COVID-19 FAQs For California Employers

In light of the legal issues stemming from COVID-19, we have prepared the following FAQ to guide California employers with respect to their workplace policies and their response to the orders and laws that have been passed at the federal, state and local level to contend with this unprecedented pandemic. The following is a summary of the commonly asked questions, both with respect to businesses in the "critical" sectors (as identified by Governor Newsom's March 19, 2020 Stay-In-Place Executive Order) who will have employees at work, and those businesses not in critical sectors that can no longer require an employee's physical presence at work. The circumstances surrounding this pandemic are changing at a rapid pace. Accordingly, all the information below is subject to change and employers should consult with legal counsel prior to implementation of new policies.

I. Statewide Stay-At-Home Order

A. What does the Statewide Stay-At-Home Order Mandate?

On March 19, 2020, California Governor Gavin Newsom issued Executive Order N-33-20 ("Order") ordering all California residents to "stay at home or their place of residence except as needed to maintain continuity of operations of federal critical infrastructure sectors." Governor Newsom's Order took effect immediately on Thursday night and will continue indefinitely. While all residents are ordered to stay at home, the Order excepts workers of the 16 critical infrastructure sectors, as outlined by the U.S. Department of Homeland Security. Details can be found at https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19 (hereinafter referred to as "critical sectors" or "essential businesses"). While not stated in the Order, the Governor indicated that California citizens will still be allowed to engage in essential activities such as grocery shopping, going for walks, and walking pets as long as people maintain a safe social distancing space of six (6) feet.

The Order is enforceable pursuant to California law and makes violations a misdemeanor crime under California Government Code section 8665, punishable by a fine not to exceed one thousand dollars ($1,000) or by imprisonment not to exceed six months. As such, employers should carefully examine whether their operations fall under one of the 16 critical infrastructure sectors to determine whether they can continue to require employees to report to work.

B. What should I do if I am an essential business under one of the 16 critical infrastructure sectors?

Governor Newsom has expressly acknowledged the vital services that the businesses within these sectors provide. Their continued operation is essential to Californians in this unprecedented pandemic. To the extent possible, however, these essential business should explore whether teleworking or remote work is possible. This will not be available for all employees such as factory workers, grocery store employees, restaurant workers necessary for takeout services, healthcare workers, emergency responders, transportation workers and more. If you have questions regarding whether your business is in a critical sector or provides an essential service, please consult with counsel before making the decision to ask employees to come to work during the stay at home order. Employers can also consult the Department of Homeland Security's recent memorandum explaining critical infrastructure sectors at https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf.

II. Workplace Safety

A. Can employees refuse to come to work even if they are not ill and have not been exposed to COVID-19?

Generally, employees do not have the right to refuse to come to work unless they believe they are in imminent danger. Currently, even with the COVID-19 pandemic, the workplace conditions in the United States may not meet the definition of creating an "imminent danger" because it requires an imminent or immediate threat (i.e. the employee must believe that death or serious physical harm could occur within a short time). Therefore, employees likely do not have a right to refuse to report physically to work unless there is a statewide or local stay at home or shelter in place order requiring employees of non-essential businesses to stay home. Practically, however, even where not dictated by emergency decree, employers should consider allowing employees to work remotely to the extent possible in order to practice recommended social distancing.

B. Can an employer require employees to telework during the COVID-19 pandemic?

Yes, the EEOC and CDC have encouraged employers to explore the possibility of allowing employees to telecommute and/or telework during the COVID-19 outbreak as a countermeasure to the spread of the virus, and now that a stay at home order is in effect in California, there is no question that this can and must be done for non-essential businesses. For essential businesses, there is no requirement that employers allow employees to telework where possible; 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.

C. Can employers require an employee to report contact with potentially infected individuals?

Yes. As long as the employer is not asking about a medical condition, an employer can generally ask employees if they believe they have been exposed or in contact with individuals with COVID-19 or if they have traveled to a high risk area for COVID-19. Employers should exercise care in doing so, as employers will want to avoid claims that any employee was subject to discrimination or retaliation based on an employer's knowledge of such exposure, and other laws may require employers to take steps in advance to ensure appropriate notice to employees. Employers who do ask employees to self-report contact with infected persons should ensure that the information is kept confidential in accordance with all state and federal privacy laws. Even with the statewide stay at home order for nonessential businesses, this inquiry is permissible so that employers may inform others in the workplace of possible exposure in the workplace to COVID-19.

III. Inquiries and Exams

A. Can I require employees to inform the company if they test positive for COVID-19?

Maybe. Under the California Family Rights Act (CFRA), applicable to California employers with 50 or more employees—and to eligible employees who have worked for the company for 12 months, worked 1,250 hours in the 12 months preceding their leave request, and who work at a site that has 50 employees within a 75-mile radius— an employer cannot ask employees requesting family or medical leave for a serious health condition to provide a diagnosis of a medical condition. On the other hand, an employer has a right to make reasonable inquiries about an employee's medical condition under both the Americans with Disabilities Act ("ADA") and the California Fair Employment and Housing Act ("FEHA") if the inquiry is job related and consistent with business necessity. The EEOC's Guidelines for "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" explain that in the event public health officials declare a pandemic, employer inquiries regarding an employee's symptoms are not "disability related" and if the pandemic is "severe" enough, as determined by the CDC, even disability-related questions are justified by a reasonable belief that the pandemic poses a direct threat. It seems reasonable that California law would allow for a similar carve-out during a severe pandemic, but there is no written regulation or law so stating. To ensure California employers remain in compliance with California law, they should ask employees to report if they are experiencing symptoms of the COVID-19 virus—such as fever or chills and a cough or shortness of breath— instead of asking employees to report a diagnosis of COVID-19.

As the COVID-19 pandemic is a continually evolving situation, employers should seek guidance from legal counsel for the latest federal, state, and local developments and information.

B. Can I send an employee home if he or she is exhibiting symptoms of the Covid-19 virus or the seasonal flu in the workplace?

Yes. An employer has a right to exclude workers who may pose a direct threat to the health and safety of their coworkers. According to guidance issued by the EEOC, "[d]uring a pandemic, employers should rely on the latest CDC and state or local public health assessments." 29 CFR § 1630(2)(B). Accordingly, an employee in the workplace who exhibits symptoms of COVID-19 or the seasonal flu (cough, fever, runny nose, chills, sore throat, difficulty breathing) should be sent home as recommended by public health officials and such actions would be excluded from the discrimination protections under the ADA and FEHA. It is important to note that employees sent home after reporting to work may be entitled to minimum compensation under state or local laws or an applicable collective bargaining agreement. (See below for more information on reporting time).

C. Can employers require a test or medical certification before an employee who displayed symptoms or tested positive for COVID-19 returns to work?

Most likely. An employer may require a medical examination under the ADA if there is a good faith basis to believe that the employee poses a direct threat to the safety and health of the workplace. This belief may be based on observable symptoms, recent travel to an affected region, exposure to an infected person, or other reasonable factors. Testing is still not widely available at the present time, however, and an employer would be required to pay for both the test and any time associated with obtaining the required testing. Further, requiring testing prior to the development of serious symptoms may be counterproductive because the lack of widespread private testing may unnecessarily expose an employee to COVID-19 who may have another less serious illness.

Under the ADA and FEHA, and the federal Family and Medical Leave Act (FMLA) and CFRA, an employer may require a return to work certification; however, during a pandemic, doctor appointments may not be easily obtainable due to high demand. As a practical matter, some individuals with COVID-19 may never develop serious symptoms – making it hard to distinguish between a common illness or the virus. In such situations, employers should weigh carefully whether an employee should be allowed to return to the workplace once they are no longer symptomatic (like a normal illness) or be asked to provide a formal return to work certification from a physician. Each case should be addressed on an individual basis, depending on whether there is an actual diagnosis of COVID-19, the severity of the symptoms, length of absence, and local availability of testing and medical treatment, keeping in mind the importance of ensuring that a contagious employee is not allowed back into the workplace too soon.

D. What are the legal risks, if any, associated with temperature checks for employees entering the company's job site?

Generally, taking employee temperatures would be considered a medical examination that is prohibited by the ADA and FEHA. However, based on EEOC guidance following the 2009 H1N1 influenza pandemic, taking temperatures during the COVID-19 pandemic is permissible under the ADA if job related and due to business necessity, or if the employer can establish that the employee poses a direct threat to the health and well-being of others in the workplace. Whether COVID-19 is determined to be a direct threat depends on how widespread it is in the community and its severity as determined by the Centers for Disease Control ("CDC") and local and state public health assessments. On March 19, 2020, the EEOC published updated guidance regarding the COVID-19 pandemic. In that guidance, the EEOC stated that the COVID-19 pandemic meets the direct threat standard and that, as such, employers may conduct temperature checks. While California law presumably would allow temperature checks due to the "direct threat" posed by COVID-19, there is no definitive answer on this under the California FEHA.

Employers considering temperature checks should carefully consider the practical issues associated with performing these checks, including additional staffing, training, and equipment costs. In addition, California employers subject to the California Consumer Privacy Act (CCPA) likely need to provide a CCPA-compliant notice to employees prior to or at the time of collection of the temperature data.

In the event employees refuse a thermal scan as a condition for entry to the workplace, the basis of their refusal may have important legal implications. For example, if employees refuse based on religious objections, the employer must analyze whether a reasonable accommodation is possible. Similarly, a coordinated refusal to be tested on the part of more than one employee may also constitute protected concerted activity under the National Labor Relations Act. If the employer has a unionized workforce, any thermal testing may also be subject to negotiation with an applicable labor union, or run afoul of an existing collective bargaining agreement.

Recent litigation involving compensation of employees for time spent in security checkpoints at retailers and industry sites also raises the prospect of similar arguments that any meaningful time spent in a line for a thermal scan may be compensable work time. The analysis of this issue would likely turn on the purpose of the scan, i.e. temporary public health emergency as opposed to a tangible benefit to the employer, and the application of such a policy to all persons entering the work site and not just employees.

E. Are you required to report suspected COVID-19 cases to public health authorities?

No. There is no requirement to report suspected or confirmed cases of COVID-19 to the CDC or other agency. Healthcare providers are mandatory reporters and are burdened with reporting to the proper agencies.

However, OSHA does require that employers report workplace injuries. If it is clear that an employee contracted COVID-19 while at work, there may be a requirement to report the COVID-19 illness to OSHA. This analysis is likely to be complex, so consult with your legal team before making the decision to report any instances of COVID-19 to OSHA.

IV. FMLA Leave and ADA/FEHA Accommodation

A. Are employees entitled to serious health condition leave under the FMLA/CFRA based on fears of contracting COVID-19?

Most likely not. Generally, employees are not entitled to FMLA/CFRA leave out of fear of contracting an illness.

B. Are employees entitled to FLMA/CFRA leave if they or a family member have a confirmed diagnosis of COVID-19?

Maybe. FMLA and the California Family Rights Act ("CFRA") provide for an employee's leave to care for themselves or to care for a family member with a "serious health condition." Whether an employee or family member with COVID-19 has a serious health condition requires an individualized assessment, particularly since individuals diagnosed with COVID-19 can exhibit a range of mild to severe symptoms. As such, employers should not make any decisions before considering the facts of each request (see also C below, which discusses the new Families First Coronavirus Act signed into law on March 18, 2020).

C. The Families First Coronavirus Response Act

On March 18, 2020, Congress passed the Families First Coronavirus Response Act, which was signed into law the same day by President Trump. The Act amends the Family and Medical Leave Act (FMLA) for employers with fewer than 500 employees to provide 12 weeks of leave to eligible employees who are unable to work or telework due to their need to care for a child if the child's school or child care facility is closed or the child's care provider is unavailable due to a public health emergency (Emergency FMLA). The first 10 days of the Emergency FMLA may be unpaid, during which time the employee may substitute available accrued sick or vacation time for the unpaid leave period. After the first 10 days, employers must provide eligible employees with paid leave at two-thirds the employee's regular rate for the number of hours the employee would normally be scheduled to work. The Act limits this pay entitlement for Emergency FMLA to $200 per day and $10,000 in the aggregate per employee. The Act relaxes the normal FMLA eligibility requirements for employees needing Emergency FMLA, requiring the employee to have worked for the employer for only 30 days and disposing of the requirement that the employee have worked 1,250 hours in the 12 months preceding the leave, or that the employee work at a facility with 50 employees within a 75 mile radius. An employee who has otherwise exhausted FMLA leave during the 12-month period is not entitled to additional 12 weeks of leave under the FMLA, but would be entitled to Emergency Paid Sick Leave (see below).

The Act also requires covered employers to provide up to 80 hours of Emergency Paid Sick Leave at the employee's regular rate (or the equivalent of two weeks for part-time employees) to employees who cannot work or telework because they are: (1) quarantined or ordered to self-isolate by health authorities or a health care provider due to COVID-19, (2) experiencing COVID-19 symptoms and seeking a medical diagnosis, (3) caring for an individual (note: this does not need to be a family member) who is ordered or advised to self-isolate due to COVID-19, (4) caring for their child whose school or child care facility is closed or whose childcare provider is unavailable due to a COVID-19 public health emergency, or (5) experiencing a substantially similar condition as specified by the Secretary of Health and Human Services. Paid sick leave wages are limited to $511 per day up to $5,110 total per employee due to the employee's own quarantine, isolation or symptoms, and to $200 per day up to $2,000 total to care for others who are quarantined, experiencing COVID-19 symptoms, or due to a school or childcare closure related to COVID 19. The Emergency Paid Sick Leave is in addition to the paid sick leave the employer already provides. The Act specifically prohibits employers from requiring employees to exhaust their existing sick leave or PTO before using Emergency Paid Sick Leave.

The Act will take effect on April 2, 2020 will remain in place through December 31, 2020.

The Act applies to all private workforces with fewer than 500 employees, and to public entities employing one or more persons and it provides tax credits to businesses to offset the costs associated with the newly-required paid leave. The legislation does empower the Department of Labor to exempt small businesses with fewer than 50 employees if the imposition of the Act's requirements would "jeopardize the viability of the business." Employers should consult with legal counsel with questions about the new Act and its requirements.

It is not clear whether the Act applies to employees who are furloughed or temporarily laid off prior to the Act's effective date, or whether it applies to employees who cannot report to work due to local and state stay-at-home orders affecting non critical or non-essential businesses. On one hand, furloughed employees and those employees laid off due to a temporary shut down, are still considered "employees" under federal and state law. The Act, however, specifically applies to employees who cannot work or telework due to a Public Health Emergency ordering school or childcare closures, or due to a quarantine or isolation order or a COVID-19 diagnosis or symptoms. One possible argument is that those employees who cannot work or telework due to local or statewide stay-at-home orders that prohibit these employees from physically reporting to work, would not be entitled to Emergency FMLA or Emergency Paid Sick Leave under the Act. Another possible argument is that if employees were or are furloughed prior to the Act's effective date (April 2), the leave and pay required by the Act would not have to be provided. As indicated, however, the Act does not address these issues so there is no definitive answer to these questions and employers should consult with their counsel. At a minimum, however, employers should not base any furlough or lay off decisions on an evaluation of which employees are likely to need Emergency FMLA or Paid Sick Leave as this could lead to a retaliation claim under the Act.

D. Is an employee's anxiety because of the COVID-19 outbreak a disability that must be accommodated?

COVID-19 could present other disability questions outside of actually contracting the virus. Employees with anxiety or stress related disorders could request accommodations from employers arguing that their stress or anxiety resulting from the COVID-19 pandemic manifests as a mental disability that must be accommodated under FEHA and the ADA. These are likely to be viable claims that employers should take seriously, especially if an employee with mental health limitations has been accommodated in the past. Employers must engage in a good faith interactive process in order to individually assess all accommodation requests and should consult with legal counsel as necessary.

V. Travel

A. Can an employer restrict travel to all locations on the CDC travel advisory?

It depends on the purpose of the travel. An employer may restrict business travel to the extent it feels necessary and can and should discourage personal travel to restricted, higher risk areas during the pandemic. Employers, however, cannot discipline employees for engaging in lawful off-duty conduct such as traveling.

The best practice regarding travel is to focus on self-reporting. Employers can inquire into whether any employees have traveled to locations that the CDC has identified as having a Level 3 travel risk or higher. Employers may also inquire into whether an employee has travelled to any location where local health officials have recommended that visitors self-quarantine after visiting. If employees have traveled to these Level 3 travel areas, employers should implement a 14-day quarantine period wherein employees either work from home or take a leave of absence.

For an up-to-date list of Level 3 risk areas, visit https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html for more information.

VI. Wage and Hour

A. Does an employer have to pay an employee if the employee is not working because of COVID-19?

Generally no. California and federal wage laws require employees to be compensated for time actually worked. Therefore, if employees are not working, and are not otherwise subject to their employer's control while not at work, then they are not generally entitled to compensation. (See Question B and E below for exceptions). However, employers must be careful when dealing with exempt employees. Exempt employees must be paid on a salary basis, which requires that employees be paid for an entire week's salary if they perform at least some work during the work period.

B. Must employees that are required to self-quarantine by their employer be paid?

Notwithstanding the above questions, employers might have to pay employees who are self-quarantined and not working if there are enough restrictions placed on the employee during this self-quarantine period that the employee is, in essence, under the "control" of the employer. In California, an employee must be paid for all hours worked. "Hours worked" is defined to include all the time during which an employee is subject to the control of an employer. The concept of control for purposes of compensation has a 2-par test:

1. Whether the restrictions placed on the employee are primarily directed toward fulfillment of the employer's requirements and policies, and
2. Is the employee substantially restricted so as to be unable to attend to private pursuits?

What the employer says to the employee regarding the quarantine period is pivotal in determining whether sufficient control exists to trigger the obligation to compensate the employee. For example, telling the employee they have to stay home and have to limit attending events, or have to make themselves available for work or to answer questions, likely will meet the test. On the other hand, if "self-quarantine" means to stay out of the work place for a time to see if the employee develops symptoms, without any expectation that the employee work, report to work, or be available to work— and no other restrictions apply— then the employee is not likely under the employer's control and would not require compensation.

C. Are employees in California entitled to reporting time pay if they report for work at the request or permission of the employer, and then are required to return home due to the virus?

Yes, if an employee is scheduled to report to work, and is sent home, the employee must be paid a minimum of two hours but no more than 4 hours. The California Department of Industrial Relations has a coronavirus FAQ page that answers the same question as follows:

> **Is an employee entitled to compensation for reporting to work and being sent home?**
>
> Generally, if an employee reports for their regularly scheduled shift but is required to work fewer hours or is sent home, the employee must be compensated for at least two hours, or no more than four hours, of reporting time pay. For example, a worker who reports to work for an eight-hour shift and only works for one hour must receive four hours of pay, one for the hour worked and three as reporting time pay so that the worker receives pay for at least half of the expected eight-hour shift.

D. Must employers reimburse employees for expenses incurred while working teleworking?

Yes. California employers are required to reimburse employees for "all necessary expenditures or losses incurred by the employee" in the course of the employee's job, as well as for any expenses arising out of an employer's directive. Cal. Labor Code §2802. This question is likely to be implicated if employees are asked to work from home. Employers should be careful to delineate between necessary expenses and other expenses that may not be necessary. For example, a portion of required technology expenses associated with work-required internet and phone usage, printing, faxing, etc. would require reimbursement, but expenses related to costs associated with meal times likely are not "necessary" even if an employer regularly provides employees with complementary meals as part of their job. Employers should draft a clear statement of what will be considered necessary expenses for reimbursement purposes and that also allows employees to raise concerns about expenses that do not appear on the employer's list that employees feel should be reimbursable. Employers can then assess expense requests as necessary.

E. Must employers allow employees to use California Paid Sick Leave if requested due to COVID-19 illness or quarantine?

Yes. The Department of Industrial Relations has directly answered this question as well. It answered as follows:

> **Can an employee use California Paid Sick Leave due to COVID-19 illness?**
>
> Yes. If the employee has paid sick leave available, the employer must provide such leave and compensate the employee under California paid sick leave laws.
>
> Paid sick leave can be used for absences due to illness, the diagnosis, care or treatment of an existing health condition or preventative care for the employee or the employee's family member.
>
> Preventative care may include self-quarantine as a result of potential exposure to COVID-19 if quarantine is recommended by civil authorities. In addition, there may be other situations where an employee may exercise their right to take paid sick leave, or an employer may allow paid sick leave for preventative care. For example, where there has been exposure to COVID-19 or where the worker has traveled to a high-risk area.

In addition, employers with fewer than 500 employees are now required to provide two weeks of Emergency Paid Sick Leave to employees who have been ordered to quarantine or self-isolate due to a COVID-19 diagnosis or exposure or have COVID-19 symptoms, who are caring for an individual who is quarantined or has symptoms, or who are caring for a child whose school or childcare facility is closed, or whose childcare provider is unavailable, due to the pandemic.

F. Can an employer require an employee to use available paid sick leave if the employee is quarantined?

No, the use of state or locally-mandated paid sick leave is left to the employee's discretion. If the worker decides to use available paid sick leave, employers in California may require that it be taken at a minimum interval of two hours (unless local leave laws, such as those in San Francisco, Oakland and Berkeley require a shorter increment), but the total number of hours used is up to the employee's discretion. Employers can, however, require the use by eligible employees of Emergency Paid Sick Leave under the Families First Coronavirus Response Act.

G. If an employee exhausts sick leave, can other forms of paid leave be used instead?

Yes if the employer's other leave policies allow. There is no law that directly requires an employer to allow a worker to substitute vacation or paid time off if an employee exhausts sick leave, however, if your internal policies allow such a practice, then they should be followed. Additionally, as a practical matter, allowing exhaustion of other forms of leave could engender good faith during the COVID-19 outbreak.

H. If an employee is exempt, are they entitled to a full week's salary for work interruptions due to a shutdown of operations?

An employee is exempt if they are paid at least the minimum required salary and meet the other qualifications for exemption. Federal regulations require that employers pay an exempt employee performing any work during a week their full weekly salary if they do not work the full week because the employer failed to make work available.

An exempt employee who performs no work at all during a week may have their weekly salary reduced.

Deductions from salary for absences of less than a full day for personal reasons or for sickness are not permitted. If an exempt employee works any portion of a day, there can be no deduction from salary for a partial day absence for personal or medical reasons.

Federal regulations allow partial day deductions from an employee's sick leave bank so that the employee is paid for their sick time by using their accrued sick leave. If an exempt employee has not yet accrued any sick leave or has exhausted all of their sick leave balance, there can be no salary deduction for a partial day absence.

Deductions from salary may also be made if the exempt employee is absent from work for a full day or more for personal reasons other than sickness and accident, so long as work was available for the employee, had they chosen to work.

Employers should also be aware that if an employer's operations are not halted but instead just slowed and, as a result, an exempt employee's job duties are altered during the pandemic and the employee's "primary duties" for any one workweek are more properly classified as non-exempt, then that employee should be considered non-exempt for the week. This status change will result in the employee having a right to meal and rest periods and being subject to overtime pay just as any non-exempt employee.

I. What options do I have if my child's school or day care closes for reasons related to COVID-19?

In addition to the Emergency FMLA and Emergency Paid Sick Leave now available under the Families First Coronavirus Response Act, California employees at worksites with 25 or more employees may also be provided up to 40 hours of leave per year for specific school-related emergencies, such as the closure of a child's school or day care by civil authorities (see Labor Code section 230.8). Whether that leave is paid or unpaid depends on the employer's paid leave, vacation or other paid time off policies. Employers may require employees to use their accrued vacation or paid time off benefits before they are allowed to take unpaid leave for school or daycare closures, but cannot mandate that employees use state and local mandated paid sick leave for this purpose. However, a parent may choose to use available paid sick leave to be with their child as preventative care.

J. Other Considerations for Nonexempt Employees Teleworking During the Pandemic

During the COVID-19 pandemic, employers who ask or permit their nonexempt employees to work remotely will need to take steps to properly track and record the "hours worked" by these employees to minimize risks of overtime and missed meal and rest break claims under federal and state wage and hour laws. Employers should put into place clear policies and rules regarding teleworking that set forth the employer's standard working hours, time reporting (including clocking in and out) and recordkeeping requirements, and that make clear employees are still subject to the employer's meal and rest period requirements and overtime rules while working from home.

VII. Retaliation and Discrimination

A. What protections does an employee have if they suffer retaliation for using their paid sick leave?

The California Labor Commissioner's Office enforces several laws that protect workers from retaliation if they suffer adverse action for exercising their labor rights, such as using paid sick leave or time off related a specified school activity. In addition, under the Families First Coronavirus Response Act, employers may not discharge, discipline, or discriminate against any employee who (a) takes paid sick leave or (b) has filed a complaint or proceeding or testified in any such proceeding related to the benefits and protections provided by the new Act.

Making immigration-related threats against employees who exercise their rights under these laws is unlawful retaliation.

B. Does an employer have a duty to prohibit discrimination/ harassment during the COVID-19 pandemic?

Yes, employers' duty to prohibit discrimination, harassment, and retaliation remain unchanged during the pandemic. Employers should take careful steps to ensure employees are not engaging in discrimination and harassment. For purposes of the COVID-19 outbreak, employers should be particularly vigilant as it pertains to harassment and discrimination because of a person's disabilities, whether actual or perceived, and their race, color, or national origin

VIII. What benefits are available to employees?

A. Disability Insurance

California employees who are unable to work due to exposure to COVID-19 (certified by a medical professional) can apply for state-sponsored disability insurance ("DI"). DI provides short-term benefit payments to eligible workers who have full or partial loss of wages

due to a non-work-related illness, injury, or pregnancy. DI can provide workers up to 60-70% of the worker's wages, up to a maximum of $1,300 per week. Governor Newsom's Executive Order regarding COVID-19 waives the one-week waiting period for DI benefits so that eligible employees may start receiving benefits the first week they are out of work.

B. Paid Family Leave

California employees who are unable to work due to the need to care for an ill or quarantined family member with COVID-19 (certified by a medical professional) may file a Paid Family Leave ("PFL") claim. PFL also is a state-sponsored benefit that provides up to six weeks of paid benefits to eligible workers in order to care for an ill family member or to bond with a new child. Similar to DI, PFL benefits are approximately 60-70 % of a worker's wages up to a maximum of $1,300 per week.

C. Reduced Work Hours Unemployment Claims

California unemployment insurance allows for partial wage replacement for workers who lose their job or have their hours reduced through no fault of their own. Workers under this policy could be eligible for unemployment wages between $45-$450 per week.

IX. What Assistance is available to Employers?

A. Assistance for Reduced Work Hours

Employers experiencing business slowdowns because of COVID-19 and the impact on the economy can apply to the Unemployment Insurance Work Sharing Program. This program allows employers to attempt to avoid layoffs by retaining employees but reducing their hours and wages, which can then be partially offset with Unemployment Insurance benefits. Workers of employers that are approved to participate in the Work Sharing Program receive a percentage of their weekly UI benefit amount based on the percentage of hours and wages reduced, up to 60 percent. This program has the dual benefit of cutting employer costs during the recovery from the impacts of COVID-19 while giving employees an opportunity to supplement any lost wages and hours.

B. Tax Assistance

California employers may request a 60-day extension from the EDD to file their state payroll reports and/or to deposit payroll taxes without interest or penalty

X. Miscellaneous

A. What information may be shared with an employer's staff if an employee is quarantined or tests positive for COVID-19?

If an employee or worker is confirmed to have contracted COVID-19, you should inform your staff of their potential exposure to COVID-19 in the workplace. However, you should not disclose the identity of the quarantined employee based on privacy laws.

B. Can employers force California employees to use accrued but unused vacation or PTO hours if they experience work shortages, or if employees cannot come to work due to state or local restrictions and are not able or asked to work remotely?

Maybe, but it remains uncertain. The U.S. Department of Labor (DOL) takes the position that because employers are not required under the FLSA to provide any vacation time to employees, there is no prohibition on an employer giving vacation time and later requiring that such vacation time be taken on a specific day(s) when employees cannot work due to inclement weather or temporary shutdowns. In contrast, accrued vacation and PTO hours are considered a vested benefit in California. The California Department of Labor Standards Enforcement ("DSLE") has opined that employers can only force employees to use vested benefits such as vacation and PTO if the employees are given "reasonable notice." The DSLE has opined that reasonable notice requires at least 90 days or one quarter. As such, it appears the plain answer is no under the DSLE approach. However, it should be noted that DLSE opinions are only enforcement guidelines and do not bind courts. A state court may not necessarily accept the DSLE approach, particularly in light of the coronavirus pandemic. Since this is a complicated issue with significant consequences, employers should consult with legal counsel before implementing a policy requiring accrued PTO or vacation be used.

C. If an employer is forced to conduct a mass layoff (50 or more employees) due to the COVID-19 pandemic, do the California WARN Act notice requirements apply?

No. On March 17, 2020, Governor Newsom signed Executive Order N-31-20 which suspends the sixty (60) day notice requirements set forth in the California Warn Act. Employers must still provide employees with written notices in accordance with Labor Code Section 1401(a)-(b). Additionally, all written notices must include the following statement, "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."

D. If an employee contracts COVID-19 while at work, will it be a compensable workers' compensation injury?

Yes, if an employee can prove that the virus was contracted in the scope of employment, then it will be a compensable injury. Practically, given that COVID-19 is being spread throughout the community, it may be difficult for most employees—other than healthcare workers or first responders— to prove where and when they contracted the virus. However, if an employee suspects they contracted the virus at work, they should be provided a workers' compensation claim form and allowed to apply.

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