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## **Employment Laws and the New Normal: New Workplace Obligations, and a Look at Prior Obligations**

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# Overview of Topics

- Safely Returning Employees to Work
- Employee Privacy and Medical Issues
- Complying with EEO Obligations in the COVID era
- Managing Employees' Time Off Options

# Safely Returning Employees to Work



# Safely Returning Employees to Work

- Review relevant public health orders for specific requirements:
  - City/county
  - State of California
  - OSHA
  - Cal/OSHA
  - Centers for Disease Control and Prevention

# Cal/OSHA Guidance

- California employers required to establish Injury and Illness Prevention Program to protect employees from hazards, including infectious disease
- Employers must determine if COVID-19 is a hazard in their workplace and, if so, must implement infection control measures
- “For most California workplaces, adopting changes to their IIPP is mandatory since COVID-19 is widespread in the community.”

# Cal/OSHA IIPP Requirements

- Encourage sick employees to stay home
- Immediately send employees with symptoms home
- Provide paid sick leave or expanded family and medical leave for COVID-19 related reasons
- Ensure that employees returning to work after recovering immediately report recurrence of symptoms
- Encourage teleworking when possible
- Practice physical distancing
- Provide or require the use of cloth face coverings
- Avoid shared workspaces
- Clean/disinfect
- Discourage travel

# Cal/OSHA Industry-Specific Guidance

- Health care facilities
- Agriculture
- Child care
- Construction
- Grocery stores
- Logistics
- Mortuary and funeral homes

# San Francisco Social Distancing Protocol

- San Francisco employers must prepare, post, and follow a Social Distancing Protocol at every active facility, including:
  - Ensuring employees stay home if they are sick
  - Measures to prevent unnecessary contact (6 feet physical distancing; separate work areas by at least 6 feet; markings in patron line areas to show 6 feet of distance; contactless/sanitized payment systems; physical barriers)
  - Sanitizing measures (disinfect high touch areas and common areas; provide disinfecting wipes and hand sanitizer)
  - Other industry-specific directives



# San Francisco Industry-Specific Guidance

- San Francisco has detailed reopening guidelines for:
  - Childcare providers
  - Summer camps
  - Curbside retail, low-contact services, and outdoor rentals
  - Warehousing and logistical support
  - Manufacturing
  - Grocers, farmers' markets, pharmacies, and hardware stores
  - Restaurants for take-out/delivery
  - Delivery services

# Considerations for Essential And Additional Businesses

- New, temporary policies and protocols regarding:
  - Common areas (restrooms, kitchens, conference rooms)
  - Social distancing
  - In-person meetings
  - Elevators/stairwells
  - Open office space
  - Use of personal protective equipment (gloves, masks, etc.)
  - Maximum capacity of various areas
  - Work-related travel

# CDC Return-to-Work Guidance

- New guidance for essential and additional businesses
  - Previously: Exposed workers isolate at home for 14 days
  - Now: Can work as long as no symptoms, but:
    - Pre-screen: Employers should take temperature and assess symptoms before starting work
    - Should wear facemask for 14 days
    - Maintain social distancing (6 feet)
    - Submit daily temperature check
    - Send employees with symptoms home
- Frequently sanitize shared surfaces and workspaces
- Increase air circulation in rooms
- Stagger breaks to reduce crowding

# CDC Return-to-Work Guidance

- Eliminate shared equipment to the extent possible.
- Compile information on persons who had contact with the ill employee during the time the employee had symptoms and 2 days prior to symptoms.
- Others at the facility with close contact within 6 feet of the employee during this time would be considered exposed
- Those individuals should follow the steps in prior slide
- Printable flyers: [https://www.cdc.gov/coronavirus/2019-ncov/downloads/Essential-Critical-Workers\\_Dos-and-Donts.pdf](https://www.cdc.gov/coronavirus/2019-ncov/downloads/Essential-Critical-Workers_Dos-and-Donts.pdf)

# Potential Liability Risks

- Worker's compensation
- OSHA enforcement actions
- Employee advocates seeking to codify OSHA/CDC directives to provide statutory basis for civil claims of:
  - Whistleblower retaliation
  - Wrongful termination in violation of public policy
    - Several cases already filed, alleging termination for:
      - Refusing to report to office in-person (i.e., asked to work from home)
      - Asking about lack of gloves; raising concerns about masks
      - Expressing concern about employees with symptoms coming to work
- Constructive discharge?

# What if Employees Don't Want to Return?

- Confirm whether telework is possible.
- Determine whether employee is entitled to reasonable accommodation (telework; LOA)
- Consider whether employee is eligible for paid sick leave or FFCRA leave
- May be eligible for unemployment
  - Position may be deemed “unsuitable” if employee is over 65, job is not in “essential sector” or has not met reopening requirements, or employee has weakened immune system/chronic health condition
  - Employer must notify EDD that employee turned down work

# Remote Workforce Implications

- Wage & hour issues
  - Exempt employees: paid full salary for any week in which performing work
  - Non-exempt employees: paid for time worked
  - Meal and rest break requirements still apply
- Expense reimbursement
- Worker's compensation
- Reasonable accommodation
  - DFEH: If employee with disabilities needs same accommodation to telework as they need at work site, employer should provide unless it would be an undue hardship

# Employee Privacy and Medical Issues





# Employee Privacy and Medical Issues

- EEOC and DFEH guidance:
  - Employers are permitted to:
    - Ask about employee symptoms, but maintain information as a confidential record
    - Take temperature to evaluate risk
    - Ask why absent from work
    - Require certificate of fitness to return to work
  - Employers should rely on “judgment” and recommendations from health professionals regarding medical documentation; suggest waiving documentation requirements for COVID-related disability, but note documentation may be required for tax refunds.

# COVID-19 and Antibody Testing

- Mandatory medical testing must be “job related and consistent with business necessity”
- Must ensure tests are “accurate and reliable”
  - Rely on FDA/CDC guidance
- While EEOC and DFEH regulations allow testing for current COVID-19 diagnosis, employers should avoid antibody testing
  - Test for current COVID-19 diagnosis evaluates whether employee is safe to be around others in the workplace
  - Antibody testing may be unlawful inquiry into medical history

# Notifying Other Employees of Exposure

- Can notify workforce of exposure, but cannot reveal names of impacted employees
- DFEH suggested language:

*“[Employer] has learned that an employee at [work location] tested positive for the COVID-19 virus. The employee received positive results of this test on [date]. This email is to notify you that you have potentially been exposed to COVID-19 and you should contact your local public health department for guidance and any possible actions to take based on individual circumstances.”*

# Contact Tracing Apps

- Communication to employees; morale issues
- Voluntary vs. mandatory; consent from employees
- Collective bargaining requirements
- Privacy concerns:
  - Information collected is confidential medical record
  - For CCPA-covered employers, notice requirements
  - Understand full gamut of data being collected (contact tracing apps may collect more data than is obvious, such as contact information for third parties, data from social media apps, call and text message information, etc.)

# Best Practices for COVID-19 Surveys

- If employer intends to ask employee about out-of-work activities related to social distancing or compliance with COVID-19 public health orders:
  - Connect inquiries to compliance with relevant public health orders in your jurisdiction
  - Limit inquiries regarding protected classifications to the extent possible (i.e., “have you attended any large group gatherings” vs. “have you attended religious services in person”)
  - Avoid implicating privacy interests of third parties (i.e., “are you concerned that a member of your household has engaged in activities placing them at higher risk of contracting COVID-19” vs. “have any of your family members recently been to a bar or restaurant”)

# Sample Employee Survey (Before Entering Office)

- ***REQUIRED CONFIRMATION – Must be able to answer YES to each question.***
- I have checked my temperature today and do not have a fever of 100.4, or above.
- I have not had any of the following new and otherwise unexplained symptoms in the last 24 hours (source: CalOSHA Checklist for Workplaces):
  - Frequent cough
  - Difficulty breathing or shortness of breath
  - Fever (measured or subjective in the last 72 hours)
  - Muscle pain
  - Recent loss of taste or smell
  - Headache
  - Sore throat
- I am not currently required to quarantine: I have not been in Close Contact (within 6 feet for 10 minutes or more) with a known or suspected case of COVID-19 in the last 14 days; I have not tested positive for COVID-19 in the last 10 days; I am not currently awaiting test results and I have not travelled by air in the last 14 days.
- I will wear a cloth Face Covering at all times in the building except when alone in a private office with the door closed.

**City and County of San Francisco Health Officer Directive - Attachment**  
**Handout for Personnel (Employees, Contractors, Volunteers) of Essential Business and**  
**Other Businesses Permitted to Operate During the Health Emergency** (May 18, 2020)

Any business or entity that is subject to a Health Officer Directive to which this handout is attached (each "Business") must give a copy of this handout to Personnel who work in the City outside their household during this emergency. Go to [www.sfdcp.org/covid19](http://www.sfdcp.org/covid19) for more info or a copy of this form.

**All Personnel:** If you work outside your household in the City during this local health emergency, you may qualify for a free test for the virus that causes COVID-19, even if you have no symptoms. Contact your healthcare provider or go to **CityTestSF** at <https://sf.gov/get-tested-covid-19-citytests> to sign up for a free test.

**Part 1 – You must answer the following questions before starting your work every day that you work.**

You may be required to provide the answers in person or via phone or other electronic means to the Business before the start of each shift. If any answers change while you are at work, notify the Business by phone and leave the workplace.

1. Within the last 10 days have you been diagnosed with COVID-19 or had a test confirming you have the virus?
2. Do you live in the same household with, or have you had **close contact\*** with someone who in the past 14 days has been in isolation for COVID-19 or had a test confirming they have the virus?

If the answer to either question is "yes", do not go to work and follow the steps listed in Part 2 below.

3. Have you had any one or more of these symptoms today or within the past 24 hours, which is new or not explained by another reason?

- |  |                           |
|--|---------------------------|
| • Fever, Chills, or Repeated Shaking/Shivering | • Loss of Taste or Smell  |
| • Cough  | • Muscle pain             |
| • Sore Throat                                  | • Headache                |
| • Shortness of Breath, Difficulty Breathing    | • Runny or congested nose |
| • Feeling Unusually Weak or Fatigued           | • Diarrhea                |

If the answer to Question 3 is "yes", do not go to work and follow the steps listed in Part 3 below.

<https://www.sfdph.org/dph/alerts/files/COVID19-Personnel-Screening-Handout-EN.pdf>

# Reminders About Medical Records

- Must be stored separately from personnel files
- Access to confidential information must be limited
- COVID-19 related medical information can be stored in existing medical files; this includes:
  - any statement from the employee that he has the disease or suspects he has the disease, or
  - any notes from questioning employees about COVID-19 symptoms or related activities



# Complying with EEO Obligations in the COVID Era



# Preventing Discrimination and Harassment

- COVID-19 pandemic has resulted in an increase in anti-Asian bias and rhetoric
- EEOC has issued guidance recommending that employers:
  - remind managers of their obligation to report and address discrimination and harassment, and
  - remind workers that discrimination and harassment will not be tolerated

# Disability-Related Obligations

- Employee with underlying medical conditions may be entitled to reasonable accommodation such as telecommuting or LOA
  - EEOC guidance specifically identifies mental health disabilities in addition to physical disabilities
- Complications from COVID-19 may also be considered a disability. In that case, the employer and employee should discuss the possibility of taking a leave from work as a potential reasonable accommodation.
- Employer cannot ask an employee to disclose the existence of a compromised immune system as it is likely to disclose a disability.
- Termination for not coming to work in compliance with a government directive, may give rise to a claim for wrongful termination in violation of public policy.

# EEO Issues With Hiring/Return to Work

- Ensure hiring and return-to-work decisions are not influenced by protected categories
- Can revoke offer (if immediate start is necessary) or delay start date for individuals testing positive for COVID-19
- At-risk individuals (disability, pregnancy, over 65):
  - Cannot unilaterally delay start date or return-to-work date based on these factors
  - Can ask employee if they are comfortable returning, or whether they would like to delay start/return date

# Undue Hardship

- EEOC guidance acknowledges that employers may experience greater hardship in providing accommodations due to COVID-19, including:
  - Logistical challenges in conducting a needs assessment
  - Difficulty acquiring equipment
  - Difficulty in providing temporary accommodation or removing marginal functions
  - Economic factors (such as a “sudden loss of some or all of an employer’s income stream” or reduction in discretionary funds) may make it easier to prove undue hardship

# Accommodations and PPE

- Employers requiring employees to wear personal protective equipment should keep in mind accommodation obligations:
  - Disability: non-latex gloves; modified face masks for interpreters; gowns for employees in wheelchairs
  - Religious: modified equipment due to religious garb

# Direct Threat

- Under ADA regulations, employer can exclude individual from the workplace if individual is a “direct threat,” or disability poses a “significant risk of substantial harm” to his own health
- EEOC cautions that this is a “high standard”; cannot be based solely on CDC guidance saying underlying condition places him/her at increased risk
- Must consider:
  - Duration of risk
  - Nature and severity of potential harm
  - Likelihood of harm
  - Imminence of harm
- Must conclude that accommodation is undue hardship before excluding

# Managing Employees' Time Off Options





# Managing Employees' Time Off Options

- Many potential sources of employee time off
- Paid
  - Accrued PTO
  - Accrued paid sick leave
  - Families First Coronavirus Response Act
    - Paid sick leave
    - Paid FMLA leave
- Unpaid
  - Leave as an accommodation/medical leave
  - Personal leave
  - FMLA/CFRA
- Supplemental income from state
  - State disability or unemployment benefits
  - California Paid Family Leave

# Unlimited PTO Policies

- Consider updating unlimited PTO policies to address:
  - Interaction with COVID-19, i.e. employees refusing to return to work
  - *McPherson v. EF Intercultural Foundations, Inc.*, 47 Cal. App. 5<sup>th</sup> 243 (Apr. 1, 2020) requirements:
    - In writing;
    - Says PTO is not additional wages, but part of employer providing flexibility;
    - Spells out rights, obligations, and consequences of failure to schedule PTO;
    - Allows sufficient opportunity to take time off;
    - Administered fairly (no “use it or lose it” or inequities)

# Families First Coronavirus Response Act

- New federal paid leave
  - Applies to all employers with less than 500 employees
  - Ends December 31, 2020
  - Hardship exemption for businesses with less than 50 employees, subject to certain criteria
  - Refundable tax credits to cover cost (tax credits can be advanced to employers)
  - Provides Emergency Paid Sick Leave and Emergency Paid FMLA Leave for employees taking time off for reasons related to Coronavirus
  - Employer notice requirement- on the DOL website

# Families First Coronavirus Response Act

- Emergency Paid Sick Leave
  - 80 hours of paid sick leave at employee's regular rate (average over the past 6 months)
    - Includes overtime, but capped at 80 hours
  - Employee is unable to work or telework due to:
    - Quarantine or isolation order from doctor or government;
    - Experiencing COVID-19 symptoms and seeking a diagnosis;
    - Caring for someone who is subject to a quarantine or isolation order from doctor or government; or
    - Caring for a child whose school or place of care is closed.
  - Payment caps:
    - Caring for self: regular rate, up to \$511/day (\$5,110 aggregate)
    - Caring for other: 2/3 regular rate, up to \$200/day (\$2,000 aggregate)

# Families First Coronavirus Response Act

- Emergency Paid FMLA Leave (EFMLEA):
  - Employees who have worked for employer for 30 days are eligible
  - 12 weeks of job-protected FMLA leave to care for a child whose school or place of care is closed for COVID-19-related reasons
  - First two weeks unpaid (employee can use PTO/paid sick leave)
  - Remaining 10 weeks paid at 2/3 regular rate, up to \$200/day (\$12,000 aggregate)
  - Overtime is included in pay calculation

# Families First Coronavirus Response Act

- DOL Guidance:
  - Employers with less than 50 employees seeking hardship exemption should document internally why providing the childcare leave would jeopardize the viability of the business
  - Both types of leave may be taken intermittently if employer allows it (DOL encourages arrangements combining telework and intermittent leave)
  - Furloughed employees not entitled to paid leave
  - New federal paid leave is in addition to leave already provided by employer

# COVID-19-Related Disability Benefits

- Governor Newsom's Executive Order waived the usual one-week waiting period for people who are disabled as a result of COVID-19.
- The Employment Development Department is taking State Disability Insurance claims filed by employees who cannot work due to "having or being exposed" to COVID-19, if certified by a medical professional.
- Older workers who are in an age-defined vulnerable population and who obtain medical certification of their age-related condition as an "illness" may also be eligible for disability benefits.

# California Paid Family Leave

- Partial wage replacement benefits
- Employees who take time off work to care for a family member
- Child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or registered domestic partner
- (Or new child bonding)
- Benefits include up to six weeks of PFL with payment of approximately 60-70 percent of wages
- Up to a maximum of \$1,300 per week for up to 52 weeks
- Tax exempt



# California Paid Family Leave

- Does not provide job protection
  - Need to look to CFRA or FMLA
- Minimum employees = 50
- Employees MAY apply for PFL if caring for an ill or quarantined family member with COVID-19, if certified by a medical professional

# Paid Sick Leave Ordinances

- Los Angeles:
  - Employers with 500+ employees in LA, or 2,000+ employees nationwide must provide additional two weeks of paid sick leave to employees unable to work due to specified COVID-19 related reasons
  - May not require a doctor's note
- San Francisco:
  - Employers covered by SF Paid Sick Leave Ordinance must allow employees to use accrued paid sick leave for various COVID-19 related reasons
  - May not require a doctor's note during the duration of COVID-19 public health emergency

# Additional Employer Guidance

- [https://edd.ca.gov/about\\_edd/coronavirus-2019/pandemic-unemployment-assistance.htm](https://edd.ca.gov/about_edd/coronavirus-2019/pandemic-unemployment-assistance.htm)
- <https://www.dol.gov/coronavirus/unemployment-insurance>
- [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html)
- <https://legalaidatwork.org/factsheet/unemployment-insurance-faqs/>
- [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)

# Questions?



# Contact Information



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