

COVID-19 Coronavirus Law: Agriculture Businesses



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I. Government's Response to COVID-19 and New Obligations for Employers

On March 11, 2020, the United States declared COVID-19 a pandemic, and a national emergency was declared on March 13, 2020. In response to COVID-19, government agencies at the federal, state and local level have implemented new and revised laws, orders, and directives to guide Americans through the next several months. One of those responses is the Families First Coronavirus Response Act (H.R. 6201), which the House of Representatives passed on March 14, 2020, and which the Senate approved with a vote of 90-8 and signed into law by President Trump on March 18, 2020.

On March 12, 2020, Governor Newsom issued an Executive Order which states, “[a]ll residents are to heed any orders and guidance of state and local public health officials, including but not limited to the imposition of social distancing measures, to control the spread of COVID-19.” Thereafter, on March 15, 2020 Governor Newsom ordered the closing of all bars, brewpubs, and wineries (tasting rooms only) throughout California in an effort to hinder the spread of COVID-19.

On March 17, 2020, Governor Newsom also issued an Executive Order designed to protect renters, and homeowners during the COVID-19 pandemic. The order authorizes local governments to halt evictions, slow foreclosures and protect against utility shutoffs. This responds to concerns many individuals are experiencing with wage loss and layoffs.

Additionally, on March 19, 2020, Governor Newsom issued Executive Order N-33-20, requiring all Californians – except for those falling within an exception – to stay at home indefinitely. The order carves out exceptions to maintain the continuity of 13 critical infrastructure sectors identified by the Cybersecurity and Infrastructure Security Agency. The State Public Health Officer also issued a list of essential critical infrastructure sectors that are exempt from the order. The food and agriculture sector are currently listed as an essential critical infrastructure, which includes food manufacturing and processing employees, and farm workers. It should be noted that the order from Governor Newsom sets the baseline level of restrictions and local governments can set forth additional restrictions. Therefore, employers that fall within a county or city that has issued a local shelter-in-place (or similar) order should consult their local order to determine whether their business or organization faces additional restrictions.

In this newsletter, we will provide you with information regarding the Families First Coronavirus Act, the impact Executive Order N-33-20 and local shelter-in-place orders have on agricultural businesses,

and other key areas of employment law employers should consider while navigating these uncharted waters.

II. Federal Laws

The Families First Coronavirus Response Act (H.R. 6201)

On March 18, 2020, President Trump signed into law the Families First Coronavirus Act, which is an economic stimulus plan aimed at addressing the impact of COVID-19. Notably, the Act includes an emergency expansion of the Family Medical Leave Act (“FMLA”), a new federal paid sick leave law, and expanded unemployment insurance benefits.

Emergency Family and Medical Leave Expansion Act

Expansion of Coverage and Eligibility: This portion of the Act will apply to employers with 1-499 employees within a single corporation. At the discretion of the Labor Department, small businesses with less than 50 employees are not required to provide emergency paid family leave, if the imposition of the Emergency FMLA provisions would jeopardize the viability of the business. The Act also lowers the eligibility requirement such that an employee who has worked for the employer for at least 30 days prior to the designated leave is eligible to receive paid family and medical leave.

Reasons for Emergency Leave: The Act provides for 12 weeks of job-protected Emergency FMLA leave for individuals employed by their employer for at least 30 days (before the first day of leave). However, individuals are only entitled to Emergency FMLA if they are unable to work or telework and need to care for their child (under 18 years of age) if the child’s school or daycare is closed or the childcare provider is unavailable due to a public health emergency. Again, this is the only qualifying reason for Emergency FMLA.

Payment: The first 10 days of Emergency FMLA may be unpaid, but an employee can substitute any accrued paid time off, including vacation or sick leave, to cover any portion or all of the first 10 days. After the 10-day period, the employer must pay full-time employees at two-thirds the employee’s regular rate for the number of hours the employee would otherwise be normally scheduled. Pay for this period is capped at \$200 per day and \$10,000 in aggregate per employee. Part-time employees are entitled to be paid based on the average number of hours the employee worked during the preceding six months. If an employee has worked for fewer than six months, then the employee is entitled to the employee’s reasonable expectation at hiring of the average number of hours that would have been scheduled. Employers with bargaining unit employees would apply Emergency FMLA provisions consistent with the bargaining agreement.

Effective Date and Expiration: The Act will become effective on April 2, 2020 and will remain in effect until December 31, 2020.

Tax Credits: Employers subject to the requirements are entitled to a tax credit equal to the amount of paid family and medical leave requirements paid by the employer. The tax credits for qualified wages are capped at \$200 per day and \$10,000 per calendar quarter per employee. The tax credits are

applied against employer Social Security taxes, but employers are reimbursed if their costs for qualified leaves exceed the taxes they would owe.

State and Local Laws: California and many local jurisdictions have their own paid sick leave requirements and leave laws, which may be in addition to these new federal requirements. Many localities are also working quickly to amend their laws and/or add new requirements as well.

Emergency Paid Sick Leave Act

In addition to Emergency FMLA, the Act also includes an Emergency Paid Sick Leave provision. Under the Emergency Paid Sick Leave provision, employers with 1-499 employees must provide employees (regardless of the employee's duration of employment prior to leave) with 80 hours of paid sick leave to under limited circumstances. Notably, at the discretion of the Labor Department, small businesses with less than 50 employees are not required to provide emergency sick leave, if the imposition of the Emergency Paid Sick Leave provisions would jeopardize the viability of the business.

Reasons Triggering Emergency Paid Sick Leave: Employers must provide paid sick time to the extent the employee is unable to work (or telework) due to one of these six reasons:

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.
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).

Calculating the Rate of Pay: For reasons 1, 2, and 3, the employee is to be paid at the higher of their regular rate, federal minimum wage, or local minimum wage. Additionally, the amount of emergency paid sick leave is capped at \$511 per day and \$5,110 in the aggregate per person. For reasons 4, 5, and 6, the employee is to be paid at 2/3 their regular rate of pay. Additionally, the amount of paid emergency paid sick leave is capped at \$200 per day and \$2,000 in the aggregate per person.

Previously Provided Paid Sick Leave: If an employer previously provided paid leave to employees before the Act passed, the emergency paid sick leave shall be made available to employees in addition to any such paid leave mandated under state or local law.

Additional Rules: Emergency paid sick leave does not carry over. The employer may not require an employee as a condition of paid leave to find a replacement to cover scheduled hours.

Notice Requirements: Employers must post a notice regarding the requirements of the law. The Secretary of Labor is required to make a model notice publicly available no later than seven days after enactment of the new law. After the first workday (or portion thereof) an employee receives paid sick

leave, the employer may “require the employee to follow reasonable notice procedures in order to continue receiving paid sick leave.”

Sick Note Requirement: Due to the limited space in hospitals, and the inability for those without COVID-19 to seek medical treatment, employers are cautioned to not require employees to provide a doctor’s note upon their return to work. Instead, employers are encouraged to ask their employees to provide a “reasonable assurance” that they were unable to appear for work due to one of the reasons triggering Emergency Paid Sick Leave.

Interplay with Other Paid Leave: Full-time employees may take Emergency Paid Sick Leave for the first 80 hours of Emergency FMLA so that this initial time is paid. Employees may also elect to use other accrued paid leave (e.g., vacation and PTO) during the first 10 days. Furthermore, the eligibility for Emergency FMLA and FMLA (for other non-COVID-19 related reasons) is 12 weeks total. This may mean the use of Emergency FMLA can affect the eligibility under traditional FMLA.

Effective Date and Expiration: The Act will become effective on April 2, 2020 and will remain in effect until December 31, 2020.

Tax Credits: Employers subject to the requirements are entitled to a refundable tax credit equal to the amount of the qualified paid sick leave requirements paid by the employer per quarter. The tax credits are applied against Social Security taxes, but employers are reimbursed if their costs for qualified leaves exceed the taxes they would owe.

Unemployment Compensation

Additionally, the Act provides \$1 billion for emergency grants to states for activities related to unemployment insurance benefit processing and payment under certain conditions. Half of the \$1 billion is for emergency grants to states which experience an increase of unemployment compensation claims of at least 10% to the same quarter in the prior calendar year. The second half of the \$1 billion is to be allocated to provide immediate funding to all states for administrative costs so long as they meet some basic requirements.

Also, unemployment compensation may be available to employees in the event of a shutdown of your business or furlough of employees. The Act includes federal funding to states to offer up to an additional 26 weeks (subject to certain conditions) or unemployment insurance.

III. State and Local Laws

Executive Order N-33-20 – Food and Agriculture Businesses Exempt

On March 19, 2020, Governor Newsom issued Executive Order N-33-20, which orders all individuals living in the State of California to stay home or at their place of residence until further notice, except as needed to maintain continuity of operation of the federal critical infrastructure sectors. Notably, the food and agriculture sector are identified as a critical essential infrastructure sector, and therefore

farms and food manufacturing business may remain open, unless their county or city has implemented additional restrictions.

In addition to Executive Order N-33-20, many counties, including Sacramento, Mendocino, Napa, San Benito, Solano, Santa Cruz, Monterey, Sonoma, Marin, San Francisco, Santa Clara, Alameda, San Mateo, and Alameda have also implemented shelter-in-place orders. Each county's order is essentially the same and is very similar to Executive Order N-33-20. The orders specifically exempt the following businesses as essential: (1) first responders; (2) emergency management personnel; (3) emergency dispatchers; (4) court personnel; (5) law enforcement personnel (6) **others supporting essential businesses**; and (7) persons performing essential government functions. Notably, the orders specifically identify businesses that maintain certified farmers' markets, farm and produce stands, and food cultivation, including farming and livestock, as "essential businesses." This means that these types of businesses are exempt from the orders. This is great news for businesses in the agricultural industry, as they can remain open for the foreseeable future.

For businesses that are not considered essential, the order requires that those businesses take all steps necessary to allow employees to work from home to the extent possible. Businesses are directed to cease any activities in facilities that go beyond the "minimum basic operations." The orders specifically define "minimum basic operations" as the "minimum necessary activities to maintain the value of the business's inventory, ensure security, process payroll and employee benefits."

The orders also require that all individuals practice "social distancing procedures," by maintaining six feet between one another, repeatedly washing hands, and regularly cleaning surfaces.

California Unemployment Compensation

The California Employment Development Department ("EDD") is offering support for employees and employers who are losing hours due to COVID-19. Workers who are unable to work after being exposed to COVID-19 can file a disability insurance claim which would offer short-term benefit payments. Employees who have to stop working in order to care for a sick or quarantined family member can file a paid family leave ("PFL") claim. The PFL offers up to six weeks of benefit payments to eligible workers. Additionally, parents who have to miss work to take care of their child while school are closed may also be eligible for unemployment insurance. Finally, an unemployment insurance claim can be filed for employees who have lost hours, or if their employer has shut down operations. The unemployment insurance will provide partial wage replacement benefit payments to the employees who lose their job or have their hours reduced.

IV. Employer Obligations Under State and Federal Labor Law

Temperature Checks Under the Americans with Disabilities Act and California Consumer Privacy Act

One possible measure that can be taken to ensure COVID-19 is not being spread within the workplace is to offer temperature checks to employees. Before offering to take an employee's

temperature, it is important to understand how such an action would be viewed under the Americans with Disabilities Act (ADA). The ADA prohibits employers from requiring medical examinations and making disability-related inquiries unless (1) the employer can show that the inquiry or exam is job-related and consistent with business necessity, or (2) the employer has a reasonable belief that the employee poses a “direct threat” to the health or safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation. The ADA also places restrictions on the inquiries that an employer can make into an employee’s medical status, and the EEOC considers taking an employee’s temperature to be a “medical examination” under the ADA. Therefore, taking an employee’s temperature may be unlawful if is not job-related and consistent with business necessity. The inquiry and evaluation into whether taking a temperature is job-related and consistent with business necessity is fact-specific and will vary among employers and situations.

Notably, California businesses are also subject to the California Consumer Privacy Protection Act (“CCPA”). Under the CCPA, employers must provide employees with a CCPA-compliant notice prior to or at the same time as their temperature is being taken.

OSHA Requirements

Another issue for employers is how to remain complaint with the Occupational Safety and Health Act (“OSHA”) to ensure a safe work environment. Under OSHA’s respiratory protection standard, a respirator must be provided to employees only “when such equipment is necessary to protect the health of such employees.” OSHA has provided guidance on when a respirator is not required; however, an employer may still provide a respirator at the request of employees or permit employees to use their own respirators, if the employer determines that using a respirator will not itself create a hazard. 29 C.F.R. 1910.134(c)(2). This means that if an employee is at risk of contracting COVID-19, employers should offer respirators to employees if doing so will not create a risk of a worksite injury.

Similarly, the California Division of Occupational Safety and Health (Cal/OSHA) has issued interim guidance that covers California-specific safety requirements under its Aerosol Transmissible Diseases (ATD) standard. California’s ATD standard requires employers to protect workers from diseases and pathogens transmitted by aerosols and droplets. The guidance confirms that all California employers must follow the Cal/OSHA regulatory scheme to protect employees from COVID-19 to the extent the disease is a hazard in the workplace. Cal/OSHA does not indicate whether employers should currently consider COVID-19 a hazard, but the analysis is essentially based on reasonable anticipation. This means that if the employer can reasonably anticipate its employees are at risk of being exposed to the virus, then the employer should provide training to employees on COVID-19 prevention methods. Cal/OSHA has also encouraged employers to implement the CDC’s recommendation for creating an infection disease outbreak plan, which includes increasing telecommuting opportunities and other methods to minimize exposure.

Best Practices for Dealing with Employees Exhibiting COVID-19 Symptoms

Dealing with Sick Employees

If any employee presents themselves at work with a fever or difficulty breathing, this indicates that they should seek a medical evaluation. While these symptoms are not always associated with

influenza, and the likelihood of an employee having COVID-19 is low, it pays to err on the side of caution. However, educate your supervisors on the importance of not overreacting to situations in the workplace potentially related to COVID-19 in order to prevent panic among the workforce.

Employers are permitted to ask employees to seek medical attention or get tested for COVID-19. The CDC states that employees who exhibit symptoms of influenza-like illness at work during a pandemic should leave the workplace. Additionally, an employer may require an employee go home if they exhibit symptoms of the COVID-19 coronavirus. Employers can also require employees to notify their supervisors if they come in contact with someone that has or is suspected of having COVID-19, or if they feel they are exhibiting COVID-19 symptoms.

Steps Employers Can Take to Protect All Employees

To minimize the risk of transmission and protect employees, employers should ensure that employees have ample facilities to wash their hands, including water and soap, and that third-party cleaning/custodial schedules are accelerated. Employers should also consider staggering employee starting and departing times, along with lunch and break periods, to minimize overcrowding in common areas such as elevators, break rooms, etc. If any employees believe they are at risk of contracting COVID-19, then employers should work those employees to determine a solution.

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