2021 Mid-Year Update: COVID-19 and Employment Law

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Legal Disclaimer

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The general information herein is provided does not constitute legal advice.

Where are we?

- COVID-19, social justice, and employment laws are rapidly evolving
- Must monitor changes to state/local law, including workplace safety (i.e., COVID), wage/hour, leaves of absence, etc.

Mid-Year Update

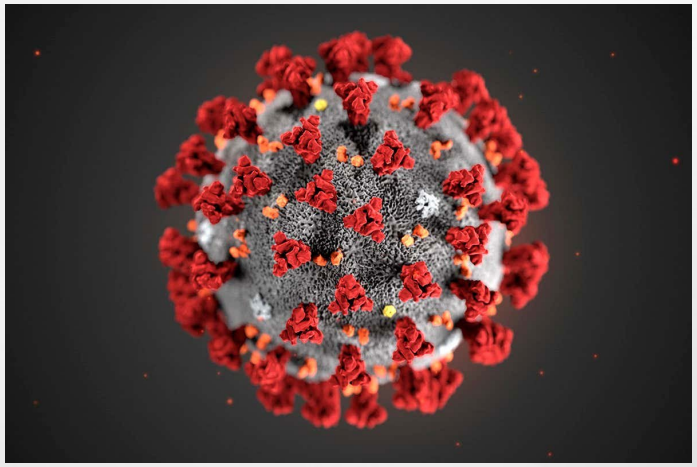
1. California's "Reopening"
2. Meal Periods
3. "Non-COVID" Legislation



COVID-19 Relaxed Rules

- Cal-OSHA (**Workplace**)
- CA Dept. of Public Health (**Generally**)

Cal/OSHA Emergency Standard



November 2020

- Written COVID-19 Prevention Program
- Notices of COVID-19 Exposures
- Notices to Local Health Department
- Exclusion Pay & Benefits
- Testing Requirements
- Workplace Safety Requirements
- Training Obligations

Cal/OSHA Emergency Standard

- **May 13** –CDC says fully vaccinated people no longer need to wear a mask or physically distance in most settings
  - *Caveat* – "except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local businesses and workplace guidance"
- **May 17** - Federal OSHA tells employers to follow CDC guidance until federal OSHA guidance is updated
- ***The Cal/OSHA Emergency Standard is the applicable rule for California employers***

Cal/OSHA – Where Are We Now?



- Cal/OSHA released a *third* set of proposed revisions to the ETS on **June 11**.
- **The Board approved the proposed changes on June 17.**
- Newsom signed an Executive Order making it effective immediately

Cal/OSHA – Current ETS

Masking -- Rules more aligned with CDC/CDPH guidance

- No mask requirement outdoors regardless of vaccine status
  - Except during outbreaks and where unvaccinated cannot socially distance
  - Must communicate that face coverings are *recommended* for unvaccinated employees outdoors where can't social distance.
- Fully vaccinated
  - Need not wear masks indoors/outdoors (regardless of whether others have been vaccinated – the old "all in a room" standard"), ***but must document vaccination status***
- Unvaccinated
  - Must continue to wear masks indoors or in vehicles, except when alone/eating etc.
  - Must be provided N95 respirators upon request for voluntary use when working indoors or in a vehicle with others
  - Need to have enough N95s on hand (and during outbreak)

Cal/OSHA – Current ETS

Vaccines -- Employers must "document" vaccine status

1. Employees provide proof of vaccination (vaccine card, image of vaccine card or health care document showing vaccination status) and *employer maintains a copy*.
2. Employees provide proof of vaccination. The employer maintains a record of the employees who presented proof, *but not the vaccine record itself*.
3. Employees self-attest to vaccination status and employer maintains a record of who self-attests.

Cal/OSHA – Current ETS



Message to Employers

"If you don't get the vaccine status of your workforce, must continue to follow old ETS guidelines."

Message to Employees

"If you want to take advantage of the relaxed rules, need to be vaccinated."

California's Reopening - Guests



Full "re-opening" on June 15

- Fully vaccinated guests
  - Masks generally not required indoors or outdoors
  - But CDPH requires masks in limited circumstances (i.e., public transit, healthcare facilities, shelters, jail…)
- Unvaccinated guests
  - Masks still required indoors
  - Masks required outdoors when distancing not possible

California's Reopening - Guests

How do you distinguish between vaccinated and unvaccinated guests?

1. Notify guests of vaccination requirement and allow vaccinated individuals to "self-attest" that they comply prior to entry
   - Signage? **Vaccinated Guests Are Not Required to Wear Face Coverings. However, Face Coverings are Required for Those Who Are Not Vaccinated. Thank You for Your Cooperation"**
2. Implement vaccine verification procedures
3. Require all guests to wear masks

Don't prevent any guest from wearing a mask if they choose to do so

COVID-19 Resources

COVID-19 Data Bank - Templates/Forms

https://www.fisherphillips.com/data-bank-templates-forms

Fisher Phillips Vaccine Resource Center

https://www.fisherphillips.com/services/emerging-issues/vaccine-resource-center/index.html

Wage and Hour Law

Donohue v. AMN Services

California Supreme Court

March 1, 2021

Meal Periods



Donohue v. AMN Services

MEAL PERIODS

- The court reaffirmed its prior holding in *Brinker* that an employer is not liable if the employee chooses to take a short or delayed meal period or no meal period at all.
- HOWEVER, if timekeeping records show that an employee failed to take a compliant meal period, there is a "rebuttable presumption" that the employer failed to provide a proper meal period.
- Employers have the ultimate burden to prove they provided compliant meal periods for any shifts where a meal period was short, late, or not recorded at all.

Donohue v. AMN Services

Employer meets its burden by presenting evidence that employees:

(1) had been "provided" compliant meal periods during which they chose to work or

(2) were paid premiums for non-compliant meal periods

Donohue v. AMN Services

ROUNDING MEAL PUNCHES

- "Employers cannot engage in the practice of rounding time punches—that is, adjusting the hours that an employee has actually worked to the nearest preset time increment – **in the meal period context**."
- Meal period laws are designed to prevent even minor infringements on meal period requirements – rounding is incompatible with that objective

Legislative Update

- California Family Rights Act (CFRA) Expansion
- “Right of Recall” Law

CFRA Expansion

- CFRA has only applied to employers with 50 or more employees
- As of January 1, 2021, applies to those with more than 5 employees.
- Business community has concerns, especially on heels of COVID-19 crisis.
- **Update your employee handbook immediately**



CFRA Expansion

- **"Job protected" leave** for up to 12 weeks, maintain job, pay; maintain health benefits (if any) for "serious health conditions"
- **Expands "family members"** to include adult children, siblings, grandparents, grandchildren (formerly just child, spouse, parent, registered domestic partner)
- **Must provide notice** of eligibility forms, designate the leave appropriately, obtain certification forms, formally track available leave time etc.
- **Intermittent leave** may be required

Rehiring and Retention – SB 93

- SB 93 went into effect April 16, 2021 immediately
- Applies to hotels (and other specified industries) with more than **50 rooms** as of December 31, 2019
- If re-open position, must recall and make offer to "qualified" employees laid-off or furloughed due to COVID-19
- Expires December 31, 2024



Rehiring and Retention – SB 93

- "Qualified" if held the "same or similar" position
- Most senior (hire-date) displaced employee has priority
- Need not retrain; and need not pay the same rate



Rehiring and Retention – SB 93

- Offers must be made in writing within 5 business days of "**establishing a position**"
  - Either by hand or last known address; and
  - By email and text message
- Simultaneous "conditional" offers may be made to laid-off employees with most senior employee receiving offer
- Employees must be given 5 business days from receipt of the offer to consider

Rehiring and Retention – SB 93

Prepare list of former employees who separated due to a COVID-19 reason with:

- Contact information, date of hire, and position held
- Prepare template letters
- Develop a system to ensure that the employer record retention requirements are satisfied



***PENALTIES ***

- $100 for each employee; and
- $500 for ***each day*** an employee's rights are violated

Wrapping it all up

1. Align COVID-19 Procedures to Comply With New Standards
2. Update Written COVID-19 Prevention Plan
3. Update Employee Handbook (CFRA, meal/rest period policies, etc.)
4. Conduct Time Card/Pay Record Audits
5. Ensure All Hiring Complies with SB 93



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Questions?



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