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## California Legal Highlights CLE for ACC So Cal

Cybersecurity, Labor & Employment and Environmental Legal  
Developments

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# Cybersecurity & Privacy

The CCPA: Are You Litigation Ready?

# Everything You Need to Know But Were Afraid to Ask About the CCPA (in 20 minutes or less). . .

- What is the CCPA?
- Who does it apply to?
- What new rights does it create?
- Who can sue me?
- What should I do to be CCPA ready?
- Questions?



- What is the CCPA?
  - California Consumer Protection Act
  - First general privacy law, modeled on GDPR
  - Effective January 1, 2020
  - Not retroactive
- Who does it apply to?
  - For profit businesses that collect personal information from CA residents that:
    - \$25 million in gross annual revenue
    - Buys, sells or receives personal information of at least 50,000 CA consumers, households or devices for commercial purposes OR
    - Derives more than 50% of its annual revenue from the sale of personal information.

# What information is covered?

- Information that identifies, relates to, describes or is reasonably capable of being associated, directly or indirectly with a particular consumer of household.

BUT:

- CCPA does not restrict a business' ability to collect, use, retain, sell or disclose consumer information that is de-identified or aggregated.



# Key Concepts in the Draft Regulations

- Notice to consumers (content and form)
  - Notice at Collection
  - Notice of Right to Opt Out
  - Notice of Financial Incentives
  - Privacy Policy
- Intake of and responding to consumer requests
  - Timing requirements
  - Verification of consumers and authorized agents
- Special rules regarding minors
- Non-discrimination and data valuation
- Service providers
- Training and recordkeeping





# CCPA Private Right of Action

- CCPA gives consumers a private right of action when their “nonencrypted and nonredacted personal information” is “subject to an unauthorized access and exfiltration, theft, or disclosure as a result of the business’s violation of the duty to implement and maintain reasonable security procedures.”





# CCPA Private Right of Action (cont'd)

- Unlike most data breach and privacy laws
- No proof of actual harm
- Statutory damages allowed

CCPA and Private Right of Action

1. Calif



- Nonencrypted and nonredacted personal information
- Subject to an unauthorized access and exfiltration, theft or disclosure
- As a result of the business's violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect the personal information



- CIS 20 (California's 2016 Data Breach Report)
- NIST Cybersecurity Framework
- Ohio statutory safe harbor (listing NIST Cybersecurity Framework, NIST Special Publication 800-171, NIST Special Publications 800-53 and 800-53a, the Federal Risk and Authorization Management Program (FedRAMP) Security Assessment Framework, the Center for Internet Security Critical Security Controls for Effective Cyber Defense, the International Organization for Standardization/International Electrotechnical Commission 27000 Family—Information Security Management Systems)

- Greater of actual damages or statutory damages for each violation
- Statutory damages—not less than \$100 and not greater than \$750 per consumer per incident
- Injunctive or declaratory relief and “[a]ny other relief the court deems proper”



- Nature and seriousness of the misconduct
- Number of violations
- Persistence of the misconduct
- Length of time over which the misconduct occurred
- Willfulness of the defendant's misconduct
- Defendant's assets, liabilities and net worth
- Other "relevant circumstances presented by any of the parties"

# Preventing or Otherwise Limiting Class Action Exposure

- Arbitration agreements with class action waivers
- Section 1798.192 of the CCPA: “Any provision of a contract or agreement of any kind that purports to waive or limit in any way a consumer’s rights under this title, including, but not limited to, any right to a remedy or means of enforcement, shall be deemed contrary to public policy and shall be void and unenforceable.”

# Defensible Arbitration Agreements

- Include class action waivers
- Prepare for arguments claiming a lack of mutual assent and unconscionability





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## **Labor & Employment**

### **Covid-19-related Challenges For Employers**

- **Remember that usual EEO Rules apply**
- **Be careful not to make decisions based on protected status**
  - Cannot exclude certain more vulnerable classes (*e.g.*, disabled, older, or pregnant workers)
  - Beware of *regarded as* discrimination
- **Be mindful of potential adverse impact**
  - According to EEOC, women, especially women of color, are more likely primary caregivers; be sensitive to impact while access to daycares, camps, schools, and nursing homes are limited
  - Risk of relying on experience as rehiring criteria
- **No retaliation against those diagnosed with COVID-19**
  - <https://www.dir.ca.gov/dlse/COVID19resources/FAQs.html>
- **Watch out for pay disparities**



- **Federal and California law require employers to accommodate employees with a disability absent an undue hardship or direct threat to health and safety**
    - EEOC says it is unclear whether COVID-19 is a disability. Long COVID?
    - DFEH says it is if “it results in inpatient care or continuing treatment or supervision by a health care provider.” Also if it leads to conditions such as pneumonia.
  - **Employee is not entitled to ADA accommodation just because at high risk from contracting COVID-19**
    - But an employee whose disability puts them at higher risk as a result of COVID-19 may be
  - **Engage in the interactive process**
    - If an employee requests a COVID-related accommodation, employers can require medical documentation
    - If documentation is difficult to obtain, may provide accommodations on an interim or trial basis
    - Account for changes in workplace (job restructuring, position transfer, modified work schedule, extra PPE, etc.)
    - Business circumstances caused by pandemic relevant in determining if accommodation is “undue hardship”
- <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
  - [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)



## What if Employees Don't Return To Work When Recalled?

- Employees who refuse to return based on generalized fear
- Vulnerable individuals at higher risk from COVID-19
- Employees with childcare or eldercare responsibilities
- Employees with medical conditions
- Employees who prefer to remain on unemployment
- Employees who refuse to return due to a mask objection



- [CDC Guidance](#), enforced through OSHA General Duty Clause
- [Executive Order](#) for Federal Contractors
- Pending Federal [Emergency Temporary Standard](#) (“ETS”)
- [Industry-Specific Guidance](#)
  - Food services, manufacturing/industrial, transportation/delivery
- [State Plan Initiatives](#)
  - E.g., California ETS
- [State and Local Orders](#)



# Cal/OSHA's Emergency Temporary Standard (ETS)

- What procedures are employers required to implement to prepare for a COVID-19 workplace exposure?
- Which employees must be excluded from the workplace after a COVID-19 workplace exposure?
- What are the requirements for notifying employees?
- What are the employers' testing, investigation, correction requirements?
- What are the employers' reporting and recordkeeping requirements?

<https://www.dir.ca.gov/dosh/coronavirus/ETS.html>

<https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html>



# California ETS Revisions (6/17/21)

- Asymptomatic fully vaccinated employees without symptoms do not need to be tested or quarantined after close contacts.
- No face covering requirements outdoors (except during outbreaks), regardless of vaccination status; workers must be trained on CDPH recommendations for outdoor use of face coverings.
- Employers may allow fully vaccinated employees not to wear face coverings indoors, but must document their vaccination status. There are some settings where CDPH requires face coverings regardless of vaccination status. In outbreaks, all employees must wear face coverings indoors and outdoors when six-foot physical distancing cannot be maintained, regardless of vaccination status.
- Employers must provide unvaccinated employees with approved respirators for voluntary use when working indoors or in a vehicle with others, upon request.
- No physical distancing or barrier requirements regardless of employee vaccination status with the following exceptions:
  - Employers must evaluate whether it is necessary to implement physical distancing and barriers during an outbreak (3 or more cases in an exposed group of employees)
  - Employers must implement physical distancing and barriers during a major outbreak (20 or more cases in an exposed group of employees)
- Employers must evaluate ventilation systems to maximize outdoor air and increase filtrations efficiency, and evaluate the use of additional air cleaning systems
- **BEWARE: City or County Ordinances May Be More Restrictive**



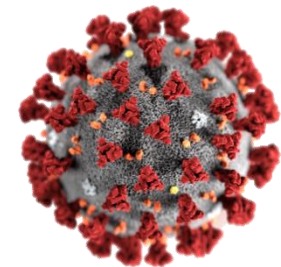
Should You Mandate That Employees Get The COVID-19 Vaccine?

Do you have a choice?



## Q: Can employers require vaccination?

- A: Generally, yes...
  - *Bridges v. Houston Methodist Hospital* – Federal judge rules mandates are lawful
  - EEOC Has Issued Guidance On Mandatory Vaccination Programs:  
<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- But consider potential exceptions
  - Americans with Disabilities Act reasonable accommodations
  - Title VII Sincerely Held Religious Belief accommodations
  - State laws restricting vaccine mandates (Montana, Texas)
- And need to accommodate vaccine symptoms
  - If vaccination is required term of employment, don't punish employees for missing work with vaccination symptoms
- Strong employee vaccination rates can be beneficial for employers
  - Reduces potential OSHA liability
  - Increases potential for business continuity



## ADA: Disability Accommodations

- Employee's responsibility to request accommodation
- Employer must engage employee and review any documentation to consider need for accommodation and reasonableness of it
- Potential accommodations: Modified work area or remote work, additional personal protective equipment (i.e. N95 mask\*), Other controls (physical barriers, no meeting attendance, etc.)
- Pregnancy?
  - If employee has hesitancy based on pregnancy, consider accommodations

## Title VII: Religious Accommodations

- Ordinarily, should not question sincerity of employee's religious belief unless objective evidence supports doing so
- Consider potential undue hardship (lower standard than ADA)
  - "more than minimal" cost or burden to employer
- State laws (CA, others) have different standards



# Executive Order Re: Vaccination – Government Contractors

- September 24, 2021, the Safer Federal Workforce Task Force issued written Guidance to implement Executive Order 14042 (“Ensuring Adequate COVID Safety Protocols for Federal Contractors”)

<https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc20210922.pdf>

- **Executive Order Applies To:**

- New contracts awarded on or after November 14, 2021
- Existing contracts when an extension is made or an option is exercised



- **Obligations under the Executive Order:**

- Ensure that all employees are fully vaccinated no later than December 8, 2021 (except those entitled to accommodation)
- Review documentation from each covered employee to prove vaccination status
- Assess Requests for Accommodation for Medical and/or Religious Reasons
- Ensure that ALL individuals – employees and visitors – comply with published CDC guidance for masking and physical distancing at covered workplaces

- OSHA to release Emergency Temporary Standards requiring all private sector employers with 100 or more employees to ensure their workforce is fully vaccinated **OR** require weekly negative test results for those who are unvaccinated
  - ❖ Details to follow.....
- Healthcare and federal employees must be vaccinated; no testing option
- NOTE: California school employees subject to state vaccination requirement (certain exemptions available)





- What will you do if an employee refuses?
- How will you handle requests for accommodation?
- Will you allow a testing opt-out? Who will pay for the testing?
- Will your leaders lead by example and get the vaccine?
- Are there workers' compensation and tort risks?
- What if an employee raises an OSHA complaint?
- How will mandating the vaccine impact employee morale?

## Q: Can employers provide incentives to employees to encourage vaccination?

- A: Yes, as long as they're not coercive.
  - Can provide reasonable incentives (gift cards, small bonuses, extra paid time off, etc.)
  - Larger incentives safer if employer is not administering vaccines itself
    - If employer administers, requires pre-vaccine medical disclosures, so can't coerce employees into providing that medical info
- Recent guidance on wellness plan rules: <https://aboutbtax.com/ZU1>
- Examples of Vaccine Incentives
  - 2 days of PTO for each shot
  - \$100 one-time payment
  - \$80 bonus, \$100 for vaccinated new hires

Some states, localities require paid vaccine leave

- E.g., New York, California





## Required in California

- Cannot be confident unvaccinated wearing masks/socially distancing if do not know who is vaccinated.
- Greater knowledge of vaccination status allows employer to manage compliance with state law/CDC guidance and better understand how to keep employees safe in compliance with OSHA GDC.

## Employee affirmations or copies of vaccination cards

- Under EO, government contractors must verify vaccination status
- Other employers, affirmations or declarations may be preferred, as not considered OSHA medical records.
- If collecting vaccine cards or other medical records, maintain confidentially/separate from employee's personnel file.
- Vaccination status – “need to know” confidentiality

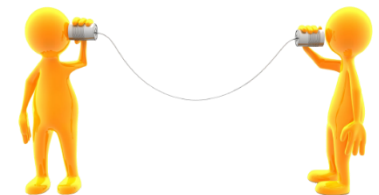


# Pandemic-Related Class Actions Primed for 2022

- **FLSA claims related to remote work**
  - Off-the-clock claims (e.g., Closing/opening procedures such as setting store alarms, bag checks)
  - BYOD/expense reimbursements
  - CA meal and rest breaks—increased difficulty with COVID/break room procedures
- **Failure to accommodate claims (masks, vaccines, work from home)**
- **WARN Act claims related to furloughs or site closings**
- **Disparate impact discrimination claims related to layoffs/furloughs**
  - Early studies show that older workers are not returning to the workplace at pre-pandemic levels
  - Focus on retaining experience can reduce diversity
- **Failure to provide leave under state and federal laws**
- **Failure to provide safe workplaces**
  - Breach of duty theories of liability
  - Conditions of employment (e.g., COVID-19 exposure, OSHA violations)
- **Retaliation Claims**



- Transparency. Employees want to feel that they know where their company stands and that they know what to expect.
- Show humanity. We are all busy with this new remote life, kids virtually learning, trying to collaborate through Zoom, etc. Make messages concise, direct, and easy to understand.
- Give Facts. When it comes to crisis response, information is key to customers, suppliers, employees, and other important stakeholders. People want facts. They want the truth. And they want it now.



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# Environmental Regulatory Developments

Proposition 65 and Environmental Regulations for Manufacturers  
and Distributors – Food, Marijuana, and Food Packaging

# Proposition 65 (The Safe Drinking Water and Toxic Enforcement Act of 1986) – New Safe Harbor Warnings

## Overview

- Businesses must provide a **clear and reasonable warning** before they **knowingly and intentionally** cause an **exposure** to a **chemical listed as known to the state to cause cancer or reproductive toxicity**.
- Safe-harbor warnings are deemed “clear and reasonable.”

## Developments

- *New Short-Form Safe-Harbor Warnings*
  - Currently (per OEHHA):
    - Businesses are not required to identify a chemical or chemicals in the short-form warning, which limits the usefulness of the warnings to consumers.
    - Businesses use the short-form warning for products that can easily accommodate a longer warning.
    - Businesses use the short-form warning prophylactically when no warning is required.




# Proposition 65 (The Safe Drinking Water and Toxic Enforcement Act of 1986) – New Safe Harbor Warnings

- So... OEHHA proposes a little less short safe-harbor short-form warnings.

- Current:

 **WARNING:** Cancer - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

- Proposed:

 **WARNING:** Cancer Risk From Formaldehyde Exposure  
[www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

- Only available where no space for longer warning.
- Comment period ended 29 March 2021.



## PROPOSITION 65

# Proposition 65 (The Safe Drinking Water and Toxic Enforcement Act of 1986) – New Safe Harbor Warnings

## Developments

- *Cannabis Warnings – Cannabis smoke and delta-9-tetrahydrocannabinol (delta-9-THC).*
  - Cannabis-specific safe-harbor warnings.
  - Provide more certainty than generic warning.
  - Proposed Warnings:



Cannabis Smoke:

**⚠ WARNING:** Smoking cannabis increases your cancer risk and during pregnancy exposes your child to delta-9-THC and other chemicals that can affect your child's birthweight, behavior and learning ability. For more information go to [www.P65Warnings.ca.gov/cannabis](http://www.P65Warnings.ca.gov/cannabis).

Delta-9-THC (ingestion):

**⚠ WARNING:** Consuming this product during pregnancy exposes your child to delta-9-THC, which can affect your child's behavior and learning ability. For more information go to [www.P65Warnings.ca.gov/cannabis](http://www.P65Warnings.ca.gov/cannabis)



# Proposition 65 (The Safe Drinking Water and Toxic Enforcement Act of 1986) – New Safe Harbor Warnings

## Proposed Cannabis Warnings (cont.)

Delta-9-THC (vaping/dabbing):

**⚠ WARNING:** Vaping or dabbing this product during pregnancy exposes your child to delta-9-THC, which can affect your child's behavior and learning ability. For more information go to [www.P65Warnings.ca.gov/cannabis](http://www.P65Warnings.ca.gov/cannabis).

Delta-9-THC (dermal application):

**⚠ WARNING:** Using this product during pregnancy exposes your child to delta-9-THC, which can affect your child's behavior and learning ability. For more information go to [www.P65Warnings.ca.gov/cannabis](http://www.P65Warnings.ca.gov/cannabis).

- No short-form warnings.
- Comment period ended 8 October 2021.

## Compliance

- Short-form and cannabis warnings.
  - One year delayed effective date to allow businesses to transition to the new warnings.
  - Sell-through period for products manufactured prior to the effective date of the regulation that were labeled using the current safe harbor warnings.

## Goals

- Reduce organic waste disposal 50% by 2020 and 75% by 2025.
- Rescue for people to eat at least 20% of currently disposed surplus food by 2025.

## Regulations (Operative 1 January 2022)



- Commercial Edible Food Generators must “arrange to recover the **maximum amount of edible food that would otherwise be disposed.**” Commercial Edible Food Generators include:
  - Supermarkets.
  - Grocery stores with a total facility size equal to or greater than 10,000 square feet.
  - Food service providers.
  - Food distributors.
  - Wholesale food vendors.

## Regulations (cont.)

- A commercial edible food generator must comply with the above requirements through **contracts or written agreements** with food recovery organizations or services.
- A large venue or large event operator that does not provide food services, but allows for food to be provided, must require food facilities operating at the large venue or large event to comply with the above food recovery requirements.
- A commercial edible food generator must comply with the above requirements unless the commercial edible food generator demonstrates the existence of **extraordinary circumstances beyond its control** that make such compliance impracticable. Extraordinary circumstances include:
  - A failure by the jurisdiction to increase required edible food recovery capacity.
  - Acts of God such as earthquakes, wildfires, flooding, and other emergencies or natural disasters.

# S.B. 1383 (Short-Lived Climate Pollutant Strategy: Methane Emissions Reduction Targets) – New Food Waste Reduction Requirements

## Regulations (cont.)

- An edible food generator **must not intentionally spoil edible food** that is capable of being recovered by a food recovery organization or service.
- Commercial edible food generators must keep the following records:
  - A list of each food recovery service or organization that collects or receives its edible food pursuant to a contract or written agreement.
  - A copy of contracts or written agreements between the commercial edible food generator and a food recovery service or organization.
  - A record of the following for each food recovery organization or service with whom the commercial edible food generator has a contract or written agreement:
    - The name, address and contact information of the service or organization.
    - The types of food that will be collected by or self-hauled to the service or organization.



## Regulations (cont.)

- The established frequency that food will be collected or self-hauled.
- The quantity of food collected or self-hauled to a service or organization for food recovery. The quantity shall be measured in pounds recovered per month.

- Compliance



- “Jurisdictions” are responsible for implementing S.B. 1383 regulations and must coordinate city and county planners, waste haulers, waste processing facilities, recyclers, commercial businesses, residents, and edible food recovery organizations.
  - “Jurisdiction” means a city, county, a city and county, or a special district that provides solid waste collection services.
- Edible food generator inspections can be combined with existing health inspections.
- Jurisdictions to begin enforcing in 2024; CalRecycle may begin enforcing in 2022.

# Safer Consumer Products Program – Potential Regulation of Food Packaging Containing PFAS

## Process

- The California Department of Toxic Substance Control (DTSC), under the Safer Consumer Products (SCP) Program, has issued its 2021-2023 Priority Product Work Plan. The Work Plan identifies categories of consumer products DTSC will evaluate during a 3-year period, and from these categories DTSC will identify **Priority Products** containing one or more Chemicals of Concern.
- DTSC will then conduct rulemaking to add products to its Priority Products list.
- After a product is listed, manufacturers must evaluate the Chemicals of Concern in the product and determine if there is a safer alternative (the “**Alternatives Analysis**”).

## Food Packaging

- Food packaging is a product category in the 2021-23 Work Plan (as it was in the 2018-20 Work Plan).
- DTSC has proposed to list **plant fiber-based food packaging products containing perfluoroalkyl or polyfluoroalkyl substances (PFASs) as Priority Products.**
- Plant fiber-based food packaging products commonly found in restaurants, grocery stores, and homes are often treated with PFASs for grease, oil, or water resistance. These products can expose humans and biota to PFASs during their manufacturing, use, and end-of-life.
- Public comment on DTSC’s proposal was accepted until September 2020.

## Status / Next Steps

- DTSC has not yet commenced formal rulemaking to adopt Food Packaging containing PFASs as a Priority Product.
- If adopted through formal rulemaking, manufacturers will be required to conduct the Alternatives Analysis.
- DTSC’s **regulatory response** may range from **no regulation** to a **product sales prohibition**.

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