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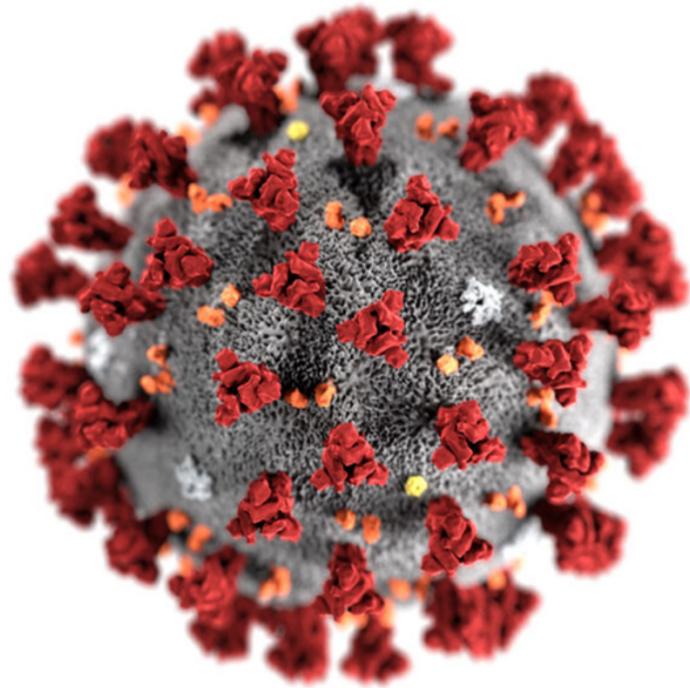


# RETURNING TO WORK: What Employers Need to Know Now

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# TODAY'S TOPICS

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- Preparing your workplace/developing a written reopening plan
- Wage and hour issues
- Privacy issues
- Paid leave/Family First Coronavirus Response Act
- Reasonable accommodation issues
- Litigation Claims to watch out for
- What if's?

# BUSINESSES ALLOWED TO OPEN

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- Essential Businesses (including in-person dining)
- 5 Categories of Lower-Risk Businesses:
  1. Retailers (50% Capacity)
  2. Manufacturing and Logistics sector businesses (lower-risk retail businesses)
  3. Non-Essential office-based businesses (telework encouraged)
  4. Indoor Malls and Shopping Centers, and
  5. Hair Salons and Barbershops.
- Music, Film and TV Productions
- Fitness Facilities
- Museums, and similar Exhibition
- Professional sports without audiences
- Personal Services (50% capacity)
- **Bars, Wineries - NO LONGER PERMITTED AS OF JUNE 28, 2020**

# PREPARING THE WORKPLACE

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## *Reopening businesses must have a plan*

- Every business must create a safe, low-risk environment tailored to its specific industry
- Before reopening, all facilities **must:**
  1. Perform a detailed **risk assessment** and create a site-specific protection plan
  2. **Train employees** on how to limit the spread of COVID-19, including how to screen themselves for symptoms and when to stay home
  3. Set up individual control measures and **screenings**
  4. Put **disinfectant protocols** in place
  5. Establish physical **distancing guidelines**

# PREPARING THE WORKPLACE

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- Risk assessment and site-specific planning:  
**[covid19.ca.gov/industry-guidance](https://covid19.ca.gov/industry-guidance)**
- **Train employees** on how to limit spread of COVID-19/self-screening

- Symptoms may appear 2-14 days after exposure:

Fever or chills

Shortness of breath/difficulty  
breathing

Headache

Congestion/runny nose

Nausea or vomiting

Cough

Fatigue

Muscle or body aches

Loss of taste or smell

Sore throat

Diarrhea

# PREPARING THE WORKPLACE

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- Individual control measures and **screening**
  - Screen at home vs. screen at work
  - Taking temperatures
  - Using questionnaires
- **Disinfection protocols**
  - Furnish hand sanitizers, perform additional cleaning
- **Physical distancing**
  - Reduce conference room capacity, plexiglass barriers, separate employee workstations, prop open doors to common areas, permit employees to work from home

# WAGE AND HOUR ISSUES

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## *Employee Screenings and Temperature Checks*

- May employers require employees to take a COVID-19 test prior to readmitting them into the workplace?
  - ***Yes. And all time and expenses required to take the test are compensable***
- Is time spent undergoing screenings considered compensable time under the Labor Code?
  - ***Yes***

# WAGE AND HOUR ISSUES

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## *Reporting Time Pay*

“Each workday an employee is required to report for work and does report, but is ***not put to work or is furnished less than half*** said employee’s usual or scheduled day’s work, the employee shall be paid for ***half the usual or scheduled day’s work, but in no event less than two (2) hours nor more than four (4) hours***, at the employee’s regular rate of pay, which shall be no less than the minimum wage.”

# WAGE AND HOUR ISSUES

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## *Telecommuting*

- If an employer requires or permits employees to work from home, California law requires the employer to reimburse the employee for “all necessary expenditures incurred by the employee in direct consequence of the discharge of his or her duties.” *Labor Code § 2802*
- **Workstation costs (computer, internet, supplies) are reimbursable**
- **Travel time**
- **Day of rest requirement**
- **Timekeeping**
- **Meal and rest breaks**



# EMPLOYEE PRIVACY ISSUES

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## *The California Consumer Privacy Act*

- Employers which collect personal information about employees (test results, temperature readings, health questionnaires) **must** store that information in a **confidential** file
- Prior to collecting such information, the employer must give advance **written** notice to employees describing the information to be collected and the purpose(s) for which it will be used

# EMPLOYEE PRIVACY ISSUES

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## *Employee Medical Inquiries*

- If employers make medical inquiries in the context of providing reasonable accommodations to employees who are at a heightened risk of infection due to underlying medical conditions, such inquiries must be maintained as ***confidential***
- An employer may ask employees if they are experiencing COVID-19 symptoms
- An employer may ask employees if they have been in close contact with anyone either experiencing COVID-19-like symptoms or confirmed to have COVID-19
- An employer may ask an employee why he/she did not report to work if the employer suspects it is for a medical reason

# PAID LEAVE AND FFCRA

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## *Emergency Paid Sick Leave*

- Effective from April 1, 2020 to December 31, 2020
- Only covers employers with fewer than 500 employees
- May be used to cover absences due to:
  - Subject to a federal, state, or local quarantine or isolation order
  - Has been advised by a doctor to self-quarantine because of COVID-19
  - Is experiencing symptoms of COVID-19 and seeking a medical diagnosis
  - Is caring for an individual who is subject to a quarantine order or who has been advised to self-quarantine
  - Is caring for a son or daughter if the school or child care provider has been closed, or if the provider is unavailable due to COVID-19
  - Is experiencing any other substantially similar condition specified by HHS

# PAID LEAVE AND FFCRA

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## *Emergency Paid Sick Leave*

- If eligible for paid sick leave, employees are entitled to:
  - Up to 80 hours of paid sick leave; part-time employees up to the average number of hours over a two-week period
  - Paid at the employee's regular rate of pay; if they are caring for a family member, employees are entitled to two-thirds of their regular rate of pay.
  - Paid sick leave capped at \$511 per day (\$5,110 aggregate) or \$200 per day per employee (\$2,000 aggregate), depending on the reason for the leave
  - The paid sick leave is in addition to any existing leave benefits
- Employers may exclude employees who are healthcare providers or first responders

# PAID LEAVE AND FFCRA

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## *Emergency Family and Medical Leave*

- Special leave provisions with respect to COVID-19 that only applies to employers with fewer than 500 employees, and only to employees employed for at least 30 days
- Amends the FMLA to provide up to 12 weeks of leave “because of a qualifying need related to a public health emergency”
- “Qualifying need”
  - Employee unable to work due to a need for leave to care for the son or daughter under 18 of such employee if the school or care facility has been closed, or the child care provider is unavailable due to an emergency with respect to COVID-19 declared by a federal, state, or local authority
  - Employees must provide notice as soon as practicable when the need is foreseeable
- The first ten days of leave are unpaid, but an employee may elect to substitute any accrued vacation, personal leave, or sick leave, and employers are prohibited from requiring the substitution of paid leave

# PAID LEAVE AND FFCRA

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## *Emergency Family and Medical Leave*

- If leave exceeds 10 days, it must be paid
- Paid at the rate of at least two-thirds of employee's regular rate of pay based on the number of hours an employee normally would have been scheduled to work
- For employees with irregular hours, a formula is used
- An employer need not pay an employee more than \$200 per day and \$10,000 in total
- Employers with 25 or more employees must restore employees to their positions following their return from leave in the same manner as under the FMLA
- Employers with less than 25 employees must reinstate employees unless certain conditions are met

# PAID LEAVE AND FFCRA

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## *Employees and Child Care Needs*

- Can employees use Emergency and Family Medical Leave and Emergency Paid Sick Leave for child care needs?
  - Not during the summer because schools are closed
- What about summer camps or other programs?
  - **Yes**, if the program or camp is closed because of a COVID-19 related reason



# REASONABLE ACCOMMODATION ISSUES

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- Does having COVID-19 qualify as a disability? ***Not necessarily***
- However, as employee who contracts COVID-19 may be entitled to reasonable accommodation if the employee's reaction to COVID-19 is severe or if it complicates or exacerbates on or more of an employee's other health conditions or disabilities
- What reasonable accommodations must employers provide to qualified employees:
  - Telework if feasible
  - Leave of absence
  - Schedule changes to accommodate employee
  - Additional PPE

# EMPLOYEE ATTENDANCE

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- Sick employees should ***not*** be at work
- Employees who appear sick or who report they are sick ***may*** be asked to leave
- Because of the contagion risk, employers may ask employees about their symptoms for purposes of determining whether to permit employee into the workplace
- Employers may require employees to get tested before permitting them to return to work, provided the requirement applies to all employees in the same job category
- What about employees who refuse to return to work?
  - ***Tread lightly***

# THE LITIGATION DAM WILL BREAK...

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## *Most Likely Claims:*

- Failure to reimburse for telework expenses/PPE
- Violation of California Consumer Privacy Act's notice requirements
- Misclassification/loss of exempt status
- Meal and rest period claims
- Reporting time pay claims
- Unpaid overtime
- Disparate treatment/impact claims related to RIFs
- Failure to follow protocols
- Check insurance / Consider a release

# WHAT IF...?

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## *What if an employee tests positive or is diagnosed with COVID-19?*

- *Isolate and quarantine*
  - *Employees who had symptoms may return:*
    - After at least three days have passed since recovery defined as resolution of fever without the use of fever-reducing medications **and** improvement of respiratory symptoms (e.g., cough, shortness of breath) **and** at least ten days have passed since symptoms first appeared
- or*
- Resolution of fever without the use of fever-reducing medications **and** improvement of respiratory systems (e.g., cough, shortness of breath) **and** negative test result

# WHAT IF...?

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***What if an employee tests positive or is diagnosed with COVID-19?***

- ***Employees who had no symptoms may return:***
  - After at least ten days have passed since the date of their first positive test result assuming they have not subsequently developed symptoms since the positive test
  - or***
  - After receipt of a negative test result

# WHAT IF...?

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## *What if an employee tests positive or is diagnosed with COVID-19?*

- Address and isolate employees who were in “**close contact**” with the infected employees
  - “**Close contact**” = Contact within six feet for a period of at least 15 minutes
- Clean and disinfect the workplace
- Notify employees who worked in the same area as the employee
  - Do not identify the infected employee by name
- Inform employees of steps being taken and send home employees who were in “close contact” with the infected employee for 14 days

# WHAT IF...?

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## *What if an employee refuses to return to work?*

- Generally, employees may only refuse to come to work if they believe they are in “imminent danger”
- Threat must be immediate or imminent, and employee’s objection must be objectively reasonable
- Most workplaces in the United States do not meet the elements required for an employee to refuse to work in these circumstances
- Nevertheless, if employees are jointly refusing to work, may raise NLRA protected concerted activity issue
- In such circumstances, employees generally are protected against discipline or termination for engaging in such conduct

# WHAT IF...?

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***My employees are refusing to return to work because their unemployment benefits are greater than their regular wages. What can I do?***

- Technically, employees who have been made an offer of re-employment are no longer entitled to unemployment benefits. With some exceptions, employees will lose their unemployment benefits if they refuse to return to work
- Consider offering telework

# WHAT IF...?

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## ***Can I prevent employees from traveling, even if for personal reasons?***

- Generally, no. However, employers should advise such employees that they may be subject to quarantine upon their return.

## ***Can employees refuse business travel?***

- Maybe. If the employee is part of a group of employees who object or if they are objecting on behalf of a group, they may be protected by the NLRA's protections for concerted, protected activity. Try to work out a solution, and consult legal counsel before taking any adverse action.

# WHAT IF...?

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## ***What if an employee appears ill but refuses to leave the workplace?***

- Explain to the employees the public health nature of the request to leave and instruct them to leave. Offer to allow the employee to use paid sick leave or other leave benefits.

## ***Do employers have to provide masks/respirators to employees?***

- Yes. Consider providing reusable cloth masks

# WHAT IF...?

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***If an employer is hiring, may it screen applicants for COVID-19?***

- Yes, but only after making a conditional offer of employment. Job offers should be in writing and include as a condition that the employee test negative for COVID-19.

***May an employer take an applicant's temperature as part of a post-offer, pre-employment medical examination?***

- Yes.

***May an employer delay an applicant's start date who has COVID-19 or related symptoms?***

- Yes. According to the CDC, such individuals should not be in the workplace.

# WHAT IF...?

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***May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or related symptoms?***

- Yes. Based on current CDC guidance, such individuals cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

**QUESTIONS?**



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