

# COVID-19: Employment Law Issues for Essential Businesses in California

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Presented by



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## Questions?

Type your question by using the Q&A chat pod and they will be answered as time allows

## CLE

CLE is approved in CA and possibility other jurisdictions. Please check after the program if you have questions



# Today's Presenters

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# Today's Topics

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- **ESSENTIAL BUSINESS: On-Site Workers**
  - Social Distancing
  - Health Screenings
  - Masks and Other PPE
  - Positive Tests and Employee Concerns
- **ESSENTIAL BUSINESS: Remote Workers**
  - Exempt and Non-Exempt Issues
  - Expenses and Equipment
  - Work-related Injuries
- **LEAVES AND OTHER OPTIONS**





## Essential Business: On-site Workers

# Social Distancing Requirements

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- Employers in various cities who are engaged in any essential activities or essential infrastructure are required to prepare and post a Social Distancing Protocol.
  - Protocols must be posted near the entrance to the business and in areas visible to the public.
  - The protocols must also be provided to the employees.
- Some specific local examples include:
  - Los Angeles (City): in effect since April 15.  
<https://www.lamayor.org/sites/g/files/wph446/f/page/file/WorkerProtectionOrdAPR10.pdf>
  - San Francisco: in effect since April 1.  
<https://www.sfdph.org/dph/alerts/files/HealthOfficerOrder-C19-07b-ShelterInPlace-03312020.pdf>
  - San Diego: in effect since April 7.  
<https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/HealthOfficerOrderCOVID19.pdf>

# Masks and Personal Protective Equipment (PPE):

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- CDC has recommended that the public wear cloth face masks to help prevent the spread of COVID-19.
- Some California cities/counties have adopted local rules requiring that non-medical essential workers wear masks while at work:
  - City of Los Angeles Worker Protection Order  
<https://www.lamayor.org/sites/g/files/wph446/f/page/file/WorkerProtectionOrdAPR10.pdf>
  - Requires all non-medical essential workers in the City of Los Angeles to wear non-medical grade face coverings while working.
  - Employees must be allowed to wash their hands at least every 30 minutes.
  - All customers and visitors must also wear face coverings over their noses and mouths.
  - All persons are encouraged to wear face coverings anytime while outside the home.



# Masks and PPE

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- Los Angeles County joined on April 15, 2020  
[http://publichealth.lacounty.gov/media/Coronavirus/HOO\\_Safer%20at%20Home%20Order%20for%20Control%20of%20COVID\\_04102020.pdf](http://publichealth.lacounty.gov/media/Coronavirus/HOO_Safer%20at%20Home%20Order%20for%20Control%20of%20COVID_04102020.pdf)
- San Diego has similar requirements for employees who have contact with the public, businesses that serve or sell food, pharmacies and drug stores, gas stations and convenience stores  
<https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/HealthOfficerOrderCOVID19.pdf>
- Beverly Hills requires ALL residents to wear face covering whenever leaving the house  
<https://www.beverlyhills.org/cbhfiles/storage/files/19071377731728922681/Finalorder.pdf>

# Masks and PPE

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- Issues when there is no applicable local ordinance:
  - Can you require an employee to wear a mask?
    - According to the DFEH, Yes. “An employer may require employees to wear personal protective equipment during a pandemic. However, where an employee with a disability needs a related reasonable accommodation (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.”
    - If required, or the PPE is specific to the work, an employer may be required to pay for the equipment.
  - What if an employee wants to wear a mask?
    - When possible, employers should allow employees to wear masks and should only deny mask use if there is a business necessity or safety reason to deny mask use.
  - Should I have a policy?
    - If possible, yes. Given the shortage of N-95 masks, employers should have a policy regarding what masks are allowed or required, whether the employer will pay for the masks, and any other relevant information. OSHA has also stated that employers should “make a good-faith effort to provide and ensure workers use the most appropriate respiratory protection available for the hazards against which workers need to be protected.”

# Temperature Checks

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- Allowed under:

- **EEOC guidance:** “Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.”  
[https://www.eeoc.gov/facts/pandemic\\_flu.html#q7](https://www.eeoc.gov/facts/pandemic_flu.html#q7)
- **DFEH guidance:** “Generally, measuring an employee's body temperature is a medical examination that may only be performed under limited circumstances. However, based on current CDC and local health information and guidance, employers may measure employees' body temperature for the limited purpose of evaluating the risk the employee’s presence poses to others in the workplace as a result of the COVID-19 pandemic.” [https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ\\_ENG.pdf](https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ_ENG.pdf)

# Temperature Checks

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- Required under many county/local ordinances:
  - Fresno County: All employers, including health care providers must screen employees for febrile respiratory illness <https://www.co.fresno.ca.us/Home/ShowDocument?id=43284>
  - Madera County: <https://www.maderacounty.com/home/showdocument?id=20274>
  - Tuolumne County: <https://www.tuolumnecounty.ca.gov/DocumentCenter/View/14185/Health-Officer-Order-FRI-32620?bidId=>
  - Mariposa County: [http://nixle.s3.amazonaws.com/uploads/pub\\_media/user28732-1585268830-media1](http://nixle.s3.amazonaws.com/uploads/pub_media/user28732-1585268830-media1)

# Temperature Checks

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- Wage and Hour Issues:
  - Time spent in line and undergoing screenings is likely compensable under *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829 (de minimis rule) and *Frlekin v. Apple, Inc.*, no. S243805 (Feb. 13, 2020) (compensability of security screenings).
  - Federal and other state laws may differ under *Integrity Staffing Solutions, Inc. v. Busk*, 574 US 27 (2014) and similar interpretations.
- Unfortunately, while compliance may be challenging risk can be substantial -- consider options to avoid wage and hour issues:
  - Can you move clocks or install additional timekeeping?
  - Minimize time
  - Have a method to track time
  - Get agreement and acknowledgments

# Temperature Checks

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- Privacy Issues/Medical Logs:
  - The EEOC guidance directs that employers may maintain a log of temperature checks, but must keep that information and log confidential.
  - The DFEH does not address the privacy issue, but does state, in other places in its FAQs, that employee medical information obtained by employers should be kept confidential. Therefore, employers should be sure to keep this information confidential.
  - In all cases, an employer should maintain this information in a separate file with access limited to only those who need to know.

# Temperature Checks

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Issues related to an employee's refusal to undergo screening:

- Determine why the employee is refusing?
  - Is there a discrimination or accommodation issue?
    - Employees may decline for religious reasons. If this is the case, employers should consider accommodation.
  - Is screening required by law or Company policy?
    - Certain localities now require temperature checks.
- Is there a coordinated refusal? (Section 7 of the NLRA)
  - Concerted activity.
  - Employers should ensure no discipline or retaliation
- Do not need to pay employees who refuse to work and those employees are not eligible for unemployment insurance benefits.

# Best Practices:

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- Enforce social distancing
  - Obtain and keep acknowledgements of receipt
- Remind employees to not come to work if sick
- Provide compliant masks to employees if possible
  - Require compliance
  - Provide guidelines for proper use
  - Reimburse for expense of masks if required and not provided by employer
- Provide facilities for washing where possible
- Develop written policy regarding safe workplace practices and provide training to employees
- Handle religious accommodation issues
- Be vigilant for changes in the law and new local requirements



## Best Practices:

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- Practice social distancing while in line
- Use a healthcare professional, management, or HR?
- Proper training and PPE for screeners
- California Consumer Privacy Act notification to employees, if required
- Send employee home if temperature exceeds CDC recommendation
- If temperatures are recorded be sure to keep confidential and have reasonable security measures in place to maintain confidentiality against a potential data breach

# Employee Concerns

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## ■ Can Employees Refuse to Come to Work?

- If Employee Is not ill and has not been exposed to COVID-19? Generally, no but:
  - Can refuse if conditions pose “imminent danger” – OSHA, Section 13(a)
  - Can engage in “protected concerted activity for mutual aid and protection” - NLRA, Section 7
    - “sick out” strikes for better conditions during coronavirus outbreak
- FMLA/CFRA leave?
- Fear of contracting COVID-19 is not a “serious health condition.” But, a serious health condition may include:
  - A serious illness caused by COVID-19
  - Pre-existing physical conditions exacerbated by Covid-19
  - Anxiety or other legitimate mental health conditions could qualify as a serious health condition

# Employee Concerns

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- If Employee Is Ill, Exposed to COVID-19 or Exhibits Symptoms:
  - The employee should not be allowed to work and should be sent home
  - Options for the employee:
    - Emergency Paid Sick Leave
    - California mandated sick leave; local ordinances; employer sick leave policies
    - FMLA/CFRA if a “serious health condition” exists
    - Reasonable Accommodation if employee has a disability

# Employee Concerns

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## Can Employees Insist on Working Remotely?

- No, there is no requirement that employers allow remote work.
  - Remote work as a reasonable accommodation?
    - Disability that places employee at greater risk from COVID-19
    - Preexisting mental health conditions
- [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm)
- [https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ\\_ENG.pdf](https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ_ENG.pdf)

# Employer Concerns

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- Can employers Require Employees to Stay Home?
  - Yes – if employees exhibit symptoms of COVID-19.
    - CDC, EEOC, DFEH guidance
- Can Employers Require Employees to Report Contact with Infected Individuals?
  - Yes, but the employer must be careful to not inquire about a medical condition
  - Maintain confidentiality of medical information received
- Can Employers Require Employees to Stay home if they are in a high-risk category such as over 60, respiratory issues, diabetes, etc.?
  - Probably not
  - *United Automobile Workers v. Johnson Controls*, 499 U.S. 187 (1991) The employer could not discriminate against women who might become pregnant by excluding them from work even where doing so was intended to protect them from harm on the job

# Medical Inquiries

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- Can:
  - Ask if exhibiting COVID-19 Symptoms
  - Ask why employee is absent from work
  - Require employees to wear personal protective equipment
  - Measure body temperature
    - DFEH – for limited purpose of evaluating risk of exposure of COVID-19 only
  - Request a doctor's note certifying fitness for duty
    - EEOC Guidance – yes
- Must:
  - Maintain confidentiality of all information relating to employee's illness/symptoms

# Medical Inquiries

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## Cannot:

- Disclose any personal health information of employee
- Communicate about the health of one employee to other employees
- Identify specific employee who tests positive?
  - Conflicting points of view:
  - Is there a duty to inform other employees?
  - What if the employee does not want to be identified?

# Use of Intermittent Emergency Paid Sick Leave and Emergency Family Medical Leave

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- Department of Labor Guidance, Federal Register, *29 CFR Sec. 826*
  - Remote Employees
    - Intermittent use of EPSL and EFMLA is permitted *if* employer agrees
  - Employees Who Do Not Work Remotely
    - Yes, if
      - Employer agrees
      - Reason for leave is to care for a child due to school/child care closure
      - No COVID-19 symptoms/contact (employee, others)
    - No, for any other qualifying reason
      - Regardless of whether employer agrees



A conceptual image showing a hand placing a puzzle piece and another hand drawing an arrow on a chalkboard, symbolizing business strategy and remote work.

## Essential Business: Remote Workers

# Exempt/Non-Exempt Issues

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- **Exempt employees** are entitled to their full salary when they work any work during a week even if they do not work the entire week because *the employer* failed to provide work.
  - Reduction of hours: An employer can reduce an exempt employee's hours provided the reduction does not take the employee below the minimum salary level threshold for the exemption.
  - Warning: Be careful of changing an exempt employee's duties as work slows down or as other employees are furloughed – it may alter their exempt status.
- **Non-Exempt Employees** must be paid for all hours worked.
  - Reduction of hours: An employer can reduce a non-exempt employee's hours provided the employee is still paid for all hours worked.
  - Warning: A non-exempt employee who reports to work but is sent home before working a full shift will be owed reporting time pay.

# Exempt/Non-Exempt Issues

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- **Other Non-Exempt Employee Concerns:**
  - Record Keeping: must accurately record all hours
  - Meal and Rest Periods: uninterrupted and duty free
  - Overtime Work:
    - Establish specific workday
    - Set expectations
    - No off-the-clock work
  - Day of Rest

# Equipment and Other Work-Related Needs:

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- **Labor Code Section 2802:** requires employers to reimburse their employees for all reasonable and "necessary" expenses incurred in direct consequence of discharging their job duties.
  - Where the expense is necessary, reimbursement "is always required," regardless of whether the employee would have incurred such expenses "absent the job." *Herrera v. Zumiez, Inc.*, \_\_\_ F. 3d \_\_\_ (9th Cir. Mar. 19, 2020)
  - If employees are **required** to work from home, the employer must reimburse the employee for reasonable and necessary home office expenses, which can including cell phone, landline, home internet, personal computer/tablet, video conferring equipment.
  - Reimbursement is not required for an expense that is not reasonable and/or necessary, such as a printer, headphones, faster computer.
  - But, reimbursement may be required for adaptive equipment needed by a disabled employee.

# Equipment and Other Work-Related Needs:

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- **Warning:** There is no established timeframe for when the employee must submit the request for reimbursement – if it meets the requirement of Section 2802, it is reimbursable.
- How much to reimburse?
  - An employer can reimburse a reasonable estimate rather than an exact amount.
  - There is no set formula -- what is “reasonable” depends on the circumstances:
    - Comparison of personal versus work-related use
    - Determination of how much use is required by the remote work
- Employees must report work-related injuries.

# Best Practices:

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- Be aware of changes in job duties/hours for exempt employees
- Establish expected work hours and schedule for non-exempt employees
  - Method for keeping track of hours
  - Mechanism for ensuring that employees are actually working
  - Develop and distribute a written policy regarding expectations
- Make sure required equipment is provided, including any needed as accommodations for a disability
- Make sure that employees are using approved programs and observing usual company protocol regarding confidential and sensitive information.
- Review and revise, if need be, existing BYOD policy



A man in a dark suit stands with his back to the camera, looking at a large, dark, circular hole in a grey, textured surface. The surface is covered with many smaller, similar holes. The man's hands are on his hips. The scene is dimly lit, with shadows cast by the holes.

## Leaves and Other Options

# Los Angeles Supplemental Paid Sick Leave

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Effective April 7, 2020: Los Angeles employers with at least 500 employees in the City of Los Angeles or 2,000 employees nationwide must provide employees with 80 hours of supplemental paid sick leave to all employees working in the City of Los Angeles.

<https://www.lamayor.org/sites/g/files/wph446/f/page/file/SUPPLEMENTALPAIDSICKLEAVE.pdf>

- Leave must be taken for specific reasons, such as:
  - To self-quarantine;
  - Because the employee is 65+ and has a qualifying health condition;
  - To care for a family member who must isolate or self-quarantine; or
  - To provide care for senior family member or children whose school operations have ceased.
- Exemptions apply for emergency and health services personnel, critical parcel delivery, government employers, closed businesses, new businesses, and employers with “generous leave” provisions (160+ hours).



# San Francisco Workers and Families First Program Paid Sick Leave Reimbursements – March 16, 2020

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- The City of San Francisco agreed to provide \$10 million to reimburse businesses within the city that agree to provide additional paid sick leave to employees.
- Program is completely optional.
- If employers agree to provide employees additional paid sick leave, up to 40 hours, the city will reimburse the employer \$15.59 per hour, up to \$311,176 in total.
- Employers will not be reimbursed for the difference between the employees hourly rate and the minimum wage.
- First come, first served- the City has not promised to extend the program past \$10 million.
- Employers can complete the application at <https://sf.gov/step-by-step/get-reimbursed-paying-your-sf-staff-extra-sick-time>.

# Other Relevant Ordinances or Legislation

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- Gov. Newsom relaxed certain requirements of Cal-WARN Act: <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.17.20-EO-motor.pdf>
- Stay At Home Orders
  - California Stay At Home Order: <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>
  - San Francisco Shelter in Place through May 3, 2020 <https://www.sfdph.org/dph/alerts/files/HealthOfficerOrder-C19-07b-ShelterInPlace-03312020.pdf>
  - Los Angeles Safer at Home Order in place through May 15, 2020 <https://www.lamayor.org/sites/g/files/wph446/f/page/file/SaferAtHomeAPR10.pdf>
- Families First Coronavirus Response Act: <https://www.congress.gov/bill/116th-congress/house-bill/6201/text>
  - Emergency Paid Sick Leave- Requires employers with less than 500 employees to provide 80 hours of sick leave to employees for coronavirus related absences
  - Emergency FMLA Expansion-Up to 12 weeks of leave to eligible employees to care for a child if the child's school or child care facility is closed.
- CARES Act: <https://www.congress.gov/bill/116th-congress/senate-bill/3548/text>
  - Phase 3 of legislative response to COVID-19; meant to provide support to businesses.

# Questions?

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Thank You

