept payment, deliver goods or services, or as otherwise necessary.</p> <p><input type="checkbox"/> Optional—Describe other measures: _____</p> <p>Measures To Prevent Unnecessary Contact (check all that apply to the facility):</p> <p><input type="checkbox"/> Preventing people from self-serving any items that are food-related.</p> <ul style="list-style-type: none"> <input type="checkbox"/> Lists for cups and food-bar type items are provided by staff, not to customers to grab. <input type="checkbox"/> Bulk-item food bins are not available for customer self-service use. <p><input type="checkbox"/> Not permitting customers to bring their own bags, mugs, or other reusable items from home.</p> <p><input type="checkbox"/> Providing for contactless payment systems or, if not feasible, sanitizing payment systems regularly. Describe: _____</p> <p><input type="checkbox"/> Optional—Describe other measures (e.g. providing senior-only hours): _____</p> <p>Measures To Increase Sanitization (check all that apply to the facility):</p> <p><input type="checkbox"/> Disinfecting wipes that are effective against COVID-19 are available near shopping carts and shopping baskets.</p> <p><input type="checkbox"/> Employee(s) assigned to disinfect carts and baskets regularly.</p> <p><input type="checkbox"/> Hand sanitizer, soap and water, or effective disinfectant is available to the public at or near the entrance of the facility, at checkout counters, and anywhere else inside the store or immediately outside where people have direct interactions.</p> <p><input type="checkbox"/> Disinfecting all payment portals, pens, and styluses after each use.</p> <p><input type="checkbox"/> Disinfecting all high-contact surfaces frequently.</p> <p><input type="checkbox"/> Optional—Describe other measures: _____</p> <p><small>* Any additional measures not included here should be listed on separate pages, which the business should attach to this document.</small></p> <p>You may contact the following person with any questions or comments about this protocol: Name: _____ Phone number: _____</p>
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CDC Guidelines

- CDC published Interim Guidance for Business and Employers to Plan and Respond to COVID-19

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

Summary of Key CDC Best Practices

Measures to improve sanitation/hygiene:

- Sign at entrance: do not enter if you have fever, cough, shortness of breath
- Provide hand sanitizer, soap and water, or disinfectant at entrances and where there is high-frequency interaction (i.e. cashiers)
- Provide for contactless payment (or disinfecting after each use)
- Regularly disinfect and provide disinfecting wipes to wipe down high-touch surfaces (door knobs, remotes, keyboards, phones, timeclocks) and shared equipment/tools
- Eliminate "self service" of food items
- Require public entering to wear face covering to enter
- Discourage handshaking
- Perform enhanced cleaning/disinfection after employee suspected/confirmed to have COVID-19 has been in the facility

Summary of Key CDC Best Practices (cont'd)

Physical workplace measures to protect employees:

- Encourage hand washing, covering cough/sneeze, other hygiene measures – place reminders in break room and employee restrooms
- Rearrange physical space to increase space between workspaces if feasible
- Provide personal phones/keyboards and discourage sharing tools/equipment
- Provide face coverings (or other appropriate personal protective equipment based on risk classification – see OSHA guidelines)
- Direct employees to stay home if sick until meet CDC criteria to discontinue isolation
 - If tested: 2 negative tests in a row, 24 hours apart; or
 - If no test: 72 hours no fever + other symptoms improved + 7 days since symptoms first appeared
- Pre-screen for symptoms at entry – fever, cough, shortness of breath
 - but *beware* privacy considerations (covered later in presentation)

Summary of Key CDC Best Practices (cont'd)

Policy measures to protect employees:

- Encourage employees to work from home, especially high risk/older workers
- Consider rotating/staggered/flexible schedules to minimize # of employees present
- Ensure sick leave policies flexible and consistent with public health guidance
 - Note: Cities (SF, San Jose, LA) enacting emergency orders expanding coverage of FFCRA paid sick leave
 - *SF Workers and Families First Program* – incentivizes employers to offer 5 extra days of leave, City subsidized
- Relax return to work/leave qualification/illness validation requirements (covered in more detail later)
 - *SF OLSE temporary rule change*: Employers may not require a doctor's note or other documentation for the use of paid sick leave taken pursuant to SF Paid Sick Leave Ordinance for duration of the Local Health Emergency re: Novel Coronavirus Disease 2019.

Summary of Key CDC Best Practices (cont'd)

Measures to prevent crowding:

- Limit # of people entering facility to maintain 6' distance at all times except to complete the "essential business activity"
- Establish where lines may form, including markings on the floor and signage to maintain distance
- Indicate separate "order" areas from "pick up" areas (i.e. service at deli counter)
- Increase barriers/partitions
- Implement "curbside" pickup and delivery
- Deliver services remotely (i.e. phone, video, web)
- Consider video conferencing/teleconferencing in place of in-person meetings
- Hold meetings in open, well-ventilated spaces – remove chairs from conference rooms to improve distancing

Summary of Key CDC Best Practices (cont'd)

Suggestions to keep operations running smoothly for this and future events:

- Develop and implement an infections disease preparedness and response plan based on level of risk associated with worksite/job tasks
- Consider rotating/staggered schedules to minimize number of employees in a given work area
- Shift operations temporarily to location where shelter-in-place order has been lifted or is less restricted
- Cross-train employees to perform essential functions so workplace can operate if key employees are absent
- Identify alternate supply chains for critical goods and services
- Encourage industry groups to adopt similar policies/coordinated approach

OSHA SAFETY REGULATIONS RE: CLEANING AND MAINTAINING A SAFE WORKPLACE

Resources

- **DOL – OSHA: Guidance on Preparing Workplaces for COVID-19**
 - <https://www.osha.gov/Publications/OSHA3990.pdf>
 - Guidance is advisory in nature and informational in content
- **Cal/OSHA: Guidance on Requirements to Protect Workers from Coronavirus**
 - <https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html>

OSHA COVID-19 Guidance

- “To reduce the impact of COVID-19 outbreak conditions on businesses, workers, customers, and the public, it is important for all employers to plan now for COVID-19.”
- Cal/OSHA recommends following the Center for Disease Control and Prevention (CDC) recommendations.

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Cal/OSHA Interim Guidelines for General Industry

- New guidelines in addition to existing OSHA requirements
- Follow CDC guidelines re infection prevention
 - Train employees on cough/sneeze etiquette, hand hygiene, avoiding touching face, avoiding close contact, etc.
 - Perform routine environmental cleaning of shared workplace equipment and furniture
 - Disinfection beyond routine cleaning is not recommended
 - Check CDC’s Traveler’s Health Notices prior to travel
- Create an infectious disease outbreak response plan
 - Allow flexible worksites, telecommuting and flexible hours
- Does not cover healthcare workers or employers covered by ATD Standard

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Cal/OSHA Interim Guidelines for General Industry (cont.)

- Injury and Illness Prevention Program (IIPP)
 - All employers must have one (8 C.C.R. § 3203) to protect employees from workplace hazards
 - Must determine whether COVID-19 infection is a hazard in the workplace
 - If so, implement measures to prevent or reduce (CDC guidelines)
 - Provide training to employees
- Washing facilities
 - Regardless of COVID-19 risk, all employees must provide (8 C.C.R. §§ 1527, 3366, 3457, 8387.4)
 - Suitable cleaning agents, water, single-use towel or blower
- Personal Protective Equipment (PPE)
 - If an employer identifies COVID-19 as a workplace hazard, select and provide employees with properly fitting PPE (8 C.C.R. § 3380)
 - Mask and gloves
 - Train how to use correctly
- Control of Harmful Exposures
 - Employers must protect against inhalation exposures that can result in illness
 - Includes COVID-19 if there is an increased risk of infection

Healthcare Workers and Those Subject to ATD Standard

- More specific requirements
- Aerosol Transmissible Diseases (ATD) Standard (8 C.C.R. § 5199)
- Applies to:
 - Hospitals, skilled nursing facilities, clinics, medical offices, outpatient medical facilities, home and long-term health care, hospices, transport and emergency services
 - Certain laboratories, public health services and police services that are reasonably anticipated to expose employees to an ATD
 - Correctional facilities, homeless shelters, drug treatment programs
 - Any other locations when Cal/OSHA informs employers in writing of need to comply
- Review section 5199 and industry-specific guidelines
 - <https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html>
 - Industry-specific guidelines for: health care, agriculture, child care, construction, grocery stores, logistics

OSHA Recordkeeping Requirements

- COVID-19 illnesses must be recorded on the OSHA 300 log if a workers is infected **as a result of performing work-related duties**
- Applies when all of the following are met:
 - Worker has a **confirmed case** of COVID-19
 - The case is **work-related**, as defined by 29 CFR 1904.5
 - The case involves **one or more of the general recording criteria** set forth in 29 CFR 1904.7

Work-Related Injury or Illness

- Must consider a COVID-19 illness to be work-related if an **event or exposure in the work environment caused or contributed** to the resulting condition
 - Also applies if pre-existing illness is significantly aggravated
 - Presumed unless exception applies
- Work environment includes locations where one or more employees are present as a condition of their employment
 - Physical locations, but also equipment or materials used
- Exceptions: present as member of general public, voluntary participation in wellness program/activity

General Recording Criteria

- COVID-19 case results in any of the following:
 - Death
 - Days away from work
 - Restricted work
 - Medical treatment beyond first aid
 - Loss of consciousness
 - Anything else diagnosed by a health care provider
- This will be every positive COVID-19 case!

OSHA Reporting Requirements

- A confirmed COVID-19 case must be reported if any of the following apply:
 - Death
 - Report within 8 hours
 - Hospitalization as an in-patient
 - Report within 24 hours
- Even those who are exempt from recordkeeping requirements must report
 - Retail, finance, service, insurance, real estate

Discretion in Enforcement

- On April 16, 2020, the OSHA Director of Enforcement Programs issued a memorandum to Regional Administrators re Enforcement
 - Allows for discretion in enforcement when employers show **good faith efforts** to comply
 - Recognizes difficulty in providing proper training and access to medical testing facilities given current circumstances
- Agents are to “assess an employer’s efforts to comply”
 - Evaluate whether employer thoroughly explored all options to comply
 - Examples: virtual training and remote communication strategies
 - Did the employer consider interim alternative protections or take steps to reschedule activity as soon as possible?
- If compliance was not possible during closure, has there been a good-faith effort to comply as soon as possible after re-opening?

Workers Compensation

- Workers Compensation may be available to employees who can demonstrate that workplace exposures led to infection and COVID-19 disease
 - Will be difficult to prove in community with widespread occurrences
- Can apply even when employee was exposed working from home
- Must arise out of and occur in the course of employment
 - Arising out of: what was the employee doing at the time?
 - In the course of: when did it happen?
 - Was employee acting in the interests of the employer?

Workers Compensation Reporting

- COVID-19 must be reported through general workers' compensation claims reporting procedures if the sickness *could* be considered work-related
- Applies to both positive cases and potential symptoms
- Employees out on workers' compensation leave is not entitled to FFCRA paid sick leave unless they were otherwise able to work on a light-duty basis

Workers Compensation – Pending Legislation

- **AB 664**
 - Front line health workers and first responders would be “presumptively eligible” for workers' compensation coverage if they contract COVID-19 or any other infectious disease
 - Only applies during a state of emergency
- **SB 1159**
 - Applies to all essential workers
 - Eligible for workers' compensation for COVID-19 illness or death
 - Would remain in place through current pandemic
 - Employers could still contest

EEOC/DFEH Answers to Common Employer Questions Regarding Re-Entry

May We Screen Employees for COVID-19 Before They Return to Work?

- The EEOC has advised that employers can make disability-related inquiries and conduct medical exams (e.g., temperature screening) if the inquiries and exams are consistent with business needs.
 - *This means that the screening is necessary to screen for a “direct threat” to health or safety of workplace.*
- Two key points to consider:
 - (1) Actions are in accordance with most recent advice from the CDC and other local health authorities for location and type of workplace;
 - (2) Actions are consistent – all employees are treated equally, and decision to screen and exclude employees is not based on any protected characteristic (e.g. race, age, national origin, etc.).

May We Take The Temperatures Of Our Employees?

- Both the EEOC and DFEH say yes.
 - Under these circumstances, taking an employee's temperature is considered a permissible "medical examination" under the ADA, given the community spread of COVID-19 and when done to assess the general workplace safety.
- If you are going to take temperatures:
 - designate one person to conduct temperature checks;
 - train the individual; and
 - determine what mitigation efforts can be taken to protect that employee (personal protective equipment, etc.).

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Should We Keep/Retain The Temperature Data?

- Probably not.
- Maintaining documents with this information increases the likelihood of privacy-related claim.
- Instead, use temperature check as a sort of daily "check-in."
- If you do retain the data, consider the California Consumer Privacy Act (CCPA), and the notice required under it.

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May We Send Employees Home Who Exhibit Symptoms At Work?

- Yes, sending an employee home who displays symptoms of COVID-19 does not violate the ADA's restrictions on disability-related actions.
- Make sure you monitor the CDC's latest updates on what is considered a COVID-19 symptom as it evolves as more information about the virus is learned.

May We Ask Our Employees If They Are Exhibiting COVID-19 Symptoms?

- Yes, if inquiries are focused on determining whether there is a direct threat to health in the workplace.
- In making inquiries, employers should rely on the CDC's guidance on emerging symptoms associated with the disease.
 - i.e., additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting.

May We Inquire Into Our Employee's Travel Plans?

- Yes, absent a claim that an employee has a recognized privacy interest in their travel activities.
 - Employers should take steps to reduce any reasonable expectation of privacy that employees might have in those activities.
- In making inquiries, employers should regularly check the CDC and State Department websites for the latest information regarding affected regions.
- Same is likely true for visitors to the workplace, provided those visitors do not have a recognized privacy interest in their travel activities.
- Consider the California Consumer Privacy Act (CCPA) implications.

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What Should I Do If My Employee's Family Member Has COVID-19?

- If it is a member of the family in the same household, employers may require the employee to stay away from the work premises.
 - Same is true for employees who have notified the employer of an exposure to COVID-19
- Employers should follow the CDC's guidelines for bringing back a sick employee in determining when the individual may return to work.
- Employers may (and should) ask employees to notify them of a COVID-19 exposure.

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May I Require Employees to Get Tested for COVID-19?

- Requiring an employee to be COVID-19 tested is considered a medical examination under the ADA, and thus prohibited unless it's job-related and a business necessity.
- This means that the employer must have a reasonable belief based on objective evidence that:
 - An employee will be unable to perform the essential functions of their job because of a medical condition; or
 - The employee will pose a **direct threat** because of a medical condition that cannot otherwise be eliminated or reduced by reasonable accommodation.
- Consider the following when considering request and act cautiously:
 - Have other employees in similar situations been required to be tested?
 - How available is a COVID-19 test in your area?
 - How reliable is the testing data?

When My Employee Returns To Work, May I Require That They Provide A Doctor's Note Certifying Fitness For Duty?

- Yes. According to the EEOC, such inquiries are permitted under the ADA either because they are not disability-related or, are justified under the circumstances.
- As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation.
- Working with the employee on acceptable documentation is recommended.
 - i.e., reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have COVID-19.

May I Ask if Employees are Especially Vulnerable?

- Generally, no.
- However, if the pandemic becomes severe or serious according to local, state, or federal health officials, ADA-covered employers may have sufficient objective information to reasonably conclude that employees will face a direct threat if they contract COVID-19. Only then may ADA-covered employers make disability-related inquiries or require medical examinations of asymptomatic employees to determine which employees are at a higher risk of complications.

What About Job Applicants?

- Employers should continue to apply their normal policies of non-discrimination to the hiring process.
- If applicant has COVID-19 or related symptoms, they should not be in the workplace and start date may be delayed.
- **If** there is documented immediate need, an employer may withdraw the job offer.
 - **Act cautiously!**
- High risk individuals (65+, pregnant, etc.) should not be treated different.
 - The EEOC has opined that the fact that the CDC has identified individuals as being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer.
 - May consider accommodations (i.e., telework).

May I Require A Job Applicant To Be Screened?

- Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job.

What About EEO Concerns?

- General rules still apply – you cannot treat anyone differently based upon their national origin.
- Per the CDC: “Do not show prejudice to people of Asian descent, because of fear of this new virus. Do not assume that someone of Asian descent is more likely to have COVID-19.”
- The EEOC recommends that employers remind supervisors and managers of their responsibility to watch for, stop and report any harassment or other discrimination, and that the employer will immediately review any allegations of harassment or discrimination and take appropriate action.

Protecting Employee Privacy Upon Re-Entry

What Can I Disclose to My Employees?

- If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain employee confidentiality as required by the Americans with Disabilities Act (ADA).
- This same rule applies to third-parties whom the employee may have come in contact with through the workplace.
- Employers should treat all information about an employee's illness as a confidential medical record and keep it separate from the employee's personnel file.

Does HIPAA Still Apply?

- Yes!
- HHS issued a reminder after the WHO declared a global health emergency.
- Generally excludes disclosure to a public health authority, such as the CDC or a state or local health department, that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury or disability.
- EEOC has stated the name of infected individual's may be shared by a staffing agency or contractor to an employer, because the employer may need to determine if this employee had contact with anyone in the workplace.

How Should We Treat Medical Information?

- EEOC and DFEH have both issued guidance reminding employers that all medical information still should be treated as confidential.

How Should I Store COVID-19 Related Medical Information?

- The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, in a confidential file.
- The EEOC has issued guidance permitting employers to store all medical information related to COVID-19 in existing medical files.
 - i.e., temperature data (if kept), an employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.

FFCRA AND OTHER LEAVES AND/OR REASONABLE ACCOMMODATIONS RELATED TO COVID-19 AFTER RE-ENTRY TO THE WORKSITE

FFCRA Entitlements Upon Re-Entry

- Don't forget that the FFCRA is in effect through December 31, 2020.
- **E-PSL** – up to 80 hours (f-t E'e/pro-rata for p-t E'e) of emergency paid sick leave for a qualifying reason: 1) quarantine/isolation order; 2) advised by HCP to self-quarantine due to concerns about virus; 3) experiencing symptoms of virus and seeking medical diagnosis; 4) caring for individual who is subject to 1 or 2 above; 5) caring for child due to school/childcare closure; or 6) experiencing another similar condition per HHS.
- **E-FMLA** – up to 12 weeks of emergency FMLA leave for eligible employees to care for child due to school/childcare closure.
- Under the FFCRA, an employee who has been employed at least 30 days (defined by DOL as being on the employer's payroll for the 30 days immediately prior to the start of leave) is eligible for E-FMLA.
- What about furloughed employees who are recalled to work when the worksite opens?
 - The CARES Act provides that employees who: (1) were laid off on or after March 1, 2020; (2) had worked for the employer for at least 30 of the last 60 days prior to their layoff; and (3) were rehired by the employer, are eligible for E-FMLA.

FFCRA (con't)

- Remember, leave under FFCRA is in addition to other forms of leave.
- Also, even after returning to the workplace, an employer cannot require employees to use other forms of available leave (e.g. PTO or sick leave under employer's policy) before taking E-PSL for a qualifying reason.
- The employer may require an employee to use other leaves for the first two weeks of unpaid E-FMLA leave, however, if the employee has exhausted E-PSL or chooses not to use it.
- More information about E-PSL and E-FMLA can be found in the DOL's FAQs at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
- More information about tax credits for amounts paid to employees on E-PSL and E-FMLA can be found in the IRS's FAQs at <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>

FFCRA (con't)

- **Query:** Can an employee elect to take E-PSL when an employer opens up the worksite because the employee is afraid to come back to work?
- No. FFCRA does not provide emergency paid sick leave for an employee's general fear or anxiety about COVID-19.
- BUT, other laws may apply...

Employee Afraid to Return to Work - Other Laws May Apply (con't)

- OSHA – employees can refuse to report to work if there is an “imminent danger” to their health and safety. SO be sure to comply with safety and social distancing requirements (as discussed previously) and communicate to the employee that you’ve taken reasonable steps for a safe work environment.
- ADA/FEHA - be sure to dialogue with the employee to see if the fear is more than a generalized anxiety about COVID-19 [like most of us have]. If it is because the employee is high risk – underlying medical condition, etc., you will need to evaluate the situation under reasonable accommodation requirements pursuant to ADA/FEHA (discussed later).
- These will be delicate situations and employers will need to be sure they actively listen to employees and obtain relevant information so a full evaluation can be done before making any employment decisions. Work with counsel.

Follow-Up Query...

- **Query:** What if a furloughed employee doesn't refuse to return to the worksite because they are afraid of the virus, but because they are making more money on unemployment (UI)?
- Earning more on UI is not usually the case but with the \$600 supplemental UI benefit under the CARES Act, some employees are earning more on UI than they would if they were working at their regular rate.
- Absent any other information that may justify the employee's refusal to return to work, an employer does not have to, and should not, accommodate this. The DOL has opined that the employee's actions could constitute UI fraud.

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DOL Letter re: Integrity of CARES Act UI Program

- The DOL issued a Letter on 4/20/2020 addressing the importance of the integrity of the UI program under the CARES Act, which stated in part that if an employee quits without good cause to obtain additional benefits, this would be fraud and the individual is ineligible for any additional benefit payments, must pay back the benefits, and is subject to prosecution.
- Thus, employers should document an employee's refusal to return because they want to make more on UI, and should advise the EDD that the employee was offered work and refused. Then work with legal counsel re: evaluating whether separation of employment warranted based on employee's refusal of work.

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Executive Order – Paid Sick Leave for Food Sector Workers

- On April 16, 2020, Governor Gavin Newsom signed an Executive Order N-51-20 to support employees of large employers in the food sector industry with two weeks of paid sick leave if employees are unable to work due to:
 - Quarantine/isolation order;
 - Advised by HCP to self-quarantine due to COVID-19 concerns;
 - Prohibited by hiring entity from working due to COVID-19 concerns.
- “Food sector workers” include farmworkers, agricultural workers, those working in grocery stores or fast food chains and delivery drivers.
- A “hiring entity” is defined as a private sole proprietorship or any kind of private entity whatsoever that has 500 or more employees in the United States.
- The intent of the Order is to fill the gap left under the FFCRA that provides similar paid sick leave only to employees of employers with fewer than 500 workers.
- More details about the paid sick leave can be found in the Executive Order at <https://www.gov.ca.gov/wp-content/uploads/2020/04/4.16.20-EO-N-51-20.pdf>

Other Statutory Leaves

- Separate from leave under the FFCRA, employees may also be entitled to other forms of statutory leave due to exigencies caused by COVID-19. For example, the following statutes may apply to certain situations:
 - An employee’s illness/medical condition - FMLA/CFRA, HWHF (statutory paid sick leave).
 - Also possible leave as reasonable accommodation under ADA/FEHA.
 - The illness/medical condition of the employee’s family member – FMLA/CFRA, HWHF (statutory paid sick leave), Organ & Bone Marrow Donation.
 - School or childcare emergencies – Leave under Labor Code section 230.8 (School/Childcare Activities Leave).
- Local paid sick leave and medical leave ordinances may also apply (e.g. SF, San Jose, LA).

Other Leaves (con't)

- Also, an employer's discretionary leave policies may apply to a certain COVID-19 contingency (e.g. personal leave, bereavement leave, etc.)
- Pursuant to the DFEH, if an employer sends an employee home because the employee is sick or exhibits signs of COVID-19, and employee has no paid leave benefit available, the leave may be unpaid but it is job protected.

Medical Certifications Supporting Need for Leave

- Generally employers can require employees to submit medical certifications to support the need for medical leave (w/in 15 days under FMLA and CFRA and within a reasonable time under ADA and FEHA).
- As the DFEH's Guidelines provide (and CDC recommends), in the context of the pandemic, it may be necessary for employers to either waive a formal medical certification or the timeframes for which employees are expected to return the certification given that HCPs are working hard to provide urgent medical needs to those impacted by the virus and may not have time to get the medical certification completed.
- However, this is not to suggest that employers should not try and seek medical certification to support medical absences.

COVID-19 and Reasonable Accommodations (RA)

- The DFEH has said that whether illnesses related to COVID-19 rise to the definition of a disability under state law is a fact-based determination. However, given the seriousness of the public health crises, employers should not over-think this question and instead, focus on determining if they can accommodate employees with COVID-19 related illnesses.
- The EEOC has issued guidance/FAQs regarding RA related to the COVID-19 pandemic. We'll cover just a few of the FAQs today. The full guidance/FAQs can be found at: https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehab_illtaion_act_coronavirus.cfm

EEOC Guidance - RA

- If an employee has a preexisting mental illness or disorder (for example anxiety disorder, OCD, or PTSD) that has been exacerbated by the COVID-19 pandemic, is the employee entitled to an accommodation?
- DOL: As with any accommodation request, employers may ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist them and enable them to keep working; explore alternative accommodations that may effectively meet their needs; and request medical documentation if needed.
- So essentially, engage in the interactive process and if you can provide a reasonable accommodation without it creating an undue hardship, then do so.

EEOC Guidance - RA

- During the pandemic, an employer may still ask questions and obtain medical certification if an employee requests an accommodation for a medical condition either at home or in the workplace, in order to determine whether the employee has a "disability" and if a reasonable accommodation is available.
 - However, be mindful that medical certifications may not be as easy to obtain from the HCP during the pandemic.
- An employer may ask employees with disabilities to request accommodations if they believe they may need them when the workplace reopens.
 - In essence, employers may begin the "interactive process" before employees return to the workplace.

EEOC Guidance - RA

- Upon return to the worksite, an employer may require employees to wear protective gear (for example, masks and gloves) and observe infection control practices (for example, regular hand washing and social distancing protocols).
- However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs), or a religious accommodation under Title VII (such as modified equipment due to religious garb), the employer should discuss the request and provide the modification or an alternative if feasible and not an undue hardship on the operation of the employer's business under the ADA or Title VII.
- The DFEH has similar guidance.

EEOC Guidance – RA “Undue Hardship”

- An employer does not have to provide a particular reasonable accommodation if it poses an "undue hardship," which means "**significant difficulty or expense**." In some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now.
- However, if a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems.

EEOC Guidance (con't) re: “Significant Difficulty”

- “Significant Difficulty” - Whether current circumstances create "significant difficulty" in acquiring or providing certain accommodations, considering the facts of the particular job and workplace.
- For example, it may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking.
- Or, it may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions.

EEOC Guidance (con't) re: "Significant Expense"

- According to the EEOC, prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall resources. However, the EEOC recognizes that the sudden loss of some or all of an employer's income stream due to the pandemic is a relevant consideration.
- Also relevant is the amount of discretionary funds available at this time - when considering other expenses - and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted).
- These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic.

Be Flexible

- The EEOC's position is that even during the current public health crisis, there may be many no-cost or very low-cost accommodations that can be provided to employees.
- Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Ideas include:
 - Further temporary remote work arrangements;
 - Temporary job restructuring of marginal job duties;
 - Temporary transfers to a different position; or
 - Temporary modification to work schedule or shift assignments.
- These measures may not only permit an individual with a disability to perform safely the essential functions of the job, but also may help to reduce exposure to others in the workplace or while commuting.

POTENTIAL IMPACT OF COVID-19 ON EMPLOYMENT POLICIES

Recommended Review of Policies

- Certain policies may have been (or will be) impacted by COVID-19.
- Given how fast employers had to adapt to the unprecedented public health crisis, certain exceptions may have been made to some policies.
- Also, given the “new normal” that we will likely be experiencing for some time, certain exceptions to policies may be necessary – or even **required by the government**.
 - **IMPORTANT:** Check the city/county ordinances where you operate re: ordinances that may impact your policies – e.g. leave benefits and local minimum wage (e.g. Emeryville increasing, Hayward delaying increase).

Recommended Review of Policies

- Below is a list of policies employers may want to review and possibly amend, even if only temporarily, to address some changes caused by COVID-19.
 - Attendance policies;
 - Work hours and scheduling policies;
 - Rest breaks and meal period policies;
 - Remote work policies;
 - Leave of absence policies (including paid sick leave policies);
 - Accommodation policies;
 - Travel policies;
 - Expense reimbursement policies

Any Questions?
Anyone?? Anyone???



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Upcoming Webinar

Insurance Coverage for COVID-19 Losses

Five Things to Know and Do

Wednesday, May 6, 2020
10:00 a.m. – 11:00 a.m.

Register here: <https://bit.ly/3bMdpFH>

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