

COVID-19: GUIDANCE FOR EMPLOYERS ON LABOR AND EMPLOYMENT LAW ISSUES

Presented by:

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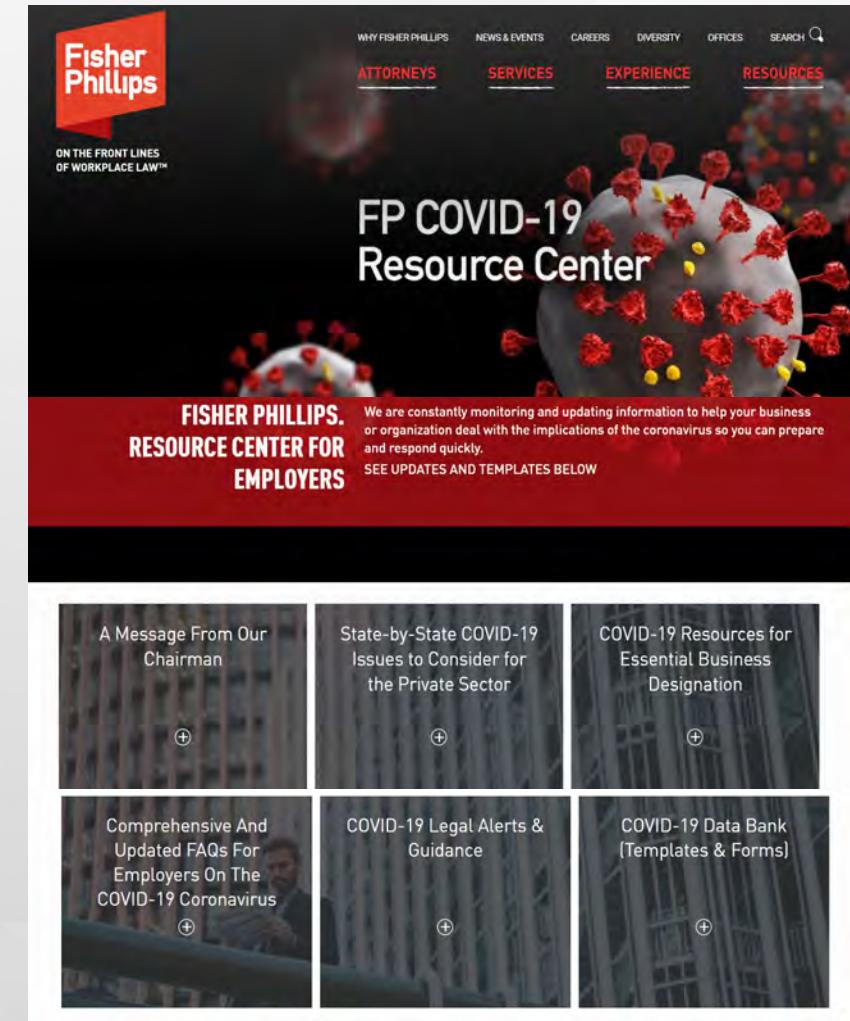
March 31, 2020



CALIFORNIA
ASSOCIATION
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GROWERS

Fisher & Phillips LLP's Resources for CAWG Members

- CAWG Labor & Employment Law Hotline
 - Email: ccook@fisherphillips.com
 - Email: bkahoush@fisherphillips.com
 - Hotline: (415) 490-9048
- FP's Website is now a COVID-19 Resource Center: <https://www.fisherphillips.com/>



TOPICS COVERED IN PRESENTATION

Topics Covered Today

- Is your business allowed to operate under the Governor's "stay at home" order and local "shelter-in-place" orders?
- Dealing with employees who have COVID-19 or may have been exposed.
- Dealing with employees who come to work sick.
- Must you pay employees when you require them to go home?
- May employees refuse to come to work out of fear of contracting COVID-19?
- Layoffs and the federal and state WARN Acts.
- Partial furloughs of exempt employees.
- The new federal paid sick leave and emergency family medical leave laws.

BACKGROUND

Background

- Declared a pandemic on 3/11 and national emergency on 3/13.
- As of 3/30, over **140,904 confirmed cases** in the United States; Over **2,405 fatalities**.
- On 3/29, Dr. Fauci predicted there would be 100,000 to 200,000 fatalities in the United States.
- First possible community transmission case in U.S. confirmed on 2/27.

Background

- House Bill passed on March 15, 2018 addressing emergency sick pay and emergency FMLA; signed into law on March 18, 2020; effective April 1, 2020.
- Over 1 million unemployment claims filed since 3/13.
- The Federal Government has elected not to issue significant restrictions on business operations.
- Governor Gavin Newsom's issued a Stay-at-Home Executive Order with exceptions for certain "critical infrastructure sectors" defined as "essential businesses."

CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT (“CARES ACT”)

The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”)

- Who is eligible for the loans?
 - Available to businesses with not more than 500 employees.
 - “Employee” includes full-time, part-time, or “other basis.”
- What is the criteria for forgiveness on the loans?
 - The bill provides for a paycheck protection programs.
 - Loan amount available is based on a formula: Average monthly payroll costs (during year prior to loan) x 2.5 or \$10 million, whichever is less.
 - The employer/borrower is eligible for forgiveness equal to the amount spent during the eight-week period following origination of the loan on payroll costs, interest on secured debt obligations, rent, and utilities.

The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”)

- Does the loan cover leave paid under the new EPSL and EFMLA requirements?
 - No. Those payments are expressly excluded from the definition of “payroll costs.” Those leave provisions are reimbursed through the tax credit. These loans, instead, cover other payroll costs and other expenses.
- For more information and assistance on the SBA loan program, contact a Fisher & Phillips attorney.

GOVERNOR NEWSOM'S EXECUTIVE STAY-AT-HOME ORDER

Governor Newsom's Executive Stay-at-Home Order – Can Your Business Remain Open?

- Basic rule is that those who can work at home must work at home, but certain businesses in the “Critical Infrastructure Sectors” who are “essential” may remain open to the public for business, including:
 - Hospitals, clinics and doctors’ offices
 - Manufacturers/distributors of pharmaceuticals and medical supplies
 - Police, fire and EMS
 - Public works employees
 - Transportation and logistics
 - **Agriculture**
 - Food processors
 - Grocery and food stores

Travel Restrictions for Essential Business

- The U.S. Department of Homeland Security's Cybersecurity & Infrastructure Security Agency's (CISA) March 19, 2020 Memorandum on Identification of Essential Critical Infrastructure Workers, which was updated on March 29, 2020, confirms that essential business employees are exempt from closure and travel restrictions.
- Fisher & Phillips LLP is drafting Travel Authorization Letters for many clients to distribute to employees in the event they are pulled over the police in transit.

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

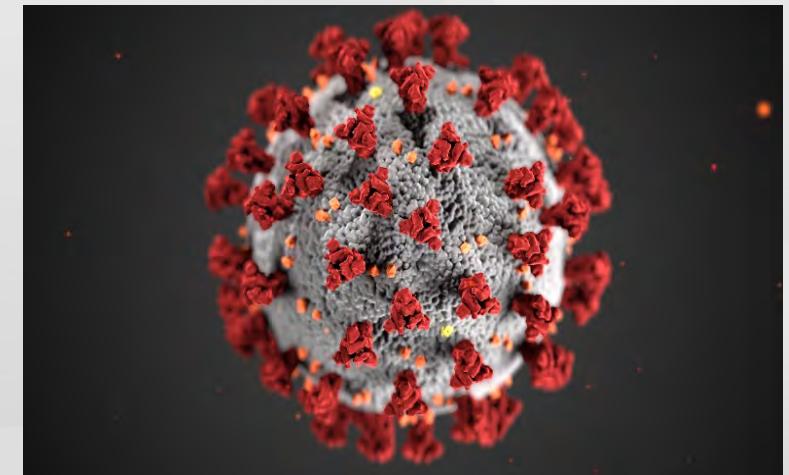
Families First Coronavirus Response Act

- Paid and Unpaid Leave for Coronavirus-Related Reasons
 - Emergency Paid Sick Leave (PSL)
 - Emergency Family and Medical Leave Act (Expands FMLA)
- Emergency Unemployment Insurance Stabilization And Access Act
 - Unemployment Insurance Funding
- Reimbursement to Employers as Tax Credits

EMERGENCY PAID SICK LEAVE

Emergency Paid Sick Leave (EPSL)

- **Employers with 1-499 employees**
 - Employees are counted if in the United States, the District of Columbia, or any territory or possession of the United States.
- **Any employee who works for employer is eligible**
 - No minimum length of employment.



Emergency Paid Sick Leave (EPSL)

- **If the EMPLOYEE is sick, employee is entitled to:**
 - Full-time Employees – Up to 80 hours of paid sick leave
 - Part-time Employees – Paid based on the average number of hours the employee worked for the six months prior to taking paid sick leave.
 - Or, if employed for less than six months, the average number of hours per week the employee would normally be scheduled

Emergency Paid Sick Leave (EPSL) Qualifying Reasons

Must provide paid sick time “to the extent the employee is unable to work (or telework) due to a need for leave because:

- (1) The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19.
- (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- (4) The employee is caring for an **individual** who is subject to an order or self-quarantine as described above.
- (5) The employee is caring for a son or daughter if school or child care is closed/unavailable.
- (6) The employee is experiencing “any other substantially similar condition” specified by HHS (catch all).

Emergency Paid Sick Leave (EPSL) Qualifying Reasons

- Based on US Department of Labor FAQs released on March 26, 2020, it now appears that a government shutdown order will not be covered under the EPLSA qualifying reason (1), which provides, “The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19.”
- However, the FFCRA has many and interpretations may change as the US DOL provides more guidance.

Emergency Paid Sick Leave (EPSL)

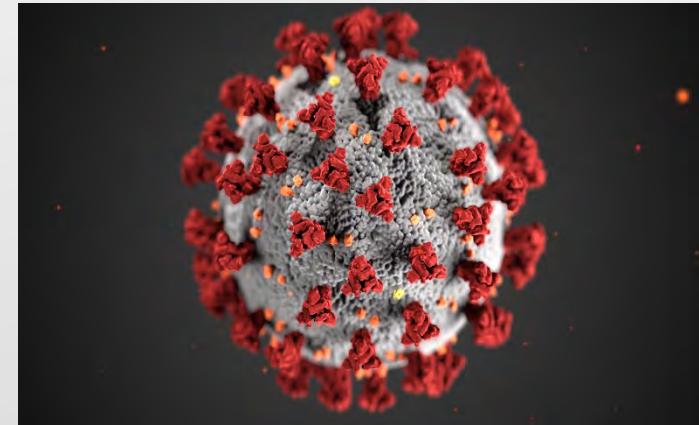
The rate of pay depends of the employee's qualifying reason:

- **At employee's regular rate for qualifying reasons (1), (2) or (3)**
 - Compensated at HIGHER of their regular rate, federal minimum wage or local minimum wage
- **At 2/3 the employee's regular rate for qualifying reasons (4), (5) or (6)**
- **Capped at the following levels:**
 - \$511 per day and \$5,110 in the aggregate per person for qualifying reasons (1), (2) and (3).
 - \$200 per day and \$2,000 in the aggregate per person for qualifying reasons (4), (5) and (6).

EMERGENCY FAMILY AND MEDICAL LEAVE (EFMLA)

Emergency Family and Medical Leave Act

- **Employers with 1-499 employees**
 - Employees are counted if in the United States, the District of Columbia, or any territory or possession of the United States.
 - A corporation is a single employer, rather than its separate establishments or divisions
 - Separate entities will be one employer if they meet either the joint employer or integrated employers tests (as set forth in FMLA regulations)
- **Significantly expands FMLA on a temporary basis**
- **Any employee who worked for employer for 30 days prior to leave and has a qualifying reason is eligible (no requirement of 12 months/1250 hours)**
- **Provides up to 12 weeks of job-protected leave (paid after the first 10 days)**



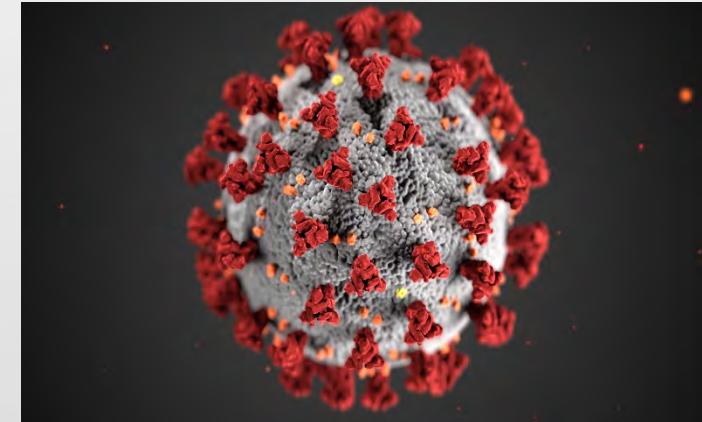
Emergency FMLA Qualifying Reasons

12 weeks of job protected leave when:

- “The employee is unable to work (or telework) due to the need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.”
- Likely FMLA definition of “son or daughter” will apply.

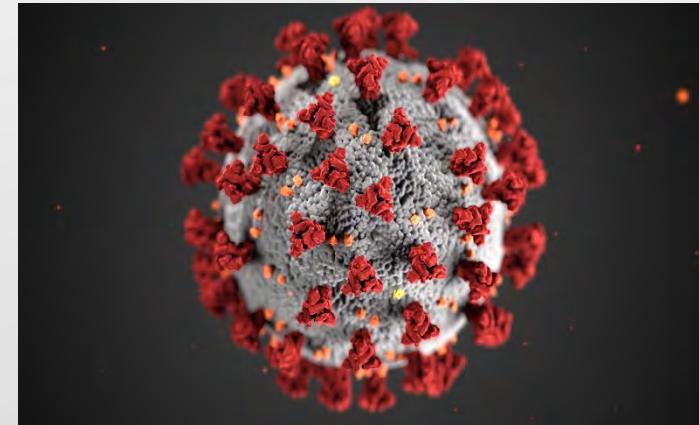
“Public Health Emergency”

- An emergency with respect to COVID-19 declared by a Federal, State or local authority



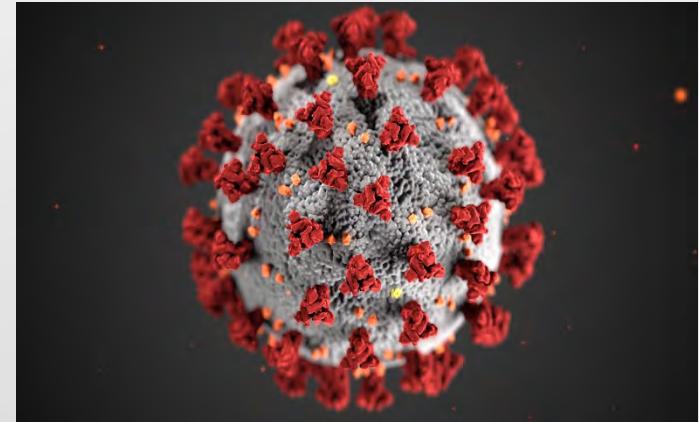
Emergency FMLA - How Does it Work?

- **First 10 days of EFMLA may be unpaid**
 - An employee may elect to substitute accrued PTO, vacation, or sick leave to cover any portion of first 10 days
 - Employer cannot require an employee to substitute such leave
- **After the first 10 days:**
 - Compensated at 2/3 of the regular rate
 - Part-time employees/irregular schedule entitled to be paid based on average number of hours employee worked in prior 6 months, or if employed less than 6 months, average number of hours employee would normally be scheduled to work
 - **Pay capped at \$200 per day and \$10,000 in aggregate per employee**
 - Bargaining unit employees – apply EFMLA consistent with the CBA



Tax Credits

- **Emergency Paid Sick Leave**
 - Each quarter, private sector employers subject to the requirement are entitled to a tax credit equal to the amount of qualified sick leave wages paid by the employer (subject to the same caps as apply to the leave amount paid).
- **Emergency Family and Medical Leave**
 - Each quarter, private sector employers subject to the requirement are entitled to a tax credit equal to the amount of qualified emergency family and medical leave wages paid by the employer (subject to the same caps as apply to the leave amount paid).



Families First Coronavirus Response Act – Notice Requirement

- For emergency paid sick leave, the bill requires employer to post a notice regarding the requirements of the law.
 - A model notice has been made available by the DOL:
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
- The emergency FMLA provisions do not contain a new specific notice requirement. However, under the FMLA, all covered employers must display a general notice (FMLA poster) about the FMLA.

A Few Things to Keep in Mind

State and Local Laws

- Many states and local jurisdictions have their own paid sick leave laws and family and medical leave laws, which employers may be required to provide in addition to these new federal requirements.
- Many states and locals are working quickly to amend their laws and/or add new requirements as well.

U.S. DEPARTMENT OF LABOR'S MARCH 26, 2020 GUIDANCE

FAQs from the Department of Labor on the Families First Coronavirus Response Act

- Effective April 1, 2020
- Employees may not take 80 hours of paid sick leave for self-quarantine, and then another amount of paid sick leave for another reason provided under the Emergency Paid Sick Leave Act.
- An employer may not deny paid sick leave even if the employer gave paid leave for a reason identified in the Emergency Paid Sick Leave Act before going into effect on April 1, 2020.
- Employees may take paid sick leave or expanded family medical leave intermittently while working remote.
- Employees may take intermittent leave in any increment, provided employers agree.

FAQs from the Department of Labor on the Families First Coronavirus Response Act

- If an employer closes the worksite on or after April 1, 2020, but before an employee goes out on leave, the employee cannot get paid sick leave or expanded family and medical leave.
 - However, employees may still be eligible for unemployment insurance benefits.
- If an employer closes their worksite before April 1, 2020, then the employee cannot get paid sick leave or expanded family and medical leave.
 - This is regardless of whether the worksite is closed due to a lack of business, or because it is required to by a government order.
 - However, employees may still be eligible for unemployment insurance benefits.

FAQs from the Department of Labor on the Families First Coronavirus Response Act

- If an employer closes the worksite while an employee is on paid sick leave or emergency FMLA, the employer must pay for the leave used before the employer closed.
 - However, as of the date the employer closes, the employee is no longer entitled to paid sick leave or emergency family and medical leave.
- If an employer is open, but furloughs an employee on or after April 1, 2020, then the employee is not entitled to take paid sick leave or expanded family medical leave.

ADDITIONAL GUIDANCE FROM THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING (DFEH) ON COVID-19

Guidance from the California Department of Fair Employment and Housing (“DFEH”) on COVID-19

- Employers should review their health and safety procedures to help prevent exposure to the virus, and to uphold civil rights protections to ensure discrimination does not occur in the workplace.
- California civil rights laws prohibit discrimination and harassment in employment, including during a pandemic.
- Employers are expected to make their best efforts to obtain public health advice that is current and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on the available information.
- Employers must comply with public health orders issued by the federal government, California state government, and also any applicable local orders.

Guidance from the California Department of Fair Employment and Housing (“DFEH”) on COVID-19

- The DFEH permits an employer to send an employee home if they display COVID-19 symptoms, and to comply with all applicable paid sick leave laws.
- During a pandemic, employers can ask employees if they are experiencing COVID-19 symptoms, such as a fever, chills, or a cough and sore throat.
- Employers may require employees to wear personal protective equipment (PPE) (e.g., face masks, gloves, etc.) designed to reduce the transmission of COVID-19, though where an employee needs a related reasonable accommodation (e.g., non-latex gloves), the employer should provide these, absent an undue hardship.

CONSIDERATIONS WHEN EVALUATING POTENTIAL LAYOFFS AND FURLOUGHS

Furlough and Layoff Considerations

- Furloughs
 - With furloughs, employees continue their employment—for example, with reduced hours or a reduced schedule.
 - If an employee is sent home as a result of a government closure order, based on the most recent guidance from the DOL, the employee would not be eligible for the Emergency Paid Sick Leave or Emergency Family Medical Leave.

Furlough and Layoff Considerations

- Furloughs
 - Fair Labor Standards Act (“FLSA”) Considerations:
 - For exempt employees, the salary basis test must be met for each workweek in which work is performed. An alternative to furloughing would be to lower the exempt employees’ pay on a prospective basis.
 - For non-exempt employees, it is lawful for an employer to reduce the number of hours worked each day or days worked each workweek.

Furlough and Layoff Considerations

- Layoffs
 - A layoff occurs when the employer decides to eliminate a position or group of employees.
 - Employment ends as of the layoff date.
 - Laid-off employees are not eligible for leave under the Families First Coronavirus Act.
 - Laid-off employees are generally eligible for unemployment benefits.
 - Layoffs may trigger the Federal WARN Act, or the California WARN Act.

Layoffs and the Federal and State WARN Acts

- Federal WARN Act:
 - Applies to employers of 100 or more full-time employees
 - Requires 60 days advance notice of any layoffs of 500 or more employees, or of 50 or more employees at a site of employment where at least 33% of full-time employees are affected within 30 days.
 - 90 day rule: if the 50+/33%+ test is met over 90 days in layoffs for some reasons, 60 days of advance notice is required
 - “Unforeseen business circumstances” exception; it would most likely apply here.

Layoffs and the Federal and State WARN Acts

- California WARN Act:
 - Applies to “covered establishments” employing 75 or more persons (including turnover) within the last year.
 - Requires 60 days advance notice of any “mass layoff” of 50 or more employees (no exception for part-time employees) at a “covered establishment.”
 - There is no “unforeseen business circumstances” exception under California law. There is only an exception for a “physical calamity,” and it is not clear whether this exception would apply to COVID-19.

Layoffs and the Federal and State WARN Acts

- Governor Has ***Suspended*** California WARN Act, provided:
 - As much notice is given as is practicable.
 - WARN notices are given or sent to:
 - Each affected employee
 - Any union representing the employees
 - The EDD
 - Local Workforce Investment Board
 - Chief elected official of the county and city where layoff occurs

Layoffs and the Federal and State WARN Acts

- Governor Has ***Suspended*** California WARN Act, provided:
 - WARN notices to employees state:
 - The effective date of the layoff or shutdown and the expected date when the employee will be separated.
 - Whether the planned action will be temporary or permanent, and if the entire plant is to be closed, a statement to that effect.
 - An indication of whether bumping rights exist.
 - Name and telephone number of a company official to contact
 - A statement of the basis for giving less than 60 days notice.

Layoffs and the Federal and State WARN Acts

- Governor Has ***Suspended*** California WARN Act, provided:
 - WARN notices to employees state:
 - That the layoff is caused by “COVID-19-related business circumstances that were not reasonably foreseeable as of the time notice would have been required.”
 - “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.”

Partial Furloughs of Exempt Employees

Key considerations when furloughing exempt employees:

- Partial-week reductions in salary with a corresponding reduction in hours are permitted; for example you could reduce an exempt employee's workweek by one day and reduce his or her salary by 20%.
- You cannot reduce the salary below the minimum salary threshold, however (\$54,080 in California).
- You have to be consistent with a reduced workweek. You can announce a reduced workweek for a discrete period (say, until May 1) or "until further notice" but you cannot go back and forth from week to week.

Partial Furloughs of Exempt Employees

- Employees should not be allowed to use accrued vacation to cover the fifth day of the workweek, but they may use vacation to cover one or more of the four assigned days in a workweek.
- Employees must be prohibited from performing any work while on any off-day. This includes sending or answering work-related e-mails or text messages or making or answering work-related phone calls.

CALIFORNIA UNEMPLOYMENT AND DISABILITY INSURANCE

California Unemployment and Disability Insurance

- The State of California has removed waiting periods for unemployment and disability insurance for employees who lose work as a result of the COVID-19 outbreak.
- The California Employment Development Department permits employees to file an unemployment insurance claim when either the employee loses his/her job, or the employee has their hours reduced.

ADAPTING TO AN EVOLVING LEGAL LANDSCAPE AND BEST PRACTICES

Continue Preparing and Adapting

- Consider rapid developments at the local, state and federal levels.
- Monitor developments daily, quickly weigh risks and make tough decisions.
- Accept the lack of legal precedent and the need to weigh risk and make your best possible decision – process-driven and not prescriptive decision making.
- Be aware of family issues and stress – anxiety – elder care concerns – school kids home – financial future.
- Be aware of morale in the workplace.

Considerations for Employers

- Educate all employees about how the coronavirus can be contracted.
- Establish a point of contact in human resources or elsewhere in your organization for employees who have concerns.
- Remind employees about policies concerning absences and working from home, including vacation, sick pay, FMLA, unemployment, and short-term disability, and considering updating policies to account for new laws.
- Train supervisors on overreaction impacts and importance of adhering to anti-discrimination policies.
- Keep track of updates from the CDC and WHO.

Considerations for Employers

- Can you ask employees to stay at home or leave work if they exhibit symptoms of coronavirus or the flu?
 - Yes. Employers may ask employees to seek medical attention and get tested for COVID-19.
- Can you ask an employee why they missed work?
 - Yes.
- Should you ask an employee for a doctor's note if they missed work?
 - Not recommended. Practice flexibility during this time.

Considerations for Employers

- May an employer take an employees' temperatures to determine whether they have a fever?
 - Not usually, but under the COVID-19 circumstances, yes.
 - However, there are still privacy issues under the ADA and California Consumer Privacy Act (CCPA) considerations.

Considerations for Employers

- What information can an employer disclose to other employees if an employee tests positive for COVID-19?
 - Employers should not identify the infected employee by name or the employee's specific health status, as that could risk a violation of confidentiality laws.
 - Employers should only disclose:
 - An employee has tested positive for COVID-19;
 - The date the employee tested positive; and
 - Advise any employees that have come into contact with that employee that they are being sent home for a 14-day self-isolation period to ensure the infection does not spread.

Can an Employee Simply Refuse to Work?

- An employee's right to refuse to do a task is protected if all of the following conditions are met:
 - Employee asked the employer to eliminate the danger, and employer failed to do so; and
 - Employee refused to work in "good faith." This means employee must genuinely believe that an imminent danger exists; and
 - A reasonable person would agree that there is a real danger of death or serious injury; and
 - There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.
- It likely would violate OSHA's general duty clause if you fail to notify employees of a confirmed COVID-19 case working in close proximity.



If an employee has COVID-19

- If an employee is diagnosed with COVID-19:
 - Remove employee from the workplace.
 - Notify employees and other persons with whom the employee worked in close proximity over the last 14 days; require those employees to self-quarantine for 14 days.
 - Have employee's work area deep cleaned and disinfected.
 - Notify county health department for direction regarding whether whole business must be closed.
- If an employee is exposed to COVID-19:
 - Send employee home for 14 day quarantine.
 - Recommend testing.

Employees Who Come to Work Sick

- Employees who come to work sick should be sent home, especially if they have fever, cough or other flu-like symptoms.
- You may not require employees to seek medical attention.
- Do not attempt to take employees' temperatures without evaluating privacy considerations.
- Consider waiving requirement that employees absent for illness lasting a certain period (e.g., more than 3 days) bring a doctor's note.

Must Employers Pay Employees if you require them to go home?

- Non-exempt (hourly) employees sent home prior to working half of a scheduled shift must be paid for half the shift or time actually worked, whichever is greater.
- Otherwise, non-exempt (hourly) employees need not be paid if they are not working but may use paid sick leave or PTO days (and possibly federal paid sick leave).
- Exempt (salaried) employees may be required to use paid sick leave or PTO days if they are not working, but they must be paid their regular salary if they perform any work such as answering business e-mails or text messages or participating in business phone calls.

GUIDANCE FROM THE CDC

New CDC Guidance on Returning to Work

- 1) Time-since-illness-onset and time-since-recovery strategy (non-test-based strategy)*
 - Persons with COVID-19 who have symptoms and were directed to care for themselves at home may discontinue home isolation under the following conditions:
 - At least 3 days (72 hours) have passed since recovery, defined as resolution of fever without the use of fever-reducing medications and improvement in respiratory symptoms (e.g., cough, shortness of breath); and,
 - At least 7 days have passed since symptoms first appeared.

New CDC Guidance on Returning to Work

- 2) Test-based strategy - Contingent on the availability of ample testing supplies and laboratory capacity as well as convenient access to testing.
 - Persons who have COVID-19 symptoms and were directed to care for themselves at home may discontinue home isolation under the following conditions:
 - Resolution of fever without the use of fever-reducing medications and
 - 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

New CDC Guidance on Returning to Work

- 3) Individuals with laboratory-confirmed COVID-19 who have not had any symptoms may discontinue home isolation when at least 7 days have passed since the date of their first positive COVID-19 diagnostic test and have had no subsequent illness.

SPOTTING ISSUES

Spotting Issues

- PTO/Sick Pay
- Furlough/Temporary Layoff/ Termination
- Wage and Hour
 - Remote worker issues (e.g., timekeeping, breaks, reimbursement, etc.)
 - Exempt vs. non-exempt
 - Reporting time pay
- Avoid setting precedents
- Mitigating risk of potential FEHA claims
- Workers' Compensation
- Fed-WARN and Cal-WARN notice considerations

EMPLOYEE HANDBOOK AND POLICY UPDATES

Updates to Employment Policies and Handbooks

- Employers should prepare new Family Medical Leave Act (FMLA) and Paid Sick Leave (PSL) policies to account for the Families First Coronavirus Response Act and update their employee handbooks accordingly.

ADDITIONAL RESOURCES

Helpful Resources

Fisher Phillips' COVID-19 Resource Center

- **Fisher Phillips Resource Center for Employers** <https://www.fisherphillips.com/>

Other Helpful Resources

- **World Health Organization** <https://www.who.int/>
- **Centers for Disease Control and Prevention** <https://www.cdc.gov/coronavirus/2019-ncov/about/prevention.html>.
- **California Department of Public Health**
<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/nCOV2019.aspx>

Helpful Resources

- **U.S. Department of Labor** <https://www.dol.gov/coronavirus>
- **Department of Industrial Relations** <https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm>
- **Labor and Workforce Development Agency** <https://www.labor.ca.gov/coronavirus2019>
- **Employment Development Department**
https://www.edd.ca.gov/about_edd/coronavirus-2019.htm
- **Department of Fair Employment and Housing** https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ_ENG.pdf

Questions?



THANK YOU



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