

Employees are Returning to Work: What are the Liabilities and Procedures Employers Should Be Aware of?

Speakers:

Amy Wintersheimer, Partner at Allen Matkins

Nick Schuchert, Associate at Allen Matkins

April 29, 2021

California COVID-19 Laws

- California 2020 COVID-19 Supplemental Paid Sick Leave Law (expired 12/31/20)
- California 2021 COVID-19 Supplemental Paid Sick Leave Law (currently in effect)
- Cal/OSHA COVID-19 Emergency Temporary Standards (currently in effect)
- COVID-19 Workers' Compensation Presumption (SB 1159) (currently in effect)



Current State and Local Guidelines

- “Blueprint for a Safer Economy” and tiered color-coded system remain in effect until June 15.
- Tiered system allows for varying levels of activities depending on infection levels.
- Planned re-opening of the state is June 15.

COUNTY	STATUS (AS OF APRIL 27, 2021)
Los Angeles	Orange-Moderate
Orange	Orange-Moderate
San Diego	Orange-Moderate
San Francisco	Orange-Moderate
Santa Clara	Orange-Moderate

What Are Employees and Companies Doing?

- In April, office occupancy in major cities was at 26%.¹
- Many companies are implementing staggered returns, while some plan to allow remote work indefinitely.

Returning to the Office	Allowing Remote Work Indefinitely
Google (September)	Facebook
Amazon (early fall)	Twitter
Ford (July)	
PwC (May and September)	
Wal-Mart (July)	
Wells Fargo (September)	

What Do Employees Want to Do?

- 87% of employees who have been working remotely would prefer to continue working remotely at least one day per week, post-pandemic.¹
- 42% of current remote workers say if their company does not continue to offer remote work options long term, they will look for a job at a company that does.²
- However, surveys show that employees acknowledge it can be more difficult to work from home and more difficult to feel motivated working from home.³
- Men and women are equally likely to want to continue to work from home.⁴



Staggered Returns to the Workplace

- Returning to pre-COVID occupancy levels on day one is not realistic.
- Consider re-opening the workplace on a voluntary basis for a few weeks before a full re-opening.
- Issues employers should consider:
 - Rotations
 - Limited work hours
 - Team approaches
 - New workplace configurations
 - Social distancing measures
 - Changes to the physical workplace



Dealing with Resistance from Employees

- Not everyone will be ready or willing to return to the office.
- Ease employees back into the office routine.
- Explain why the return to the office is necessary.
- What can employers do to entice employees back into the office?



Accommodation Requests

- The California Fair Employment and Housing Act requires employers of five or more employees to provide reasonable accommodations for individuals with a physical or mental disability, and to accommodate religious beliefs and observances if reasonably possible without undue hardship.
- The success (or failure) of remote work will affect employee accommodation requests to work from home in the future.
- Higher bar for employers to show that working from home is not a reasonable accommodation if the employee worked from home successfully during the pandemic.

Legal Issues Arising from Working from Home

- Wage/Hour Issues for Non-Exempt Employees.
 - Off the Clock Work (“quick emails” after hours create liability).
 - Proper meal/rest periods.
- Business Expenses
 - Electricity, internet, office supplies?
 - Office furniture?
 - Mileage reimbursement for coming into the office?
- Employees Who Relocate Out of State.
 - Taxation questions.

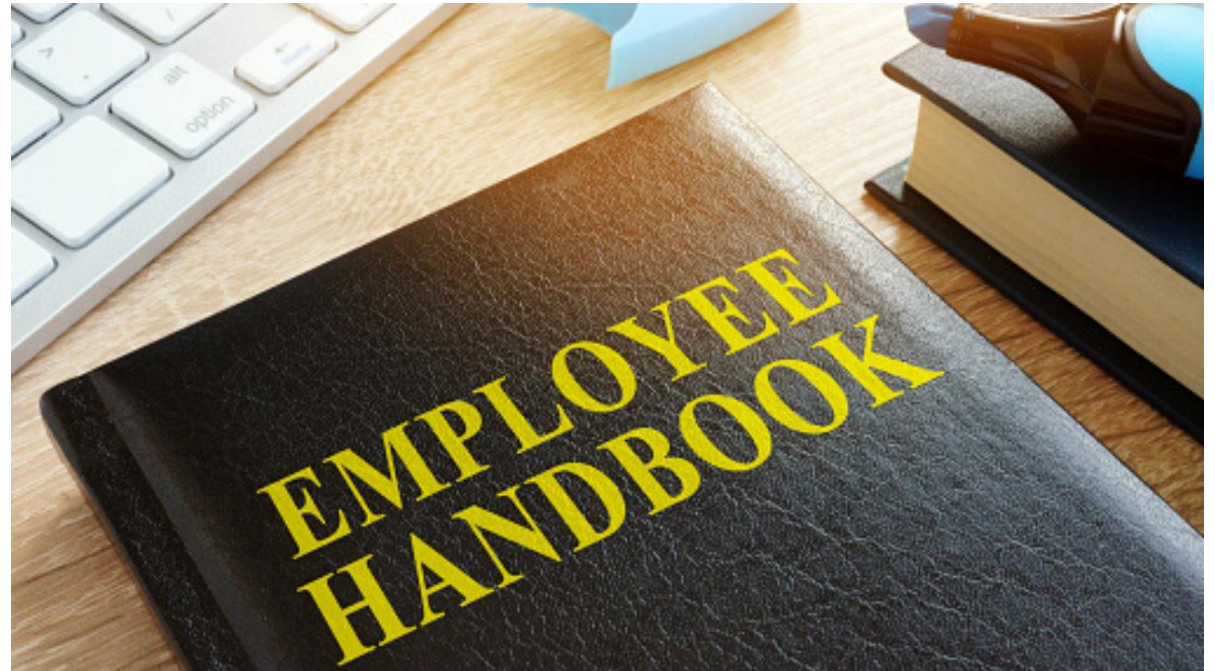
Changes to the Workspace

- Employers will need to make changes to the physical workplace.
- New policies will need to be implemented like self-screening for COVID-19 symptoms.
- New training that is required by Cal/OSHA regarding COVID-19 will need to be implemented.



Updating Personnel Policies

- As employees return to the office, personnel policies will need to be updated.
- Employers should consider updating the following policies:
 - Confidentiality/Privacy Policy
 - Remote Work Policies
 - Timekeeping Policies
 - Overtime Policies



Vaccines

- Biden Administration's National Strategy for COVID-19 Response and Pandemic Preparedness
 - 117 page national strategy
 - Does **not** include **requiring** Americans to get vaccinated
 - Vaccines are currently only issued pursuant to Emergency Use Authorization.
 - Statutory right of recipient to be informed they have "right to refuse administration of the EUA product . . ." FDCA Section 564(e)(1)(A)(ii)(II).



Current Legal Guidance

- EEOC Guidance Allows Employers to Mandate Vaccines Subject to Various Required Accommodations:
 - Disability
 - Medical Condition
 - Religious
- Does **not** mean you can terminate employees who request accommodation.
- Does **not** mean you can automatically bar unvaccinated individuals from the workplace.



Undue Hardship Analysis

- Undue hardship analysis requires consideration of:
 - Does a direct threat of harm exist?
 - What is the duration of the risk?
 - What is the nature and severity of the potential harm?
 - What is the likelihood that potential harm will occur?
 - What is the imminence of the potential harm?
- Even where “direct threat” is the conclusion, reasonable accommodation analysis begins.
- Given all the preventative measures that are available that would enable physical presence in the workplace, unlikely that employee would be banned from the office due to inability to be vaccinated.



What Businesses Are Doing

- February 2021 survey¹ found:
 - 0.5% of companies mandating vaccines for all employees.
 - 6% planning to mandate vaccines in the future for some or all employees
 - 3% planned to mandate vaccines for certain workers.
 - 43% would “consider” mandatory vaccination.
 - 48% would never consider mandatory vaccination.



Vaccines at Universities

- Rutgers University announced mandatory vaccination for students to be on campus in Fall 2021.
 - First University to announce such a requirement—several others have followed.
 - Students not permitted in dorms or in person on campus if not vaccinated.
 - Students on-line exempt.
 - Exemptions for medical and religious reasons.
 - Does **not** extend to faculty and staff.

Best Practices for Vaccines

- Best practice: encourage, do not mandate.
 - Provide information on way to obtain vaccination.
 - Paid time off to receive vaccine.
 - Covering any additional costs for obtaining vaccine under benefits plan.
 - Paid time off/sick leave for side effects of vaccine.
 - Beware of discrimination allegations related to “benefits” provided for vaccinations.
- Other Considerations:
 - Employee privacy concerns.
 - Potential liability by employer for medical issues related to vaccine.
 - Continued need for preventative measures (i.e., face masks) even with vaccines.
 - Treatment of clients, vendors, other third parties?



Contact



Amy Wintersheimer, Partner

619.235.1544

awintersheimer@allenmatkins.com



Nick Schuchert, Associate

949.851.5444

nschuchert@allenmatkins.com

600 W Broadway, 27th Floor, San Diego, CA 92101 | www.allenmatkins.com