

Employing in the Age of COVID-19: What Employers Should Know

April 6, 2020

Presented by:

Lukas Clary, Meagan D. Bainbridge
and Ryan E. Abernethy

weintraub tobín
ATTORNEYS AT LAW

Speakers



Lukas Clary
(916) 558-6075
lclary@weintraub.com
weintraub tobín
ATTORNEYS AT LAW



Meagan Bainbridge
(916) 558-6038
mbainbridge@weintraub.com



Ryan Abernethy
(916) 558-6037
rabernethy@weintraub.com

Shelter In Place: What Qualifies as an Essential Business

weintraub tobín
ATTORNEYS AT LAW

California's Shelter-In-Place Order Executive Order N-33-20

- Went into effect on Thursday, March 19, 2020.
- The order is in place until further notice. It covers the whole state of California.
- Orders "all individuals living in the State of California to stay home or at their place of residence" unless they operate in one of **sixteen sectors deemed to be critical** to our infrastructure by the federal government (an "**essential business**")
- Many other states have issued similar orders.

weintraub tobin
ATTORNEYS AT LAW

What Qualifies As An Essential Business?

The **16 sectors** deemed essential/critical to our infrastructure:

1. Chemical Sector
2. Commercial Facilities Sector
3. Communications Sector
4. Critical Manufacturing Sector
5. Dams Sector
6. Defense Industrial Base Sector
7. Emergency Services Sector
8. Energy Sector
9. Financial Services Sector
10. Food and Agriculture Sector
11. Government Facilities Sector
12. Healthcare and Public Health Sector
13. Information Technology Sector
14. Nuclear Reactors, Materials, and Waste Sector
15. Transportation Systems Sector
16. Water and Wastewater Systems Sector

weintraub tobin
ATTORNEYS AT LAW

What Qualifies As An Essential Business? (Cont.)

Examples of essential businesses (identified by CA):

- Gas stations;
- Pharmacies;
- Food: Grocery stores, farmers markets, food banks, convenience stores, take-out and delivery restaurants;
- Banks;
- Laundromats/laundry services;
- Certain manufacturers;
- Essential state and local government functions will also remain open, including law enforcement and offices that provide government programs and services.

Examples of non-essential business (identified by CA):

- Dine-in restaurants;
- Bars and nightclubs;
- Entertainment venues;
- Gyms and fitness studios;
- Public events and gatherings;
- Convention Centers; and
- Hair and nail salons.

weintraub tobin
ATTORNEYS AT LAW

Guidance For Whether Your Company Qualifies As An Essential Business:

- The **CISA website** gives overview of each sector and sector-specific plans containing sector profile and descriptions – “data mine it”;
- **CA State Public Health Officer** sent additional guidance on March 22, 2020 discussing what qualifies as an essential business;
 - Last updated on March 31, 2020 -- periodically adding specific types of business so stay tuned if you’re unsure if your company qualifies;
 - Found at: <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf>
- **Advisory note from CISA on March 28, 2020**—not binding
 - **Delegates response activities primarily to regional government** (state, municipal)
 - Individual jurisdictions are encouraged to add or subtract essential workforce categories based on their own requirements and discretion;
 - The categories are meant to be “**overly inclusive**”;
 - Encourages state and local leaders to consider the impact that closing operations would have outside jurisdiction;
 - Found at: <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>
- Sometimes the answer remains unclear – seek legal counsel

weintraub tobin
weintobco, llc a california limited liability corporation

If You Conclude Your Business Qualifies As Essential:

- **CHECK YOUR COUNTY AND CITY FOR ANY STRICTER LIMITATIONS!!!**
- Specific authorization from the state is not required.
- Still must comply with the order “except as needed to **maintain continuity of operations.**”
- Still required to adjust operations amid COVID-19
 - Telecommuting where possible
 - Social distancing (6 feet is the current general standard)
 - Hand washing
 - Sent home if sick
 - Over 65 w/pre-existing conditions encouraged to stay home
- **Authorization letters** from company leadership explaining that the identified worker carrying the letter is a critical infrastructure worker who needs to be allowed access to their place of work, and directing questions to point-person at company.

weintraub tobin
weintobco, llc a california limited liability corporation

Penalties

- Violation is a misdemeanor punishable by fine, imprisonment, or both.
(California Health and Safety Code sections 120295, et seq.)
- Some CA cities are threatening to shut off utilities to non-essential business that continue operations.

weintraub tobin
weintobco, llc a california limited liability corporation

Maintaining Workplace Safety

weintraub tobin
ATTORNEYS AT LAW

OSHA Covid-19 Guidance

- "To reduce the impact of COVID-19 outbreak conditions on businesses, workers, customers, and the public, it is important for all employers to plan now for COVID-19."
- Cal/OSHA recommends following the Center for Disease Control and Prevention (CDC) recommendations.

weintraub tobin
ATTORNEYS AT LAW

CDC Guidelines: Steps Employers Should Take

- Prepare to implement basic infection prevention measures
- Develop an Infectious Disease Preparedness and Response Plan
- Develop policies and procedures for prompt identification and isolation of sick people, if appropriate

weintraub tobin
ATTORNEYS AT LAW

Infection Prevention Measures

- Actively encourage sick employees to stay home
- Send employees with acute respiratory illness symptoms home immediately
- Provide information and training to employees on:
 - Cough/sneeze etiquette
 - Hand hygiene: provide a place to wash hands and encourage frequent washing
 - Avoid close contact with sick persons
 - Avoid touching eyes, nose, and mouth with unwashed hands
 - Avoid sharing personal items with co-workers (i.e., dishes, cups, etc.)
 - Provide employees with tissues, no-touch disposal trash cans, and hand sanitizer
- Perform routine environmental cleaning of shared workspaces

weintraub tobin
ATTORNEYS AT LAW

Creating an Infectious Disease Outbreak Response Plan

- Allow flexible worksites
 - Telecommuting
 - Flexible work hours to increase physical distance between employees
 - Distancing measures for those present at work
- Consider downsizing operations and conducting essential operations with a reduced workforce
 - Could include cross-training workers on new jobs
- Postpone or cancel large work-related meetings or events

weintraub tobin
ATTORNEYS AT LAW

Develop Policies and Procedures

- Employers should inform and encourage employees to self-monitor for signs and symptoms of COVID-19
- Develop clear reporting policies for employees who are sick or experiencing symptoms
- Policies for isolating: move potentially infectious people to a location away from other workers
 - Designated rooms with closed doors may serve as an isolation room until a worker can be removed
 - Restrict number of people allowed in isolation areas
- Allow and encourage use of facemasks and other personal protective equipment

weintraub tobin
ATTORNEYS AT LAW

Develop Policies and Procedures (cont'd)

- Ensure that sick leave policies are flexible and consistent with public health guidance
 - And that employees are aware of the policies
- Do not rely on healthcare provider's note to validate illness or to return to work
- Maintain flexible policies that allow employees to stay home with sick family members

weintraub tobin

Resources

- **Center for Disease Control and Prevention**
 - <https://www.cdc.gov/coronavirus/2019-ncov>
- **DOL – OSHA: Guidance on Preparing Workplaces for COVID-19**
 - <https://www.osha.gov/Publications/OSHA3990.pdf>
- **Cal/OSHA: Guidance on Requirements to Protect Workers from Coronavirus**
 - <https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html>
- **Guidance is advisory in nature**

weintraub tobin

The Warn Act, Furloughs, Layoffs, Salary Reduction

weintraub tobin

Layoffs

- A layoff is a termination of employment
- Employees are eligible for unemployment benefits
 - Not eligible for statutory leave
- Be mindful of obligations in employment contracts and CBAs
- Provide separation documents
- Consider severance package

weintraub tobin
ATTORNEYS AT LAW

Furloughs

- A furlough is essentially an unpaid leave of absence
- Still eligible for unemployment benefits
- If furlough lasts longer than one pay period, effectively treated like a lay off for wage payment purposes
 - Final pay, vacation/PTO
- Consider impact on health coverage and other benefits
- No statutory leaves, but possibly vacation/PTO

weintraub tobin
ATTORNEYS AT LAW

Layoffs vs Furloughs

- Laid off employees are removed from payroll
 - Difference can impact employee head count for EDD/ACA/Workers' Compensation purposes
- Both eligible for unemployment benefits
- Both entitled to final pay on last day worked
 - Includes accrued vacation and PTO
 - Exception: furlough lasting less than one pay period
- Furloughed employees might still retain benefits while laid off employees will not
 - Check the language in your plans and policies
 - Sick pay may be retained (furloughs) or reinstated (lay offs), depending on length
- Need to re-verify employment eligibility if layoff lasts longer than 3 years

weintraub tobin
ATTORNEYS AT LAW

Salary Reduction

- Can be combined with a reduced schedule/furlough
- Check contracts/CBAs to ensure compliance
- Exempt employees: do not drop below minimum salary unless reclassifying
- Non-exempt employees: do not drop below minimum wage
- EDD and Labor Code § 2810.5 notices

weintraub tobin
ATTORNEYS AT LAW

Federal WARN Act

- Worker Adjustment and Retraining Notification Act (29 U.S.C. § 2101, et seq.)
 - Requires employers to provide at least 60 calendar days notice in advance of plant closings and mass layoffs
 - Applies to businesses with 100 or more full-time workers and lays off at least 50 people at a single employment site
 - Part-time workers do not count for head-count purpose but are still entitled to WARN notice
- Exception: does NOT apply when the closing or mass layoff results from “unforeseeable business circumstances”
 - Must be something outside the employer’s control
 - For example, COVID-19

weintraub tobin
ATTORNEYS AT LAW

Cal-WARN

- California Worker Adjustment and Retraining Notification Act (Cal. Labor Code § 1400 et seq.)
- Requires 60-day notice when at least 50 employees laid off at single location within 30-day period
 - Does not distinguish between full-time and part-time
- Does NOT normally contain “unforeseeable business circumstances” exception
- Must provide written notice to the impacted employees and to the EDD/LWBD/chief elected official in the city and county
- Must state the basis for the layoff

weintraub tobin
ATTORNEYS AT LAW

Cal-WARN Suspension

- On March 17, 2020, Gov. Newsom issued an Executive Order temporarily suspending Cal-WARN requirements
 - In place through “the end of this emergency”
- Must still provide notice as far in advance as practicable, but need not be 60 days
- Must be COVID-19 related per EDD FAQs
- Must still provide notice to all same people/government agencies
- Resource: https://www.edd.ca.gov/about_edd/coronavirus-2019/faqs/WARN.htm

weintraub tobin

Cal-WARN Notice Language

- Include the following information in the notice to each affected employee:
 - A statement as to whether the planned action is expected to be permanent or temporary and, if the entire location is to be closed, a statement to that effect
 - The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated
 - An indication whether or not bumping rights exist ¹
 - The name and telephone number of a company official to contact for further information
 - **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.”**

weintraub tobin

Notice Language (cont.)

- Include the following information in the notices separately provided to the EDD, the Local Workforce Development Board, and the chief elected official of each city and county government within which the termination, relocation, or mass layoff occurs: Name and address of the employment site where the closing or mass layoff will occur.
- Name and phone number of a company official to contact for further information.
- Statement as to whether the planned action is expected to be permanent or temporary and, if the entire location is to be closed, a statement to that effect.
- Expected date of the first separation, and the anticipated schedule for subsequent separations.
- Job titles of positions to be affected, and the number of employees to be laid off in each job classification.
- In the case of layoffs occurring at multiple locations, a breakdown of the number and job titles of affected employees at each location.
- An indication as to whether or not bumping rights exist.
- Name of each union representing affected employees, if any.
- Name and address of the chief elected officer of each union, if applicable.
- The notice may include additional information useful to the employees such as, if the planned action is expected to be temporary, the estimated duration, if known.

weintraub tobin

Family First Coronavirus Response Act, FMLA, PTO and Available Tax Credits

weintraub tobin
ATTORNEYS AT LAW

Family First Coronavirus Response Act (FFCRA) – the basics

- **Expands the Family and Medical Leave Act (FMLA)** temporarily to cover leave needed for the care of children out of school because of COVID-19 and also makes weeks 3 through 12 of its effective period paid leave;
- Creates **2 weeks of paid sick leave** for leave related to the coronavirus;
- Provides for **tax credits** related to the paid leave mandated by the act;
- Effective April 2, 2020; and
- Expires December 31, 2020.

weintraub tobin
ATTORNEYS AT LAW

Family First Coronavirus Response Act (FFCRA) – The Basics

- **Covered Employers:** All private employers with **fewer than 500 employees**, and certain public employers, as of April 1, 2020, to provide E-FMLA leave
 - Count includes full-time, part-time working anywhere in US (includes employees on leave and jointly employed employees)
- Employer **posting requirement** March 25, 2020, available on DOL website

weintraub tobin
ATTORNEYS AT LAW

Emergency Family and Medical Leave Expansion Act (EFMLEA)

- **Eligible Employees**
- Covers all employees who have been employed for at least **30 calendar days** by the employer
 - “30 days” if on payroll for the last 30 calendar days
- Part-time, full-time, salaried
- Much broader than regular FMLA: 1250 hours in the last 12 calendar months
- Employers MAY exclude “health care providers” or “emergency responders” (both broadly defined)

weintraub tobin

Emergency Family and Medical Leave Expansion Act (EFMLEA)

- **Unpaid/Paid Leave Benefits (12 weeks total)**
- **First 10 days of E-FMLA may be unpaid**—employee may elect to use PTO, vacation or paid sick leave under EPSLA during this time
 - For many employees, this period will be paid as a result of paid sick leave under Emergency Paid Sick Time Act
- **After first 10 days**, employers must provide **paid leave, for up to 10 additional weeks**, in an amount not less than **two-thirds** of the employee’s regular pay rate, for the number of hours the employee would otherwise be normally scheduled to work.
 - with continuation of health insurance
 - E-FMLA paid leave cannot exceed \$200 per day and \$10,000 in the aggregate
 - Does not give more weeks to FMLA – Employee who already used FMLA disqualified

weintraub tobin

EFMLEA (cont’d)

- **One REASON FOR LEAVE:**
 - employee is unable to work (or telework) due to a need to care for the employee’s son or daughter who is under 18 years of age if the child’s school or place of care has been closed or the child care provider of the employee’s child is unavailable due to a public health emergency.

weintraub tobin

EFMLEA (cont'd)

Exceptions:

1. Small Business:

- Business with **fewer than 50 employees** are exempt from child care leave obligation if employer can prove ANY of the following apply:
 - Financial burden of leave would exceed available business revenues;
 - Employee is specialized and essential to operations; OR
 - Insufficient employees to operate if granted.
- No application process to qualify
- Even if exempt, still must post FFCRA notice

2. Employers of **health care providers or emergency responders** may elect not to provide the sick leave under the E-PSLA to those employees.

weintraub tobin

ATTORNEYS AT LAW

EFMLEA (cont'd)

Job Restoration

- As under the existing FMLA, covered employers must restore employees who take public health emergency leave to their previous position or an equivalent position upon their return from leave.

weintraub tobin

ATTORNEYS AT LAW

Emergency Paid Sick Leave Act ("E-PSLA")

Benefit Basics:

- Again, covers ALL employees of private business that have fewer than 500 employees and certain government employers
- Six qualifying COVID-19 related reasons for job-protected leave
- During Leave, continuation of health insurance
- Entitled to paid sick leave over a 2-week period

weintraub tobin

ATTORNEYS AT LAW

E-PSLA (cont'd)

Amount of Emergency Paid Sick Leave (2-week calculation)

- Full-time employees = **80 hours** of paid sick time;
- Part-time employees = the average number of hours the employee works over a **two-week period**.
- Schedule varies from week to week = the **amount agreed upon at hire**, or, if unclear, the average number of hours per day over the **6-month period** ending on the date the employee takes leave under the Act.

weintraub tobin

Purposes For Taking E-PSLA Leave

Unable to work (or *telework*) because the employee:

- 1) is **subject to a Federal, State, or local quarantine** or isolation order related to COVID-19;
- 2) has been **advised by a health care provider to self-quarantine** due to concerns related to COVID-19;
- 3) is **experiencing symptoms of COVID-19** and seeking a medical diagnosis;

...

weintraub tobin

Purposes for Taking E-PSLA Leave (cont'd)

- 4) is **caring for an individual** who is subject to a quarantine or isolation order related to COVID-19;
- 5) is caring for a son or daughter because the **child care provider or school is unavailable due to COVID-19** precautions; or
- 6) is experiencing any other **substantially similar condition**.

weintraub tobin

E-PSLA – Amount Available

- leave for **themselves** (numbers 1-3) = **full pay** (cap at \$511 per day or \$5,110 in total)
- leave for **others** (numbers 4-6) = **2/3rds pay** (cap at \$200 per day or \$2,000 in total)

weintraub tobin

E-PSLA (cont'd)

Reasonable Notice to Employer

- After the first workday (or portion thereof) an employee receives paid sick time under the E-PSLA, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.

Available for immediate use by the employee regardless of how long the employee has been employed by the employer.

weintraub tobin

Available Tax Credits Under FFCRA

- Eligible Employers are entitled to a fully refundable tax credit equal to the required paid sick leave under the E-PSLA or FMLA leave under the E-FMLA.
 - the costs to maintain health insurance coverage for covered employees
 - Medicare taxes
- Employers should further review the FFCRA and IRS website regarding such tax credits and work with their CPA and/or our corporate attorney regarding such credits.

weintraub tobin

The Payroll Protection Act

weintraub tobin
CHEDIAK COLEMAN GRODIN LLP

The Payroll Protection Act

- \$349Bn "Paycheck Protection Program" (PPP)
 - Funding >> EIDL program
 - Largest economic rescue package in U.S. history
- For small businesses (less than 500 employees) that need **funds to covered expenses caused by current economic disruption** and not already covered under COVID-19 relief law and was in business on February 15, 2020
- Loan forgiveness available under some stipulations; unforgiven portion due in ten years (with option to defer)
- Application available March 31; **applications can be submitted as of April 3**

weintraub tobin
CHEDIAK COLEMAN GRODIN LLP

The Payroll Protection Act (cont.)

- "Substantially Affected by COVID-19" includes business that have been affected by ...
 - Supply chain disruptions
 - Quantity and lead time
 - Quality including shortages for quality reasons
 - Technology, including compromised payment networks
 - Staffing challenges
 - Decrease in sales and/or customers
 - Shuttered businesses

weintraub tobin
CHEDIAK COLEMAN GRODIN LLP

The Payroll Protection Act (cont.)

- **Loans up to \$10MM** to cover [payroll and other working capital]
 - Loan limit is 2.5x average monthly total payroll (excluding comp to employees over \$100K but including vacation time, health insurance, retirement benefits, etc.) plus unrealized share of 7(a) program
 - Loans made through current SBA 7(a) lenders and **other designated institutions**
 - **No collateral or personal guarantees required**; other indebtedness is allowed
- **Forgiveable** if used for payroll, rent, utilities, and mortgage interest payments (forgiveable amount reduced by recent cuts in number of employees or salary reductions, among other things -- can **rehire** to fix calculus)
- Six months of no payments
- Unforgiveable rate is fixed at 4.0% and unforgiveable portion will be amortize over ten years

weintraub tobin

AGENCY GUIDANCE on COVID-19 COMMONLY ASKED QUESTIONS

weintraub tobin

Can I Take my Employee's Temperature?

- Yes. The EEOC and DFEH have confirmed that measuring employees' body temperatures is permissible in light of the global pandemic. Under these circumstances, taking an employee's temperature is considered a permissible "medical examination" under the ADA, given the community spread of COVID-19 and when done to assess the general workplace safety
- If you are going to take temperatures:
 - designate one person to conduct temperature checks;
 - train the individual; and
 - determine what mitigation efforts can be taken to protect that employee (personal protective equipment, etc.).

weintraub tobin

Can I Send An Employee Home Who Exhibits Symptoms At Work?

- Yes, sending an employee home who displays symptoms of a contagious illness would not violate the ADA's restrictions on disability-related actions.

weintraub tobin
ATTORNEYS AT LAW

What Can I Disclose to My Employees?

- If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain employee confidentiality as required by the Americans with Disabilities Act (ADA).
- This same rule applies to third-parties whom the employee may have come in contact with through the workplace.

weintraub tobin
ATTORNEYS AT LAW

Does HIPAA Still Apply?

- **Yes!**
- HHS issued a reminder after the WHO declared a global health emergency.
- Generally excludes disclosure to a public health authority, such as the CDC or a state or local health department, that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury or disability.

weintraub tobin
ATTORNEYS AT LAW

How Should We Treat Medical Information?

- EEOC and DFEH have both issued guidance reminding employers that all medical information still should be treated as confidential.

weintraub tobin

Is COVID-19 a Recordable Illness for Purposes of OSHA?

- OSHA recordkeeping requirements mandate covered employers record certain work-related injuries and illnesses on their OSHA 300 log.
- OSHA guidance states that you must record instances of workers contracting COVID-19 if the worker contracts the virus **while on the job**. This means the following circumstances are met:
 - The case is a confirmed case of COVID-19;
 - The case is work-related, as defined by 29 CFR 1904.5; and
 - The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g. medical treatment beyond first-aid, days away from work).

weintraub tobin

When Can My Sick Employee Return to Work?

- CDC has provided two options:
- (1) At least 72 hours have passed since recovery (defined as resolution of fever without the use of fever-reducing medications and improvement in respiratory symptoms); other symptoms have improved; **and** at least 7 days have passed
- (2) Resolution of fever without the use of fever-reducing medications; improvement in respiratory symptoms (e.g., cough, shortness of breath); and negative results of an FDA Emergency Use Authorized molecular assay for COVID-19 from at least two consecutive nasopharyngeal swab specimens collected ≥ 24 hours apart (total of two negative specimens).

weintraub tobin

How Do We Complete I-9 Forms if Workplace is Remote?

- If workplace is remote, DHS has announced greater flexibility for complying with the Form I-9 requirements.
- Employers can inspect the Section 2 documents remotely (e.g., over video link, fax or email, etc.) and then obtain copies of the documents, within three business days.
- Documents must then be physically inspected as normal once normal operations resume
 - Employers should enter "COVID-19" as the reason for the physical inspection delay in the Section 2 "Additional Information" field once physical inspection takes place after normal operations resume.
 - Once the documents have been physically inspected, the employer should add "documents physically examined" with the date of inspection to the Section 2 additional information field on the Form I-9, or to section 3 as appropriate.
- Only applies to remote workplaces. However, if newly hired employees or existing employees are subject to COVID-19 quarantine or lockdown protocols, DHS will evaluate this on a case-by-case basis.

weintraub tobin
ATTORNEYS AT LAW

Does COVID-19 Implicate the ADA?

- Generally, no, in most cases it is a transitory condition.
- Possible argument that the ADA is implicated if the virus substantially limited a major life activity, such as breathing.
- Moreover, if an employer "regards" an employee with COVID-19 as being disabled, that could trigger ADA coverage.

weintraub tobin
ATTORNEYS AT LAW

May I Ask if Employees are Especially Vulnerable?

- Generally, no.
- However, if the pandemic becomes severe or serious according to local, state, or federal health officials, ADA-covered employers may have sufficient objective information to reasonably conclude that employees will face a direct threat if they contract COVID-19. Only then may ADA-covered employers make disability-related inquiries or require medical examinations of asymptomatic employees to determine which employees are at a higher risk of complications.

weintraub tobin
ATTORNEYS AT LAW

May I Encourage Telework?

- Yes.
- The EEOC has opined that telework is an effective infection-control strategy.
- May also be a reasonable accommodation for some employees (especially vulnerable, 65+, etc.).

weintraub tobin

What About EEO Concerns?

- General rules still apply – you cannot treat anyone differently based upon their national origin.
- Per the CDC: “Do not show prejudice to people of Asian descent, because of fear of this new virus. Do not assume that someone of Asian descent is more likely to have COVID-19.”

weintraub tobin

Work-From-Home Policies and Tips and Traps for Maintaining a Remote Workplace

weintraub tobin

Should We Institute A Temporary Remote Work Policy?

- It depends.
- Consider:
 - What type of business are you?
 - Can your employees perform work from home effectively?
 - Do your employees have the means to work from home?
 - Do you have a system/work from home policy already in place?

weintraub tobin

Step One: Identify Roles

- Identify what roles can effectively work from home – focus on duties performed, not individual performing roles or title
 - Will there be exemptions for “essential” personnel that need to be at a certain physical location?
 - What about roles that cannot be performed at home?
- You will want to identify the roles that are critical to your business operations and determine whether those individuals can carry out their jobs while working remotely.

weintraub tobin

Step 2: Take Inventory

- Do you have the IT capabilities?
- Do you have sufficient security and privacy protocols in place?
- Take an inventory of the types of equipment your workers would need to get their job done and ensure they have access to them.
 - This could include laptops, desktop computers, monitors, phones, printers, chargers, office supplies, and internet access.
 - Make sure you consider and clearly communicate with your workers about which physical items are acceptable to be taken from the workplace and which need to stay in your location at all times.
- How will you track time? Productivity?

weintraub tobin

Step 3: Create Policy

- Explain expectations, including that you expect them to help your organization maintain normal business operations during this period of time to the extent possible.
- Identify expectations re: availability – are they working regular work hours? What about family/other obligations?
 - Are employees expected to be online and available over the course of the entire workday, or just during predetermined core hours?
- How will they be expected to maintain contact, report work completed, time, etc.
- Identify whether workers can perform work on their own devices, and if so, do you have a comprehensive BYOD (bring your own device) policy in place?
- Will you prohibit employees from meeting with third parties while doing company business during this period of time?
 - What about co-workers/colleagues?
- Provide an anticipated end date to policy
- Explain how you will evaluate work performance

weintraub tobin

Step 3: Qualify Remote Work Policy

- Avoid creating a precedent that remote work is presumptively a reasonable accommodation in the future.
- Qualify that work from home policy was established because of this pandemic and for its duration only – and that it would not be permitted in the ordinary course of business

weintraub tobin

Step 3: Consider Confidentiality Issues

- Remote work can give rise to information security breaches, even when inadvertent.
 - For example, a family member accidentally sees confidential client/customer information or trade secrets
- Require that employees log in and out when they are not using their computer
- How will you ensure security is protected?

weintraub tobin

Step 4: Execute

- Regularly communicate with staff – via email and through other programs (Zoom, Slack, etc.)
- Monitor productivity, but do not micromanage
- Evaluate as you go and adjust

weintraub tobin

Paying Remote Workers

- Regular rules apply
- Exempt employees need to be paid in full for any week in which they perform any work remotely.
- Nonexempt employees generally are entitled to pay only for time actually worked remotely, whether a full or a partial day.
- Set up tracking system for time worked and watch out for overtime

weintraub tobin

Reimbursable Expenses

- Section 2802 of the California Labor Code requires employers to reimburse their employees for the reasonable and "necessary" expenses they incur in direct consequence of discharging their job duties.
 - Where the expense is necessary, reimbursement could be required regardless of whether the employee would have otherwise incurred such expenses. See *Herrera v. Zumiez* (9th Cir. Mar. 19, 2020).
- **Mandatory** remote work expenses must be reimbursed
 - Required items vs convenience items
 - What about home office equipment(desk, etc.)
- Best Practices:
 - (1) provide employees with all equipment you deem necessary; or
 - (2) have a policy that outlines which expenses are reimbursable and to what extent, and makes clear that if the employee incurs necessary business expenses beyond those anticipated, those expenses should be submitted in accordance with the company's business expense reimbursement policy.

weintraub tobin

Other Considerations

- Workplace injuries - Labor Code section 3600 states that an employer is liable "for any injury sustained by his or her employees arising out of and in the course of the employment."
 - Liability for an injury sustained by an employee while working at home is no different than if the employee had sustained the injury while working in the corporate office.
 - Consider ergonomically unfriendly work areas
- Cybersecurity risks

weintraub tobin

ATTORNEYS AT LAW

Any Questions? Anyone?? Anyone???



weintraub tobin

ATTORNEYS AT LAW

Speakers



Lukas Clary
(916) 558-6075
lclary@weintraub.com

weintraub tobin

ATTORNEYS AT LAW



Meagan Bainbridge
(916) 558-6038
mbainbridge@weintraub.com



Ryan Abernethy
(916) 558-6057
raberne@weintraub.com

DISCLAIMER:

The Labor and Employment Section at Weintraub Tobin Chediak Coleman Grodin ("Weintraub Tobin") is dedicated to providing up-to-date, useful information to allow employers, human resources professionals, and managers to react to rapidly evolving case law, statutes, and regulations that control the California workplace. California employment law, however, is dynamic: Yesterday's standard practice may very well become today's prohibition. While seminar materials and articles offer a common sense means of trying to stay current, such materials are not intended to, and cannot, substitute for legal advice. An individual employer's employment questions require an individual employment lawyer's response. Weintraub Tobin hopes that, in order to answer specific employment questions, you will seek qualified employment advice. The materials presented by attorneys from Weintraub Tobin at this training/seminar and the materials contained in the hand-outs are not intended as legal advice. While Weintraub Tobin hopes that these materials and the discussion at the training/seminar provide you with a useful context to make employment decisions, Weintraub Tobin reminds all users of these materials that specific legal questions require a very specific analysis. None of the materials distributed at the training/seminar are intended as, and are not, legal advice.

weintraub tobin
weintraub tobin chediak coleman grodin law corporation
