

Labor & Employment Year-in-Review:

Companies' Responses to COVID and Other California Laws

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Presented by



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Today's Presenters



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Topics

1. Limitations on Agreements
2. COVID-19 Rules and Regulations
3. Cal/OSHA ETS
4. Agency and Court Updates
5. New Laws in 2022

Cal/OSHA ETS and Interplay with CDPH Isolation & Quarantine Guidelines

Limitations on Agreements



Prohibitions on Arbitration [AB 51]

- Went into effect in California on **January 1, 2020**.
- Reversed case law that allowed employers to unilaterally impose pre-dispute arbitration agreements on employees as a condition of hire or continued employment.
- Prohibits employers:
 - From requiring applicants or employees “as a condition of employment, continued employment, or the receipt of any employment-related benefit” to waive any right, forum or procedure for a violation of any provision under the Fair Employment and Housing Act or the California Labor Code, “including the right to file and pursue a civil action or complaint with ... any court.”
 - From “threatening, retaliating or discriminating against employees who refuse to enter into such mandatory arbitration agreements.”
 - Prohibits arbitration agreements that are not entered into voluntarily – no coercion.

Current Status of AB 51

- ***Chamber of Commerce of the United States, et al. v. Becerra, et al.*, No. 2:19-cv-2456 (E.D. Cal. 2019):** On 1/31/2020, the U.S. District Court for the Eastern District Court of California issued a preliminary injunction enjoining the state from enforcing AB 51 agreements covered by the FAA.
 - The state of California appealed the decision to the Ninth Circuit.
- ***Chamber of Commerce v. Bonta*, No. 20-15291 (9/15/2021):** The Ninth Circuit in a 2-1 decision reversed in part the District Court's decision and held that the FAA does not fully preempt AB 51.
 - Concluded that because AB 51 was focused on the conduct of the employer **prior to** entering into an arbitration agreement, the statute did not conflict with the FAA.
 - AB 51 does **not** void any arbitration agreements previously entered into under the FAA, and does **not** prohibit employers from offering arbitration on a voluntary basis.
 - AB 51 does **not** void or render unenforceable an arbitration agreement signed by any person going forward under the FAA, even if the agreement had been required as a condition of employment.

Limits on Non-Disclosure Agreements [SB 331]

- FEHA makes it unlawful for an employer to require an employee to sign a non-disparagement agreement or other document that purports to deny the employee the right to disclose information about “unlawful acts in the workplace,” including, but not limited to, *sexual harassment* or discrimination.
- Effective January 1, 2022, the term “unlawful acts” is expanded to include not only sexual harassment, but *any harassment or discrimination* in the workplace.
- If an employer requires employees to sign a non-disclosure agreement during employment, the agreement must contain the following language:
 - **“Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful.”**
- SB 331 also expands existing law by (i) making it unlawful for an employer to include *in any separation/severance agreement* a provision that prohibits the disclosure of information about unlawful acts in the workplace, and (ii) requiring employers to provide employees with a reasonable time period of not less than five business days to consider the agreement and to consult with an attorney.



COVID-19 Rules and Regulations

California Department of Public Health Mask Mandate (12/15/2021)

- On Monday, December 13, the California Department of Public Health (CDPH) announced a new statewide mask mandate, effective December 15, 2021 through January 15, 2022.
- On January 5, 2022, the CDPH extended the mask mandate through February 15, 2022.
- Described as “guidance” but mandates masks in “indoor public spaces” by all individuals, regardless of vaccination status.
 - Applies to all workplaces in covered jurisdictions, regardless of whether they serve the public, or are open to the public (except vaccinated individuals attending indoor religious worship services).
 - Only applies to those local health jurisdictions that do not already have an existing indoor masking requirement in public settings that applies irrespective of individuals' vaccine status.
 - SF Public Health Department’s exemption for fully vaccinated cohorts no longer applies.
 - <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Face-Coverings-QA.aspx>

CDPH

- January 5, 2022 updated guidance: **EVERYONE** is required to wear a mask, unless an exemption applies:
 - Indoor public spaces (until February 15, 2022)
 - Workplaces (until February 15, 2022)
 - Public transit
 - Healthcare settings (including long term care facilities)
 - Adult and senior care facilities
 - Indoors in K-12 schools, childcare, and other youth settings
 - State and local correctional facilities and detention centers
 - Homeless shelters, emergency shelters, and cooling centers
- Exemptions exist for children under two; people with medical or mental health conditions or disabilities that preclude wearing a mask; people for whom seeing the mouth is essential for communication; and people for whom wearing a mask would create a risk as they work as determined by local, state or federal regulators or workplace safety guidelines.

Workplace Requirements

- **Masks are required indoors, regardless of vaccination status.**
- **Masks are not required outdoors** (except during outbreaks), regardless of vaccination status. Workers should be trained for outdoor use of face coverings.
- **Employers must provide unvaccinated employees with NIOSH-certified respirator masks** for voluntary use when:
 - Working indoors, or
 - In a vehicle with others.
- **Unvaccinated workers must wear masks in state offices.**
- This mask requirement **applies to all workplaces**, regardless of whether or not they serve the public, or are open to the public.
- In effect until at least **February 15, 2022** – date may change depending on current COVID surge.

Type of Mask

- **CDPH:** Surgical masks or higher-level respirators (e.g., N95s, KN95s, KF94s) are **recommended, not required.**
- **Los Angeles County Department of Public Health:** January 5, 2021 Order:
 - Requires all employers to provide face masks to all employees “who work indoors and in close contact with other workers or the public.”
 - Requires all employers to provide employees “with and require them to wear a well-fitting medical grade mask, surgical mask, or higher-level respirator, such as an N95 filtering face piece respirator or KN95, at all times while indoors at the worksite or facility.” Cloth masks no longer acceptable.
 - Employers must provide these masks to employees “as soon as possible, but no later than **January 17, 2022.**”
 - **Fact Sheet:**
<http://publichealth.lacounty.gov/media/Coronavirus/docs/business/UpgradeMaskRequirement.pdf>

A conceptual image showing a hand holding a white puzzle piece on the left and a hand drawing a white arrow on a dark grey chalkboard on the right. The chalkboard is covered with several white puzzle pieces, some of which are arranged to form a path leading towards the arrow. An orange rectangular box with a white border is overlaid on the center of the image, containing the text 'Cal/OSHA ETS'.

Cal/OSHA ETS

CDPH Current Guidance – January 6, 2022

- Aligns with CDC *isolation* and *quarantine* guidelines issued on December 27, 2021.
 - Guiding principle: The majority of COVID-19 transmission occurs within the first few days after contracting the virus.
- **Isolation:** separates those infected with a contagious disease from people who are not infected (i.e., isolation rules apply after someone is deemed COVID-19 positive by test or a diagnosis)
- **Quarantine:** restricts the movement of persons who were exposed to a contagious disease in case they become infected (i.e., quarantine rules apply after close contact with a COVID-19 positive individual)
- **Booster Eligible (adopts CDC definition):**
 - 5 months after receiving second dose of Pfizer-BioNTech or Moderna vaccines
 - 2 months after receiving J&J/Janssen vaccine
 - 12 years and older: Pfizer-BioNtech booster
 - 18 years and older: Moderna and J&J/Janssen boosters.
- **Workplace Settings:** Employers are subject to additional requirements under the Cal/OSHA ETS
 - But periods of exclusion from the workplace will now be established by CDPH or local health departments
 - (more on this later)

CAL/OSHA Emergency Temporary Standard

- **November 2020:** Cal/OSHA Emergency Temporary Standard (ETS) adopted:
 - Physical distancing requirements; face coverings required for all employees; **exclusion pay** for work-related quarantine or isolation.
- **June 17, 2021:** Cal/OSHA ETS updated and the new standards became effective that day via Executive Order N-09-21. ETS later updated September 21, 2021 to align with CDPH Isolation and Quarantine Guidelines.
 - Required employers to document vaccination status, but did not mandate vaccination or regular testing
 - Distinguished between fully vaccinated and unvaccinated employees in terms of masking and quarantine requirements after close contact. Required unvaccinated employees to wear face coverings indoors and in vehicles when others are present
 - Required testing of unvaccinated employees after work-related close contact
- **December 16, 2021:** Cal/OSHA approved a re-adoption and revision of the ETS for COVID-19 Prevention effective January 14-April 14, 2022: <https://www.dir.ca.gov/dosh/doshreg/covid-19-emergency-standards/Proposed-second-readoption.pdf>

CAL/OSHA Revised ETS

- Effective **January 14, 2022 through April 14, 2022**
- **Revised Definitions:**
 - Face Coverings: must be well-fitting, includes face coverings made of tightly woven fabrics or non-woven material of at least two layers.
 - After the CDPH mask mandate expires, the revised ETS, like the prior ETS, will require only those employees who are not fully vaccinated to wear a mask while indoors or in vehicles with others unless those fully vaccinated employees have had close contact and remain in the workplace under the quarantine options (more below).
 - COVID-19 Test: includes specific instructions for workers taking home tests; the employer or telehealth professional must observe the use of the test. Antigen and PCR Tests acceptable.
- **Requires employers to provide vaccinated employees with testing after work-related close contact**
- **No change to isolation requirements for employees who test positive for COVID-19, but would have revised the quarantine requirements for fully vaccinated and unvaccinated employees after close contact and those who recently had COVID-19 [but now, the ETS will require the CDPH isolation and quarantine guidelines, unless local orders require a longer time].**

Interplay Between the Cal/OSHA ETS and the CDPH Guidelines

Q: How do the January 6, 2022 changes to CDPH's recommended isolation and quarantine periods affect the ETS?

A: In December of 2020, the Governor issued [Executive Order N-84-20](#), which states that the recommended isolation and quarantine periods in the ETS (also called "exclusion periods" in the ETS) will be overridden by any applicable isolation or quarantine recommendation by the CDPH or, if applicable, the local health department with jurisdiction over the workplace, if the periods in the ETS are longer than those recommended by the CDPH or local health department. If the CDPH and local health department isolation and quarantine recommendations differ, the required exclusion period under the ETS is the longer of the two. This means that, with only one exception noted below, the [new isolation and quarantine recommendations from CDPH](#) replace the exclusion periods and return to work criteria in...the ETS...when the second re-adoption of the ETS takes effect on January 14, 2022.

Link to most current FAQ for the Revised ETS:

https://www.dir.ca.gov/dosh/coronavirus/ETS-FAQ2_01.24.2022-AF.pdf

Isolation/Quarantine Rules at Work

1. Exclusion Requirements For Employees Who Test Positive for COVID-19

-Applies to ALL employees, regardless of vaccination status, previous infection, or lack of symptoms

-Exclude from workplace for at least 5 days

-Return to work (RTW) after day 5 if symptoms are gone or resolving (except fever must be completely gone), AND a diagnostic specimen collected on or after day 5 is negative

-Wear face coverings around others for 10 days after the first positive test.

-If worker cannot test or declines to test**, they can return to work after 10 days from their first positive test specimen collection.

****Employers may require a test**

2. Employees with Close Contact to a COVID-19 Case

-Unvaccinated; OR

-Vaccinated and Booster Eligible but Haven't Yet Received Booster [**BUT, see next page**]

-Exclude for at least 5 days; test on Day 5 or later

-RTW after Day 5 if no symptoms AND negative test on or after Day 5; wear mask for 10 days after close contact

-If unable/unwilling to test and asymptomatic, end quarantine and RTW after day 10. If symptoms develop after RTW, exclude pending test result

Quarantine After Close Contact

Subject to local orders*, Fully Vaccinated Employees Who Are Booster Eligible but Not Yet Boosted:

- At least 5 months after completing primary vaccination series of Pfizer or Moderna
- At least 2 months after completing J&J vaccine

***Some local health quarantine orders do not contain this exception for fully vaccinated, but not yet boosted, employees.**

Employers are not required to exclude asymptomatic, fully vaccinated, booster eligible but not yet boosted employees, if:

- a negative diagnostic test is obtained 3-5 days after exposure to COVID-19
- Employee wears a face covering around others for 10 days after exposure date

3. No Quarantine Required IF

- Boosted; OR
- Vaccinated but not booster eligible [i.e., employee was fully vaccinated with Pfizer or Moderna within the last 5 months, or with the J & J vaccine within the past 2 months]

- Test on Day 5 with negative result
 - Wear face coverings around others for 10 days after exposure date
 - If employees develop symptoms, must be excluded pending results of a test
- If employees test positive, follow isolation guidelines

Revised ETS: Exclusion Pay

Q: If an employee is excluded from work because of workplace exposure under the ETS, is the employee eligible for exclusion pay?

A: Yes. An employee who was excluded from work because of a workplace COVID-19 exposure should receive exclusion pay if: 1) the employee was not assigned to telework during that time; and 2) the employee did not receive Disability Payments or Workers' Compensation Temporary Disability Payments during the exclusion period.

Q: The ETS states that an employer is not required to provide exclusion pay if the employer can demonstrate that an employee's "close contact" was not work related. What does that mean?

A: The ETS does not require employers to pay workers who are excluded from work if the employer can show that the employee's COVID-19 exposure was not work related. In such circumstances, employers may have other legal or contractual payment obligations, but pay and benefits are not mandated by section 3205.

Q: How long does an employee with COVID-19 exposure, or who tests positive for COVID-19 from the workplace, receive pay while excluded from the workplace?

A: An employee would typically receive pay for the period the employee is excluded, which could be 10 or more days. If an employee is out of work for more than a standard exclusion period based on a single exposure or positive test, but still does not meet the regulation's requirements to return to work, the employee may be entitled to other benefits, such as Temporary Disability, Disability, or Supplemental Paid Sick Leave.

COVID-19 Supplemental Paid Sick Leave (SPSL) Reboot?

- **SB 95:** State requirement to provide COVID-19 SPSL expired on September 30, 2021.
 - Required employers with 26 or more employees to provide up to 80 hours of COVID-19 supplemental paid sick leave for COVID-related reasons relating to the employee or employee's family member or for vaccine-related reasons and required SPSL balances to be reflected on itemized wage statements or in another written notice.
 - Continuing SPSL ordinances in several localities for covered employers and employees (e.g., Los Angeles City, Los Angeles County (unincorporated areas), Oakland, San Mateo (county employees only))
- **1/25/22: Governor Newsom announced an agreement with state lawmakers to require employers with 26 or more employees to provide COVID-19 SPSL**
 - Will be retroactive to January 1, 2022, effective through September 30, 2022
 - Up to 40 hours of flexible paid leave to full-time workers who are sick or caring for an ill family member, or for a parent with a child who cannot attend school due to COVID-19 illness or exposure
 - Upon proof that the employee or a family member tested positive for COVID-19, an additional 40 hours of paid time off . Part-time employees would be eligible for SPSL equal to the number of hours they typically work in a week or twice that amount with a positive test.

Status of Federal Vaccine Mandates

- **November 4, 2021:** OSHA published its Emergency Temporary Standard (ETS) requiring employers with 100 or more employees to implement a mandatory vaccination policy, or to develop a “soft” policy allowing employees to choose between vaccination, or at least weekly testing for COVID-19.
 - Required employees to be vaccinated by January 4, 2022; everything else by December 5, 2021.
 - Stay imposed by 5th Circuit on November 12. Stay lifted by Sixth Circuit on Dec. 17th. The Supreme Court stayed the ETS on January 13, 2022, holding that OSHA did not have the authority to issue such a broad ETS.
 - On January 25, 2022, OSHA announced its withdrawal of the ETS.
- **November 4, 2021:** Centers for Medicare and Medicaid (CMS) issued a mandate for staff in health care settings that receive Medicare and Medicaid reimbursements to be fully vaccinated by January 4, 2022 and to receive their first shot before December 6, 2021. Stay imposed nationwide, but then lifted in states not challenging the CMS Mandate. On January 13, 2022, the Supreme Court upheld enforcement of the CMS Mandate so it remains in effect today.

Who Pays for Mandated Testing or Vaccines?

Vaccines or Tests: If Mandated by Employer

- **California:** If an employer requires an employee to obtain a COVID-19 test or a vaccination or a booster, or if the employee obtains the test or vaccination/booster as a direct consequence of the employee's discharge of the employee's duties (i.e., the test or vaccination/booster effectively is required for a job), the employer must pay for the costs of the test or vaccination under California Labor Code Section 2802 as it is a reimbursement of a necessary business expense and must compensate employees for the time it takes for the testing or vaccination, including travel time, because such time would be considered "hours worked" under the employer's control.
 - What if regular testing is offered only as an alternative to employees who won't get vaccinated?
- **FLSA:** New Fact Sheet #84 from the Department of Labor: Compensability of Time Spent Undergoing COVID-19 Health Screenings, Testing and Vaccinations:
 - If Employer requires employee to obtain a COVID-19 vaccine dose, test, or engage in a COVID-19 screening/temperature check during employee's normal work hours, the time is compensable.
 - Employers must pay employees who report to a workplace where other individuals are present and who do not work exclusively outdoors for time spent going to, waiting for, and obtaining a **mandatory** COVID-19 vaccine dose because it is necessary that employees be able to perform their jobs safely and effectively during the pandemic.
 - Where an employer has a mandatory COVID-19 vaccination policy, but an employee is unable to receive COVID-19 vaccination (e.g., where a disability or sincerely held religious belief, practice, or observance precludes the employee from being vaccinated) and the employee is entitled to a reasonable accommodation under federal civil rights laws, the time spent undergoing regular employer-required COVID-19 testing outside of normal working hours is "integral and indispensable" to the employee's work and therefore compensable.
 - Where an employee is able to receive the COVID-19 under an employer's "soft" policy, but where the employee has voluntarily declined to be vaccinated, the employer is not required to pay the employee for time spent undergoing regular COVID-19 testing.



Agency and Court Updates

EEOC and DFEH Covid-19 Guidance

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

L.2. Does an employer have to accept an employee's assertion of a religious objection to a COVID-19 vaccination at face value? May the employer ask for additional information? (10/25/21)

Generally, under Title VII, an employer should assume that a request for religious accommodation is based on sincerely held religious beliefs. However, if an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, the employer would be justified in making a limited factual inquiry and seeking additional supporting information.

N.2. When is COVID-19 an actual disability under the ADA? (12/14/21)

Applying the ADA rules stated in and depending on the specific facts involved in an individual employee's condition, a person with COVID-19 has an actual disability if the person's medical condition or any of its symptoms is a "physical or mental" impairment that "substantially limits one or more major life activities." An individualized assessment is necessary to determine whether the effects of a person's COVID-19 substantially limit a major life activity...A person infected with the virus causing COVID-19 who is asymptomatic or a person whose COVID-19 results in mild symptoms similar to those of the common cold or flu that resolve in a matter of weeks—with no other consequences—will not have an actual disability within the meaning of the ADA.

https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2021/10/DFEH-Unruh-Information-on-COVID-19-FAQ_ENG.pdf

Rescission of Joint-Employer Rule

- On July 29, 2021, the US Department of Labor (DOL) filed a final rule rescinding a final rule issued under the Trump administration that narrowed the definition of a joint employer under the Fair Labor Standards Act (FLSA).
- Under the rescinded rule, the DOL would consider the following when determining if a company is a joint employer:
 - Whether a business hires and fires employees;
 - Whether a business supervises and controls employees' work schedules or conditions of employment to a substantial degree;
 - Whether a business determines employees' rate and method of payment;
 - Whether a business maintains employment records.
- The rescission took effect on October 5, 2021. The DOL reverted back to using the **economic realities test** to determine joint employment status, which examines whether the worker is economically dependent on the potential joint employer by looking at the totality of the circumstances.

Other Meal and Rest Period Cases

- ***Naranjo v. Spectrum Security Services, Inc.*, 40 Cal.App.5th 444 (2019)** - Court of Appeal decision holding that violations of the meal break provisions do not entitle employees to pursue derivative claims for improper wage statements and waiting time penalties. Currently under review by the Cal. Supreme Court.
- ***Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal.5th 858 (2021)** - California Supreme Court held that premium pay for noncompliant meal, rest and recover periods must be compensated at the employee's regular rate of pay, which must take into account the base hourly pay and all other forms of non-discretionary compensation earned during the same pay period. Overtime and sick pay must be calculated in the same matter.
 - The ruling is retroactive (i.e., employers face potential past liability for up to four years for missed meal and rest break payments not properly calculated using the "regular rate of pay.")

No Rounding of Time for Meal Periods

- ***Donohue v. AMN Services, LLC*, 11 Cal.5th 58 (2021)**
 - The California Supreme Court ruled that the rounding of time to the nearest time increment is impermissible for meal periods.
 - The Court noted that the meal period regulations were enacted due to concern about working conditions, and the health and welfare of employees, and that the practice of rounding time punches for meal periods is inconsistent with these purposes “given that they set precise time requirements for meal periods, which is at odds with the imprecise calculations that rounding involves.”
 - The Court also held that if time records show noncompliant meal periods, then a rebuttable presumption of liability arises, and “the employer may rebut the presumption with evidence of bona fide relief from duty or proper compensation.”
 - **Takeaway:** Employers who use rounding practices at the meal period should review their policies and practices to ensure compliance with the Supreme Court’s decisions.



New Laws in 2022

Amendments to the California Family Rights Act [CFRA]

- **SB 1383:** Effective January 1, 2021, it amended the CFRA to cover employers with 5 or more employees (anywhere). It also:
 - Added grandparents, grandchildren, and siblings as covered family members.
 - Amended the CFRA to include a qualifying military exigency as a basis for CFRA leave.
 - Eliminated the requirement that employees work within a specified radius.
 - Which also eliminated the need for the (separate) New Parent Leave Act
- **AB 1033:** Effective January 1, 2022, it amends the Government Code to clarify “**parents-in-laws**” are covered by the CFRA.
- **AB 1041:** Would have extended the CFRA protections and California Paid Sick Leave protections to employees who take leave/time off to care for a “designated person.” The bill failed to pass both houses.

Other Laws Effective Jan. 1, 2022

- **AB 1003**: Makes the intentional theft of wages by an employer punishable as grand theft if the wages equal more than \$950 for one employee or \$2,350 for two or more employees in any consecutive 12-month timeframe. Wages include gratuities, benefits and other compensation. The law applies to both employees and independent contractors.
- **SB 807**: Extends the current personnel record retention requirements for employers pursuant to Government Code Section 12946 from 2 years to **4 years** from the date that the records were created, after an employee is terminated, or when an applicant is not hired by a company.
- **SB 762**: Requires arbitration fees to be paid upon receipt of invoice unless the arbitration agreement expressly establishes a payment schedule.
- **AB 701**: Requires employers with large warehouse distribution centers to disclose quotas and pace-of-work standards to each employee upon hire or within 30 days of the law going into effect.
- **SB 606**: Amends the Labor Code to state that if an employer has multiple worksites and has a written policy or procedure that violates Cal/OSHA rules, a rebuttable presumption arises that the violation is enterprise-wide. Employer can rebut the presumption by submitting evidence to show its other worksites have different and compliant written policies and procedures. If it fails to do so, Cal/OSHA can issue an enterprise-wide citation.

Questions?

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