



Opening Back Up – What Employers Need to Know

Presented By: Christine H. Long

And

California Restaurant Association

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Re-Opening – Big Picture



Money – PPP Fund
Considerations



Leasing
Considerations



Social Distancing
Protocols



Leaves of Absence
and Required Sick
Pay



Recommendations
for Dealing with
Employees



Wage and Hour
Considerations

Leases – Things to Consider

- Commercial lease tenant security deposits have restrictions
 - Tenant can waive California Civil Code Section 1950.7 which limits use of security deposit to cure defaults in the payment of rent, repair of damages to the premises
 - Force majeure clauses are typically read very narrowly and will only apply if the specific event was enumerated in the clause or reasonably captured by the catch-all phrase.
- Civil Code Section 1511 excuses a party's performance of a contractual obligation when performance is 'prevented or delayed by operation of law' or by an 'irresistible, superhuman cause.'
 - Example – Restaurant with operations in Mall and Stand Alone or Foot Traffic Clause.
- Lease Negotiation. Review lease and have candid discussion with landlord about reduced rent and ramping up.
 - Consider adding percent of revenue ramp up
 - Revise percent leases or negotiate for a lower base

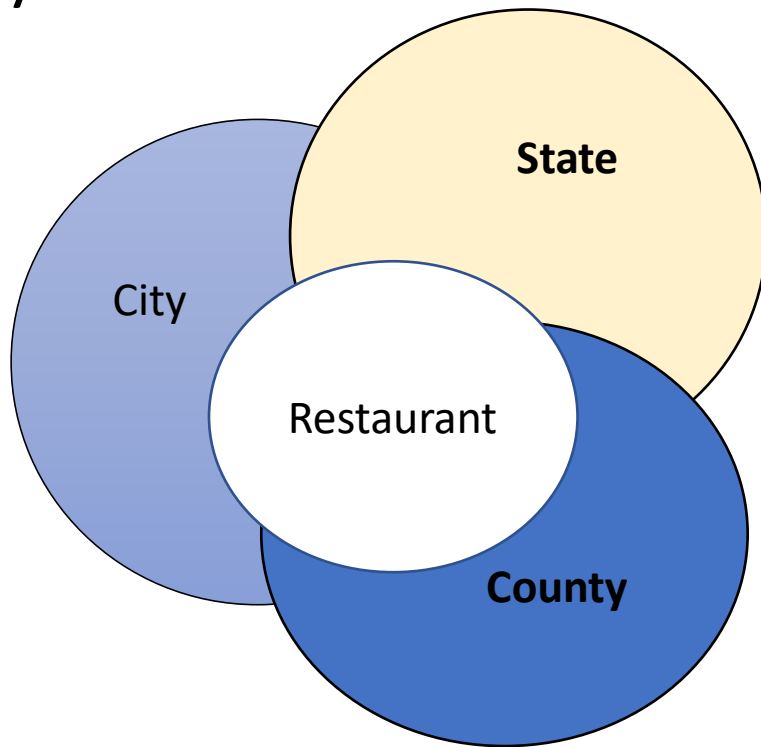
PPP Money Protocols



- Know when your 8 weeks begins – Date of Funding
- Have a way to track your PPP Funds
- Make sure you are meeting the ratio – meaning that of the money you spend (not just receive) that you are adhering to 75/25
- Don't wait to spend money
- Have a way to track sick leave money

Shelter In Place Orders – Which Law Controls

Interplay



Business must follow all orders.


If there is a conflict – businesses need to follow the Order that is most restrictive for their jurisdiction.

If State is in Phase 2 but County is in Phase 1 – Business follows Phase 1.

Changes constantly – so must be able to adjust.

Social Distancing Protocols

Each County will have its own set of rules. If you have restaurants in multiple cities/counties adjust policies or set guidelines that can apply universally.



Bay area protocols were updated May 4, 2020
and May 8, 2020

<https://www.sccgov.org/sites/covid19/Documents/Appendix-A-Social-Distancing-Protocol.pdf>

<https://www.sfdph.org/dph/alerts/coronavirus-healthorders.asp>

Signage Required

- Post signage at each public entrance of the facility to inform all personnel and customers to:
 - 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
 - Wear face coverings, as appropriate, and
 - Not shake hands or engage in any unnecessary physical contact

Specific Guidelines for Restaurants

- Santa Clara County Modified Restaurant Guidance **May 8, 2020**.
 - Letter to Permit Holders
 - <https://www.sccgov.org/sites/deh/Documents/COVID-19-Notice-for-Food-Facilities-05-08-2020.pdf>
 - Mitigation Measures for Food Facilities
 - <https://www.sccgov.org/sites/deh/Documents/COVID-19-Risk-Mitigation-Measures-for-Food-Facilities-05-08-2020.pdf>
 - Guide for Workers
 - Covers what workers should do at work, at home and reporting guidelines
 - <https://www.sccgov.org/sites/deh/Documents/Guidance%20for%20Workers.pdf>



Masks Required – Most Counties

- Masks are going to be County Specific – but it is important that you know the rules and your employees know the rules
- You must require face coverings to be worn by all personnel and customers
 - entering your facilities, except for those exempted from this requirement.
- The only exemptions are for people for whom face coverings may not be safe:
 - Children 6 years old or younger.
 - Anyone who has trouble breathing, is incapacitated, or otherwise unable to remove a face covering without assistance.
 - Anyone who has been advised by a medical professional not to wear a face covering.
- Any worker to the extent wearing a face covering creates a safety hazard at work under established health and safety guidelines.
 - Face coverings should not be surgical or medical masks, which are in short supply and urgently needed by healthcare workers. Instead, face coverings such as bandanas, scarfs, or home-sewn fabric coverings should be used.
- Note that wearing a cloth face covering does not eliminate the need to follow social distancing and hygiene measures, including physically distancing yourself from others and frequently washing your hands.

California Strict Policy for Restaurants

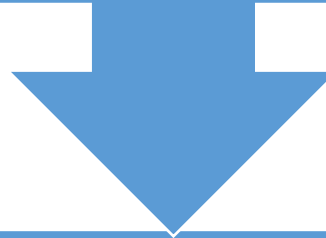
California has several policies in play for restaurants.

- Executive Order N-51-20
 - Covers Sick Leave and Guidelines for Employment
- Dine In. <https://covid19.ca.gov/pdf/guidance-dine-in-restaurants.pdf>
 - Covers protocols to protect employees and public.
- County Orders
 - These will vary by County and City. Check County Public Health and City Public Health websites.
- CRA Resources. <https://www.calrest.org/coronavirus-resources>



Handwashing Intervals Required

As of April 18, 2020, food facilities are required by California law (Executive Order N-51-20) to allow employees to wash their hands every 30 minutes and additionally as needed.



Staff must wash their hands with soap and water for at least 20 seconds as often as necessary to prevent contamination of food and food contact surfaces, including:

When entering the kitchen	Before starting food preparation	After touching their face, hair, or other areas of the body	After using the restroom	After coughing, sneezing, using a tissue, smoking, or drinking	Before and after eating	When handling raw food then ready-to-eat food	After cleaning, bussing tables, or touching any items customers have used	Before putting on gloves o For information on glove use
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Assign

Assign an employee to keep soap and paper towels stocked at handwash stations at least every hour

Protect

Protect food and drinks from contamination by having a designated person prepare and pack for delivery and carryout

Prevent

Prevent Employees from Phone Use While working to Minimize touching phone or other personal items

Provide

Provide extra garbage cans near restrooms exits

Have

Have staff monitor customers entering facility to ensure compliance

Ensure Protocols Followed

New Sanitation Guidelines

- The Counties now require food facilities to:
 - Regularly disinfect all high-touch surfaces exposed to customers or employees routinely throughout the day.
 - Chlorine-based (bleach) sanitizer at 100 ppm or quaternary ammonium-based sanitizers at 200 ppm are effective sanitizers.
 - Use test strips to ensure that sanitizer is at these required concentrations.
 - Change sanitizer when the solution becomes cloudy or dirty or does not meet the required concentration.
 - Reduce physical contact by providing for contactless payment systems. If it is not feasible to do so, disinfect all payment portals, pens, and styluses after each use.

- COVID-19 can last for days on some surfaces.
- Assign designated staff to continuously clean and disinfect all high-touch areas.
- Clean
 - Payment Systems Hour
 - Doorknobs
 - Faucet handles, and cabinet/drawer pulls
 - Cash registers
 - Shopping carts and shopping baskets
 - Provide disinfecting wipes that are effective against COVID-19 near shopping carts and baskets for customers

Make Sure
Cleaning
Standards
Met



Don't Let Customers Bring In Own Items

- You may but are not required to prohibit customers from using reusable bags from home.
- Do not permit customers to bring their own mugs, food containers, or other reusable items from home (except for bags, with precautions above).
- Disallow self-service by customers.
- Provide customers with all beverages and unpackaged food items.
- Have employees place additions/condiments into products (like cream into coffee), rather than allowing customers to do so.
- Staff should provide lids for cups, condiments, utensils, and napkins to customers upon request

Operation Considerations

- Review the size of business and determine how many can be inside to meet social distance guidelines.
- Consider roping areas.
- Mark floor with tape and put up appropriate signage.
- Signs to indicate “order” areas from “pick up” and waiting areas.
- Increase barriers if open kitchen or host area.
- Eliminate self-service areas and buffets.
- Implement “curbside” pickup and delivery.
 - Separate parking/waiting area for takeout.
 - DoorDash, UberEats, GrubHub delivery drivers – text when ready.

Employee Health

- Essential businesses must monitor employee health.
 - Screen personnel at the beginning of each shift for symptoms of illness.
 - Ask if they are experiencing any of the following: fever, tiredness, cough, muscle or body aches, shortness of breath nausea, vomiting, diarrhea, chills, night sweats, sore throat, headaches, confusion, or loss of sense of taste or smell. o If a worker shows any of these symptoms, send them home and instruct them to follow the instructions on the County's COVID-19 Learn What to Do – If You Think You are Sick webpage:
<https://www.sccgov.org/sites/phd/DiseaseInformation/novelcoronavirus/Pages/learn-what-to-do.aspx#sick> Workers who are living with someone who has tested positive should also follow applicable instructions on this webpage.

CDC Guidance – Screening Employees

- 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.).



Temperature Checks

- Temperature Checks
 - During a pandemic, taking temperature is considered a permissible “medical examination” under the ADA if done for workplace safety:
 - designate individuals to conduct temperature checks;
 - Provide training; and
 - Determine what mitigation efforts can be taken to protect that employee (personal protective equipment)
 - Maintain privacy – i.e. don’t announce if someone has a temperature
 - Retaining “biometric” data may trigger California Consumer Privacy Act (CCPA) notice, privacy policy updates which go into effect July 1, 2020
 - Consider simple check to see if taken but not maintaining actual data
 - Consider whether additional compensation needs to be paid for waiting to check in

Sending Home If Symptoms

- Fred reports to work, has no temperature but begins sneezing, blowing nose and occasional coughing. His manager asks him to go home. Fred says it is his allergies.
 - Can Fred insist on staying?
 - No
 - Can Fred request reporting time pay?
 - Depends on what your policy is – if it states any symptoms don't report – then no.

Employee Tests Positive

- If a worker tests positive with COVID-19 and was working while showing symptoms, the following steps shall be taken:
 - Immediately cease operation, close facility, and thoroughly sanitize it. Instructions for sanitizing your facility may be found at this link: <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html> Your facility can reopen as soon as it has been sanitized.
 - Instruct the worker to follow the instructions on the County's COVID19 Learn What to Do – If You Think You are Sick webpage.
 - Inform other workers that they may have been exposed to COVID-19 and the day(s) on which the potential exposure occurred. If you take this step, you should also instruct your personnel to closely monitor themselves for any symptoms of COVID-19 (fever, coughing, and/or shortness of breath) for 14 days.
 - If you have personnel who are at high risk for severe illness from COVID19, consider temporarily re-assigning them to non-public-contact duties.

Employee's Family Member is Sick

Member of the family in the same household has COVID or COVID exposure.
The employer may

- Require employee to stay away from work
- May ask employee if they have any COVID Related Symptoms
- May ask the employee to get tested
- May screen the employee upon return

DOL /FEHA Guidance

The State and Federal Laws are generally similar when it comes to pandemic activity. Employers generally can:

- Ask employee if they are experiencing COVID symptoms
- Require them to wear PPE
- Ask if they have travelled
- Ask for medical certification if request accommodation
- Must still comply with ADA and Discrimination Laws

Employee Refuses to Come Back to Work

- Employee generally does not have the right to refuse work merely because of a potentially unsafe condition in the workplace.
- Employer may not discriminate against an employee who exercises “any right afforded” by the OSH Act.
- An employee may only refuse to come to work if:
 - 1. He/she asked the employer to eliminate a hazard in the workplace but the employer has failed or refused to do so;
 - 2. He/she has a “good faith” belief that an imminent danger exists;
 - 3. A “reasonable” person would agree there is a “real danger” of death or serious injury; AND
 - 4. There is no time to get the hazard corrected through appropriate channels (i.e., OSHA inspections, etc.).
- Certainly, the “reasonable” element of the test makes this a fact-intensive inquiry. What is “reasonable” in this crazy COVID-19 world?
 - Key will be documentation and interactive discussion with employee

How Does Employee Refusal Affect PPP

- **SBA Clarifies Loan Forgiveness Not Reduced for Employees Who Refuse Recall/Rehire**

40. Question: Will a borrower's PPP loan forgiveness amount (pursuant to section 1106 of the CARES Act and SBA's implementing rules and guidance) be reduced if the borrower laid off an employee, offered to rehire the same employee, but the employee declined the offer?

Answer: No. As an exercise of the Administrator's and the Secretary's authority under Section 1106(d)(6) of the CARES Act to prescribe regulations granting de minimis exemptions from the Act's limits on loan forgiveness, SBA and Treasury intend to issue an interim final rule excluding laid-off employees whom the borrower offered to rehire (for the same salary/wages and same number of hours) from the CARES Act's loan forgiveness reduction calculation. The interim final rule will specify that, to qualify for this exception, the borrower must have made a good faith, written offer of rehire, and the employee's rejection of that offer must be documented by the borrower. Employees and employers should be aware that employees who reject offers of re-employment may forfeit eligibility for continued unemployment compensation.

FLSA/Wage and Hour



While State and Federal law differ on minimum wage and timings for breaks, etc. they have the same general pandemic requirements. Employers are required to:

- Pay no less than the minimum wage for all hours worked
- Pay at least 1 and 1.5 times the employee's regular rate of pay for overtime
- Maintain an accurate record of hours worked for all employees, including those participating in telework or other flexible work arrangements
- Employees can be required to perform work that is not within their job description.
- Employers may or may not, be able to require employees to pay for internet access, computer, an additional phone line, increased use of electricity, etc.
 - Applies to Managers and Shift Supervisors that May Now Be Working from Home

How Federal and State Programs Interact

Week 1	Week 2	Week 3 – 12	Week 13	Week 14	No More Leave
<p>Less than 500 E'ees</p> <p>Federal Paid Sick Leave for COVID</p> <p>100% of Pay for Employee COVID (\$511 p/day or \$5110 total)</p> <p>Or</p> <p>2/3 due to Child Care or Family Member COVID (\$200 per day or \$2000)</p>		<p>50 Or More Employees</p> <p>EMERGENCY FAMILY MEDICAL LEAVE 12 Weeks Total Available</p> <p>2 WEEKS UNPAID (Starts at Week 1 of Federal)</p> <p>10 WEEKS PAID AT 2/3 of Regular Rate Pay (Cap of \$200 p/day or \$10,000)</p> <p>Applies to Employee's due to School Closure</p> <p>Any other FMLA event follows standard FMLA Rules</p>	<p>24 Hours of Paid Sick Leave</p>	<p>Employees Use Paid Time Off, Vacation and Any Company Sick Leave Benefits</p>	<p>Unemployment Benefits</p>
Federal Sick Leave	First two weeks unpaid – Employee can use vacation or PTO benefits or if eligible coordinate with Federal Sick Pay		California Sick Pay	Employer Programs	State Benefit

Cities Paid Sick Leave

San Jose

- Provides up to 80 hours of paid sick leave for uses related to COVID-19.
- Applies to employees who work for companies with 500 or more employees or less than 50
- Employers that provide some combination of paid leave that is at or above the leave required under the Ordinance do not need to comply with the Ordinance.

San Francisco PHELO

- Applies to employees who work for companies with 500 or more employees.
- Provides up to 80 hours of paid sick leave for uses related to COVID-19.
- Available immediately.
- In addition to company-provided sick leave and other paid time off, unless that leave was independently provided for COVID-19 purposes
- If restaurant provides California PSL (CPSL) hours, for each hour employer can reduce the amount of PHELO leave employees must receive. So, if PHELO requires 80 hours to be available to an employee, and the employee takes 40 hours of CPSL, the employer would be obligated to provide, at most, 40 PHELO hours for a qualifying event.

Employee Claims COVID From Working

- [Executive Order N-62-20](#) creates a rebuttable presumption that an employee's COVID-19-related illness arose out of the course of employment for workers' compensation purposes if
 - the employee tests positive or is diagnosed "within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction."
 - The presumption does not apply if the employee worked from home.
- To qualify, the employee must either
 - (1) test positive for COVID-19 within 14 days after performing work; or
 - (2) be diagnosed with COVID-19 by a licensed physician within 14 days after performing work and have that diagnosis confirmed by further testing within 30 days of the diagnosis. Additionally, the date of injury must occur between March 19, 2020, and July 5, 2020.

Questions?



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Ms. Long is the Chair of the Employment Law Practice Group and Hospitality Practice Group at Berliner Cohen, LLP. Ms. Long provides innovative employment advice to businesses throughout California. Her practice includes handling Class Actions and PAGA Claims, wage and hour claims, claims of employment discrimination, ADA compliance, wrongful termination, and breach of employment contract cases in all venues, including actions before the DFEH, Labor Commissioner, and the EEOC. Her experience includes both trial and arbitration experience on matters relating to employment including compensation issues, mandatory leaves of absence, reasonable accommodations, and reductions-in-force for individuals, companies and local government.



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