

COVID-19 and the Workplace: What California Employers Need to Know

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Today's Presenters



Michele Ballard Miller



Walter Stella

Today's Topics

- Introduction
- California's Response to this Pandemic
- Issues Facing Employers With Facilities in California
- The Future of Work in California

A stethoscope with a black chest piece and a silver binaural is resting on a light blue surface. In the background, a white computer keyboard is visible. The word "Introduction" is centered in a white box with an orange border.

Introduction

Background on Pandemics

- **Pandemic** – an epidemic (sudden increase in a particular disease) that has spread across geographical regions to several countries or continents, usually affecting a large number of people
- **History of Flu Based Pandemics**
 - **Spanish Flu (1918-1919)** : 40-50 million deaths
 - **Asian Flu (1957-1958)**: 1.1 Million deaths
 - **Hong Kong Flu (1968-1970)**: 1 Million deaths
 - **Swine Flu (H1N1) (2009-2010)**: 200,000 deaths
 - **SARS (2002-2003)**: 770 deaths
 - **Middle East Respiratory Syndrome, a/k/a MERS (2015-Present)**: 850 deaths
 - **COVID-19 (2019-Present)**: 8,787 deaths as of March 18, 2020

COVID-19 Update

- Coronaviruses are a large family of viruses that are transmitted from animals to humans. In late 2019, a novel coronavirus, named COVID-19 was first documented in Wuhan, Hubei Province, China.
- Since its discovery, COVID-19 has spread to at least 164 countries and territories and over 200,000 people have been infected.
- In the U.S., COVID-19 has been confirmed in all 50 states, with more than 9,345 confirmed cases and at least 153 deaths as of March 18, 2020.
- On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic.
- On March 13, 2020, President Donald Trump declared a national emergency.
- In response to the virus, experts have implored citizens and employers to be vigilant in social distancing in an attempt to slow the spread of the virus.
- In response cities across California are beginning to implement “shelter-in-place” orders impacting millions of California employees and many of California’s employers.

OSHA Guidance on Preparing Workplaces for COVID-19 and Temporary Respiratory Enforcement Guidelines

- Following the outbreak, OSHA drafted guidance on preparing the workplace for COVID-19 as well as temporary respiratory enforcement guidance in the wake of healthcare supply shortages.
- Identifies four Risk Zones, which categorizes what employees are at the most risk of exposure to COVID-19
 - Very High- Healthcare employees and Healthcare or laboratory personnel
 - High- Persons performing autopsies, medical transport personnel, healthcare delivery staff
 - Medium- Employees with high-frequency contact with the general population
 - Low- Employees who have minimal occupational contact with the public and coworkers
- What employers should do now
 - Develop an infectious disease preparedness and response plan
 - Prepare and implement infection prevention measures
 - Develop, implement, and communicate about workplace flexibilities and protections
 - Implement workplace controls
- See the guidance at <https://www.osha.gov/Publications/OSHA3990.pdf> and <https://www.osha.gov/memos/2020-03-14/temporary-enforcement-guidance-healthcare-respiratory-protection-annual-fit>

DOL Wage and Hour and FMLA Guidance

- The Department of Labor drafted its own Questions and Answers informational pages regarding Fair Labor Standards Act and Family and Medical Leave Act considerations during the COVID-19 pandemic.
- These FAQs and guidance apply to federal wage and hour laws and federal family and medical leave, but do not necessarily govern all California wage and leave or family and medical leave considerations.
- Employers should be careful to stay abreast of changes to both state and federal laws during the pandemic. Note: the DOL's FAQ regarding FMLA will likely be updated now that President Trump has signed into law the Families First Coronavirus Response Act which mandates temporary changes to the FMLA due to COVID-19.
- See the FAQs at <https://www.dol.gov/agencies/whd/flsa/pandemic> and <https://www.dol.gov/agencies/whd/fmla/pandemic>

Government Resources for Businesses

<https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html>

https://www.eeoc.gov/facts/pandemic_flu.html

<https://www.osha.gov/Publications/OSHA3990.pdf>





California's Response to this Pandemic

SF Shelter-in-Place Order

- On March 16, 2020, seven Bay Area counties implemented a Shelter-In-Place order directing all persons living in those counties to shelter at their place of residence.
 - Exceptions:
 - Essential services
 - Essential functions – includes tasks essential to health and safety, such as shopping for household goods and supplies, obtaining medical services and supplies, and engaging in outdoor activities such as hiking, walking, or running.
 - Persons engaging in essential functions must still maintain social distancing of at least 6 feet between other persons.
 - Work for essential businesses and government services
 - Healthcare operations and essential infrastructure, including public transportation
 - Grocery stores, gas stations, etc.
 - Food cultivation & livestock
 - Police, fire, jails, utilities, and certain city offices
 - Individuals experiencing homelessness, but urging them to find shelter

SF Shelter-in-Place Order

- Businesses are directed to cease all non-essential operations at physical locations
- Prohibiting gatherings of any number of individuals
- Ordering cessation of all non-essential travel
- Shelter-in-place ordered in San Francisco, Santa Clara, San Mateo, Marin, Contra Costa, Santa Cruz, and Alameda counties
- San Benito, Sonoma, and Monterey counties and the City of Fresno have since joined.

Business Closures in Los Angeles

- On March 15, 2020, Los Angeles Mayor Eric Garcetti ordered L.A. bars to close and ordered restaurants to stop all dine-in services.
 - Bars and restaurants employ approximately 350,000 employees, the largest private sector employee group in the L.A. area.
- The order also applies to movie theaters, gyms, and fitness centers.
- Essential businesses like pharmacies and food banks remain open.
- The order went into effect at midnight on March 16, 2020 and will run until at least March 31, 2020.

Business Closures in San Diego

- On Monday, March 16, 2020, San Diego County enacted restrictions to curb the spread of COVID-19.
- Prohibits the gathering of 50 or more people
 - However, gatherings of any kind are “strongly discouraged”
- All bars that do not serve food and all dine-in restaurants were ordered to close.
- Restaurants are allowed to serve food only via drive-thru and pick up orders.
- All businesses are encouraged to enact social distancing, increase sanitation efforts, and should use telecommuting when possible.
- Public and private schools, colleges, and universities were urged to cancel activities that require gathering.
- All persons over the age of 65 years old and those with underlying health issues or weakened immune systems were urged to self-isolate.
- Non-essential personnel were prohibited from entering hospitals or long term care facilities.

Other California Measures

- Ban on Dine-in Eating
 - Orange, San Bernadino and Ventura counties
- Bar Closures
 - Orange, San Bernadino, and Ventura counties
 - Palm Springs
- Gyms and Movie Theater Closures
 - Ventura and San Bernadino counties
 - Palm Springs
- Ban on Gatherings
 - Orange and San Bernadino counties and Palm Springs banned all gatherings
 - Riverside County banned gatherings of 10 or more people

Statewide Shelter-in-Place Order Coming?

- On March 17, 2020, Governor Gavin Newsom was quoted as saying, “The directive coming out of the Bay Area...is no gatherings, which just makes sense to me at this point. ... So directing that no gatherings be considered, advanced in this state, that’s the new guideline we’re putting out this evening as well, and we think it’s very rational under these circumstances. Disruptive, I know, for some, but rational, we believe, in this moment.”
- This could signal an openness by the Governor to create a statewide shelter-in-place order, although this is not confirmed.
- This would constitute a seismic shift in the workplace in California.

A man in a dark suit stands with his hands on his hips, looking out over a vast, cracked, grey landscape. The ground is covered with numerous circular holes of varying sizes, some with cracks radiating from their edges. The scene is dimly lit, creating a somber and challenging atmosphere.

Issues Facing Employers With Facilities in California

Workplace Safety Requirements

Teleworking During COVID-19 Pandemic

- Following the Shelter-in-Place orders, many businesses will be forced to allow employees to work from home to the extent possible.
- As of March 17, Governor Newsom is considering making shelter-in-place a statewide directive.
- Employers can force employees to telework unless the employee needs to take sick leave. The pandemic is not an excuse for employees not to work if they have the tools to do so in their home.
- There is currently no requirement that employers allow employees to telework where shelter in place orders are not in effect; however, if this is a viable request and the employee is able to telework, this option should be allowed to promote social distancing.
- Employers also should be aware that employees might request to telecommute as a reasonable accommodation for a physical or mental disability during the pandemic. Employers who face such a request have an obligation to engage in the interactive process just as they would with any reasonable accommodation request.

Temperature Checks



- One measure that has been implemented internationally is temperature checks to screen persons with a fever. Many property owners and employers are considering such measures in the United States.
- Who would perform the checks? Security guards? Company nurse? Are they trained?
- If you hire a contract medical provider, consider the potential HIPAA issues if the health care provider shares personal health information - an authorization is recommended.
- What are the practical issues? To be effective, screening must include all visitors and vendors - not just employees.
- Consider the wide availability of over the counter medications that lower fever, diminishing the benefit of the screening.
- Consider potential arguments that examination time/delays may be compensable time or violate state biometric screening laws absent authorization.
- Consider legal issues related to refusals to cooperate, including protected concerted activity, accommodation of disability or religious requests, and applicable CBA requirements.

“Direct Threat” Exception to ADA Claims

A “**direct threat**” is “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”⁽²⁰⁾ If an individual with a disability poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA.

Assessments of whether an employee poses a direct threat in the workplace must be based on objective, factual information, “not on subjective perceptions . . . [or] irrational fears” about a specific disability or disabilities.⁽²¹⁾ The EEOC’s regulations identify four factors to consider when determining whether an employee poses a direct threat: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm.⁽²²⁾

“Direct Threat” Exception to ADA Claims

DIRECT THREAT AND PANDEMIC INFLUENZA

Direct threat is an important ADA concept during an influenza pandemic.

Whether pandemic influenza rises to the level of a direct threat depends on the severity of the illness. If the CDC or state or local public health authorities determine that the illness is like seasonal influenza or the 2009 spring/summer H1N1 influenza, it would not pose a direct threat or justify disability-related inquiries and medical examinations. By contrast, if the CDC or state or local health authorities determine that pandemic influenza is significantly more severe, it could pose a direct threat. The assessment by the CDC or public health authorities would provide the objective evidence needed for a disability-related inquiry or medical examination.

During a pandemic, employers should rely on the latest CDC and state or local public health assessments. While the EEOC recognizes that public health recommendations may change during a crisis and differ between states, employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.

ADA/FEHA: Inquiries and Exams

- It is becoming increasingly more likely that employers will be able to require employees to inform the company if they test positive for COVID-19.
 - The EEOC has set forth guidance that employer inquiries are not “disability related” if the pandemic is severe. As such, if a pandemic is severe, employers can require employees, under the federal law, to disclose a positive test.
 - Under California law, there is no similar written guidance, but it may be reasonable to believe California courts would follow suit.
 - A conservative approach is to ask employees if they are experiencing symptoms common to the spread of the virus (i.e. chills, cough, fever, cold, difficulty breathing).
- Employers can and should require anyone exhibiting symptoms to stay home from work.
- Employers should weigh carefully whether they wish to ask employees to submit to temperature checks or to provide medical certification upon return to work.
 - At this point, these actions are likely to be allowed under the law, but the healthcare system is likely to be inundated during the pandemic and medical certifications may be hard to obtain.

ADA/FEHA: Inquiries and Exams

- It remains unanswered whether COVID-19 is a disability or condition that must be accommodated under the ADA or FEHA.
 - ADA states a disability is an impairment that “substantially” limits a major life activity.
 - FEHA only requires an impairment to “limit” a major life activity.
- Illnesses such as the yearly flu are not considered ADA/FEHA conditions that require an accommodation.
- However, scientific studies suggest COVID-19 is multiple times more severe than the flu in critical or serious cases.
- As such, employers should at least engage in the interactive process when receiving accommodation requests based on COVID-19.

ADA/FEHA: Inquiries and Exams

- **Anxiety or Stress arising from COVID-19 might need to be accommodated**
 - While it remains unclear if the actual virus is a condition that must be accommodated under the ADA/FEHA, if the virus exacerbates an employee's already existing condition related to stress or anxiety, employers will likely need to accommodate that condition.
- ***EEOC v. STME, LLC*, 938 F.3d 1305 (11th Cir. 2019):**
 - The Court of Appeals for the Eleventh Circuit held that the EEOC could not pursue a disability discrimination/bias claim on behalf of a massage therapist who was fired for refusing to cancel a trip to Ghana because her employer feared she would contract the Ebola virus.
 - The Court held that the Americans with Disabilities Act does not protect against discrimination on the basis of a potential future disability.
 - The Court rejected the EEOC's argument that firing the employee for a potential disease was akin to treating her as being "regarded as having such an impairment."

The Families First Coronavirus Response Act

- FMLA changes are forthcoming as President Trump has now signed into law the Families First Coronavirus Response Act.
 - The Act was passed by the Senate on March 18, 2020 to help provide relief to impacted employees in the wake of the COVID-19 pandemic and President Trump signed the Act into law last night.
 - The Act, which differs from the House Bill passed earlier this week, provides employees of employers with less than 500 employees with a right to take 12 weeks of protected Emergency Family and Medical Leave to take care for the employee's child if the child's school or place of care has been closed, or the childcare provider is unavailable, due to a COVID-19 public health emergency. Eligible employees must have worked for the employer for 30 days.
 - 10 of the 12 weeks will be paid at a rate of no less than 2/3 of an employee's regular rate of pay
 - The first 10 days of leave may be unpaid and eligible employees may choose to use any accrued leaves, but employers may not require them to do so.
 - For employees with varied schedules, the rate of pay is based on the average number of hours the employee was scheduled per day in the six months immediately preceding the leave.

The Families First Coronavirus Response Act Continued

- **Emergency Paid Sick Leave Act**

- Applicable to all private employers with fewer than 500 employees, and public agencies with one employee
- After a declaration of a public health emergency, all employers must provide an employee:
 - With 80 hours of paid sick leave at the employee's regular rate of pay if the employee is unable to work or telework because the employee:
 - is subject to a quarantine or isolation order related to COVID-19,
 - is advised to self quarantine by a health care provider due to COVID-19 reasons, or
 - is experiencing COVID-19 symptoms and seeking a medical diagnosis
 - care for a child whose school or daycare has closed due to a COVID-19 public health emergency, or
 - for the care of an individual who is subject to a quarantine or isolation order related to COVID-19, is advised to self quarantine by a health care provider, or is experiencing COVID-19 symptoms and is seeking a medical diagnosis
 - is experiencing a substantially similar condition, as specified by the Secretary of Health and Human Services
 - Part Time Employees:
 - Entitled to two weeks of paid sick leave based on the number of hours that they work in an average two-week period

The Families First Coronavirus Response Act Continued

- **Refundable Tax Credits for Employers Paying Sick Leave and Providing FMLA for COVID-19**
 - Employers who are required to pay leaves described above will be provided with a series of refundable tax credits to offset the costs.
 - The credits are allowed against the employer portion of Social Security Taxes

Employee Restrictions on Travel

- Employers can restrict Business travel
- Must be careful when restricting personal travel
 - California makes it an unlawful employment practice to discipline employees for engaging in lawful off-duty activities
- Employees in shelter-in-place locations may be in violation of the law if they are engaging in “non-essential travel”
 - The SF shelter-in-place order prohibits all non-essential travel.
 - It is unlikely that any travel by air, other than to care for family members, is essential

Wage and Hour Issues

Generally

- Employees are entitled to pay if they are engaging in work.
- If not engaged in any work either because there is no work to be performed or because the employee's duties cannot be performed at home, then non-exempt employees are not entitled to wages.
- Exempt employees are entitled if they perform at least some work during the work period.

Reporting Time Pay

- Employees are still entitled to reporting time pay under California law.
- Employees required to report must be paid at least 2 hours pay but not more than 4 hours.

Wage and Hour Issues

Reimbursements

- Employees are entitled to reimbursement for “all necessary expenditures or losses incurred by the employee” in the course of the employees job or for expenses incurred at the employers directive.
- If employees are forced to work from home, employers will likely have to pay for at least a portion of employees’ required technology, phone, printing and faxing expenses.
- Expenses related to meal times are likely not necessary expenditures.

Leave

- Employers must allow employees to use accrued sick leave and/or school leave.
- Cannot force an employee to use accrued sick leave.
- May allow employees to supplement other forms of leave (PTO, Vacation, etc.).

Wage and Hour Issues

Reduction in Hours

Furloughs

Temporary Layoffs

Terminations

WARN Act



Federal WARN- No Changes

California WARN

- Governor Newsom has suspended the 60 day notice requirement of the WARN Act in response to the COVID-19 pandemic.
- Employers who must enact layoffs, however, must still provide as much notice as possible and must provide written notice of the layoff.
- The notice of layoff must include the following language: “If you have lost your job or been laid off temporarily, you may be eligible for Unemployment Insurance (UI). More information on UI and other resources available for workers is available at labor.ca.gov/coronavirus2019.”

Benefits Available to Employees

- **Disability Insurance**
 - Employees who contract the virus may be eligible for disability payments between 60-70% of wages, up to \$1,300 per week.
 - Governor Newsom has waived one-week waiting period.
- **Paid Family Leave**
 - California PFL provides 60-70% of worker's wages, up to \$1,300 per week to care for an ill or quarantined family member.
- **Reduced Work Hours Unemployment**
 - Employees are eligible for partial wage replacement if they are laid off or have their hours reduced in response to COVID-19.
- **Stay tuned!!**

A conceptual image showing a hand holding a puzzle piece on the left and another hand drawing a white arrow on a chalkboard on the right. The chalkboard surface is covered with several white puzzle pieces, some of which are connected by the drawn arrow. The entire scene is set against a dark, textured background.

The Future of Work in California

The Future of Work in California

- These are unprecedented times and the laws are changing at the most rapid pace ever seen in America. New laws are being implemented hourly.
- Treasury Secretary Steve Mnuchin warned that unemployment across the country could soar to 20%.
- As California is one of the most hard hit, it could see the brunt of this impact.

Thank You

Questions?

Michele Ballard Miller: mbmiller@cozen.com

Walter M. Stella: wstella@cozen.com

www.cozen.com

