

CORONAVIRUS PANDEMIC: IMPACT ON THE CALIFORNIA WORKPLACE

Employers the world over are struggling with the impact of the novel coronavirus and the infectious disease it causes (known as COVID-19). It is believed that the virus originated in China in late 2019; it has since spread across the globe. The World Health Organization (“WHO”) has declared the COVID-19 outbreak a pandemic. Although the situation remains fluid and new information is released daily by public health and government authorities, we offer the following guidance for employers, particularly those in California, coping with the upheaval caused by the outbreak.

Health-Related Inquiries

Employers are generally forbidden from inquiring about employees’ health, as doing so could violate the Fair Employment & Housing Act (“FEHA”) or the Americans with Disabilities Act (“ADA”). The Equal Employment Opportunity Commission (“EEOC”) recognizes that under certain circumstances (including during a pandemic), some health-related inquiries are permissible.

According to the EEOC, where an employee poses a “direct threat,” that employee is not protected by the nondiscrimination provisions of the ADA. Whether an employee poses a “direct threat” is a fact-specific inquiry, based upon assessment of the following factors: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. Whether a pandemic illness rises to the level of a direct threat depends on the severity of the illness. Where the CDC or a local health authority determines that a pandemic illness is severe and the illness could pose a direct threat, the CDC or local health authority’s assessment would provide the objective evidence needed for a disability-related inquiry. Given that President Trump, the Secretary of Health and Human Services, and Governor Newsom have declared states of emergency in the U.S. and California regarding COVID-19, and the CDC and WHO have declared the existence of a pandemic, it seems clear that COVID-19 poses a direct threat thereby justifying limited health-related inquiries.

Thus, during this pandemic, employees who report experiencing flu-like symptoms or call in sick may be questioned. Notably, the employer must maintain the confidentiality of such information.

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If the employer is aware that an employee has returned from travel, the employer may ask about potential exposure to the coronavirus during such travel, even if the employee exhibits no symptoms of COVID-19. If the CDC or state or local public health officials recommend that people who visit specified locations (such as China, South Korea, Iran, Europe, etc.) remain at home for 14 days until it is clear they do not have pandemic COVID-19 symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal.

Sending Employees Home

The WHO, CDC, and EEOC opine that it is permissible to send an employee home, or require the employee to remain home, if the employee has exhibited symptoms of upper respiratory illness. Specifically, advising symptomatic employees to go home does not constitute a disability-related action under the ADA if the illness is similar to seasonal influenza or COVID-19.

Employee Compensation

Many employers have inquired about their obligation to compensate employees during the pandemic. As with many areas of employment law, the precise obligation depends on the circumstances, including, but not limited to: whether the employee is hourly (non-exempt) or salaried (exempt), whether the employee was sent home from work, whether the employee continues to work from home or elsewhere, and so forth.

Generally, California law does not require non-exempt employees to be paid when they are not performing work. Thus, the cessation of business operations, as a general matter, does not necessitate continued payment of wages to hourly employees who are no longer performing work. However, there are a few notable exceptions employers must keep in mind:

Reporting Time Pay

Employers must compensate their employees for “reporting time pay” when they cancel or cut short a workday. Employees who report to work but are not put to work or are furnished with less than half of their scheduled day’s work are entitled to pay for half of their usual or scheduled day’s work. This means, for example, that employees who typically work an eight-hour shift will be entitled to two hours of reporting time pay if work is stopped after only two hours of work. The reporting time pay rules apply not only when employees physically appear at the workplace or jobsite but also when they log on to a computer remotely or are required to call-in to a telephone line prior to the start of a shift to ascertain their work schedule for the day.

Narrow exceptions to the reporting time pay obligation exist, such as when civil authorities recommend that work not begin or continue. Work interruptions that are caused by an act of God or an event not within the employer’s control are also a separate exception to the reporting time pay rules. There is no definitive authority as to whether a suspected COVID-19 occurrence at the workplace will count as an “event not within the employer’s control.” However, this exception is

commonly reserved for natural disaster scenarios and likely will not relieve employers of reporting time pay obligations.

If any employers believe that they need to suspend operations, they should provide employees with as much advance notice as possible. Same-day suspensions and/or cancellations may trigger reporting time pay obligations. Moreover, sending an employee home without compensation, even as a precaution, will likely undermine morale during a time when unity, trust, and loyalty will be especially important.

Exempt Employees

If an employee is appropriately classified as exempt, that employee is entitled to compensation for a full workweek as long as the employee performs work during any portion of that workweek. This holds true even if an employee works only a portion of the workweek and is otherwise prevented by his/her employer from working any additional portion of that workweek.

If an exempt employee performs no work during a given workweek, an employer is permitted to withhold pay for that week. Practically speaking, however, employers typically have difficulty preventing exempt employees from performing any work during that time. Under the present circumstances, employers should therefore consider whether the services of exempt employees will be required, in any form, for entire workweeks at a time. If an employee can be “shut down” for an entire workweek, that employee’s salary *can* be reduced. Taking this step should only be considered, however, after appropriately considering the possible impact of reducing compensation, both to the employer and the employee.

As a result of the practical implications and, ultimately, difficulty temporarily reducing salaries of exempt employees, many employers will continue to pay full salaries during this period. As remote or alternate work schedules may make tracking of employees’ work product more difficult, employers must therefore also remain cognizant of the type of work being performed by exempt employees. Tests for exemption utilize a quantitative approach to confirming appropriate classification and require that exempt employees continue to spend majority of their working time performing exempt tasks. Employers should therefore take reasonable steps to ensure that exempt employees continue to perform primarily “exempt work” throughout the course of their remote assignment.

As COVID-19 related restrictions continue to increase, a growing number of employers will consider placing employees (both exempt and non-exempt) on unpaid “furlough.” While non-exempt employees may be furloughed simply by removing employees from work schedules, the process is more complicated for exempt employees. As exempt employees must generally receive compensation for any workweek during which work is performed, employers must consider defined workweeks and ensure that furlough time does not allow or require an exempt employee to work during an unpaid workweek. If work is performed during a workweek, compensation must be paid.

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WARN Obligations

Both the federal and state version of the Worker Adjustment and Retraining Notification (“WARN”) Act require that certain employers provide their employees with 60 days of notice before a mass layoff or plant closing affecting a prescribed minimum number of employees. The federal law applies to companies employing 100 or more full-time employees and (1) a plant closing affecting at least 50 full-time employees, or (2) a mass layoff affecting at least 50 full-time employees and at least 33% of the full-time workforce at a single work site. California’s version has broader application. California’s Act covers establishments employing 75 or more full or part-time employees and applies in the event of: (1) a mass layoff of 50 or more employees at a single work site, (2) relocation of operations to a location more than 100 miles away, or (3) the termination of operations.

WARN obligations are triggered even in the event of temporary layoffs or closings. WARN obligations will thus be implicated during this pandemic if an employer of the appropriate size decides to temporarily close operations. Under California law, an exception to the notice obligations exists during a “physical calamity or act of war.” This standard is more restrictive for employers than the federal WARN, which provides that the notice is not required for “business circumstances that were not reasonably foreseeable as of the time that notice would have been required.”

Is a temporary cease of operations to preempt the spread of a global pandemic a “physical calamity” within the meaning of California law? Unfortunately for employers, neither the state legislature nor any state courts have provided guidance on how the phrase will be interpreted. At least one court has recognized, however, that “California employers, not California employees, should bear the risk of surprise resulting from an unexpected layoff.” (*The Internat. Brotherhood of Boilermakers, etc. v. NASSCO Holdings Inc.* (2017) 17 Cal.App.5th 1105, 1128.) Thus, employers should consider their WARN obligations before imposing a temporary work stoppage or cease of operations. Failure to comply with the WARN Act can result in substantial penalties, attorney’s fees, and liability for up to 60 days of back pay and benefits for each affected employee.

As an alternative to wholesale work stoppages, remote working options and/or staggered shifts and time-off plans may help to mitigate the effects of this current pandemic.

Paid Sick Leave

Under the Healthy Workplaces, Healthy Families Act of 2014, California employers are required to offer at least three days (24 hours) of paid sick leave per year to employees who work 30 or more days per year in California. Paid sick leave may be utilized by the employee, among other things, to treat or recover from a health condition (such as COVID-19), or preventative measures such as a quarantine. The law similarly authorizes leave to care for an affected family member such as a spouse, child, parent, grandchild, grandparent, or sibling. Employees begin accruing paid sick leave from the start of their employment and continue to do so at a minimum of one hour of paid leave for every 30 hours worked. Employees are not entitled to utilize paid sick leave until the 90th day of

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employment, though employers may elect to permit usage before that time. State law permits employers to cap the accrual of paid sick leave at 48 hours and the usage at 24 hours per year, though some cities (including Los Angeles, San Diego, Santa Monica, and San Francisco) have set higher accrual or usage caps that must be honored. For instance, San Diego's sick leave ordinance permits employees to use 40 hours of sick leave per year (with accrual capped at 80 hours), while Los Angeles' sick leave ordinance permits employees to use 48 hours per year (with accrual capped at 72 hours). Employers utilizing a paid time off policy that exceeds the state or local minimums with regard to sick leave are compliant as well.

Local sick leave ordinances may also specifically authorize the use of sick leave for public health emergencies. For example, San Diego's Earned Sick Leave and Minimum Wage Ordinance, which applies to employees working within the city limits of San Diego, provides that employees may use paid sick leave when the employer or the employee's child-care provider or school is closed due to a public health emergency.

School Activities Leave

Employers should be mindful that other statutes may authorize time off under the current state of affairs. Labor Code section 230.8 mandates that employers with 25 or more employees must permit time off for an employee to visit their child's school or day care facility. An employee is permitted up to 40 hours of time off per calendar year for such purposes, but no more than eight hours per calendar month.

Typically, this form of leave is taken for purposes of enrolling a child in school or day care or participating in school activities. However, the statute also authorizes time off to address a child-care provider or school emergency, including closure or unexpected unavailability of the school or child-care provider. Thus, employees may utilize school activities leave to obtain time off to address school closures caused by the COVID-19 outbreak.

School activities leave need not be paid, but the employer may require employees to use accrued vacation, personal, or compensatory time off for planned absences authorized by the statute. Moreover, the employer may require documentation from the school or child-care provider substantiating closure or unavailability.

Availability of Other Benefit Programs

Unemployment Insurance: Work Sharing Program

Employers experiencing a business slowdown as a result of the economic impact of the Coronavirus may apply for the Unemployment Insurance Work Sharing Program. This program permits employers to seek an alternative to layoffs by retaining their employees by reducing their hours and wages that can be partially offset with unemployment benefits. Workers approved to participate in the Work Sharing Program receive the percentage of their weekly unemployment benefit amount based on the percentage of hours and wages reduced, not to exceed 60%.

Additional information about the Work Sharing Program is available here:
https://www.edd.ca.gov/Unemployment/Work_Sharing_Program.htm

Unemployment Insurance: Shut Down of Operations

Employers who temporarily shut down operations due to the COVID-19 but expect to reopen in a few weeks can inform employees to apply for unemployment benefits. Employees are not required to actively seek work each week but must remain able and available and ready to work during their unemployment for each week of benefits claimed and meet all other eligibility criteria. Eligible individuals can receive benefits that range from \$40-\$450 per week. The Governor's Executive Order waives the one-week unpaid waiting period, so employees can collect unemployment benefits for the first week they are out of work. If an employee is eligible, the EDD processes and issues payments within a few weeks of receiving a claim.

State Disability: Unable to Work Due to Being Sick or Quarantined

An employee unable to work due to having or being exposed to COVID-19, can file a Disability Insurance ("DI") Claim. DI provides short-term benefit payments to eligible workers who have a full or partial loss of wages due to an illness or injury. Benefit amounts are approximately 60%-70% of wages and range from \$50-\$1,300 a week, tax free. To be eligible for DI benefits, an employee must submit medical certification to the state. The medical certification must be signed by a treating physician or a practitioner that includes a diagnosis and ICD-10 code, or if no diagnosis has been obtained, a statement of symptoms; the start date of the condition; its probable duration; and the treating physician's or practitioners license number or facility information. This requirement can also be met by a written order from a state or local health officer that is specific to the employee. The fastest way to submit a claim is by visiting the following website:
https://www.edd.ca.gov/Disability/SDI_Online.htm.

The Governor's Executive Order waives the one-week unpaid waiting period. As such, an employee can collect DI benefits for the first week he/she is out of work. If an employee is eligible, the EDD processes and issues payments within a few weeks of receiving a claim.

Paid Family Leave: Benefits Available if an Employee is Caring for a Sick Family Member

If an employee is unable to work because he/she is caring for an ill or quarantined family member with COVID-19, the employee can file a paid family leave claim. Paid family leave provides up to six weeks (extends to eight weeks starting July 1, 2020) of benefit payments to eligible workers who have a full or partial loss of wages because they need time off work to care for a seriously ill family member (or to bond with a new child). Benefit amounts are approximately 60%-70% of wages and range from \$50-\$1,300 a week, tax free. For the purposes of paid family leave coverage, a family member is defined as a seriously ill child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or registered domestic partner. To be eligible for paid family leave, an employee must submit

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medical certification to the state regarding the family member in his/her care who is either ill or quarantined due to COVID-19. This requirement can be completed by a medical certification for that person from a treating physician or practitioner that includes a diagnosis and ICD-10 code, or if no diagnosis has been obtained, a statement of symptoms; the start date of the condition; its probable duration; and the treating physician's or practitioner's license number or facility information. This requirement can also be met by a written order from a state or local health officer that is specific to the employee's family member's situation.

The fastest way to submit a claim is by visiting the following website: https://www.edd.ca.gov/Disability/SDI_Online.htm.

Rapid Response Program: Potential Closure or Layoffs

Employers planning a closure or major layoffs as a result of the COVID-19 can get help through the Rapid Response program. Rapid Response teams will meet with an employer to discuss their needs, help avert potential layoffs, and provide immediate on-site services to assist workers facing job losses.

Additional information is available on the [Rapid Response Services for Businesses Fact Sheet](#) or an employer can contact their local America's Job Center of California.

EDD Taxpayer Assistance Center

Employers experiencing a hardship as a result of COVID-19 may request up to a 60-day extension of time from the EDD to file their state payroll reports and/or deposit state payroll taxes without penalty or interest. A written request for extension must be received within 60 days from the original delinquent date of the payment or return. For questions, employers may call the EDD Taxpayer Assistance Center.

Toll-free from the U.S. or Canada: 1-888-745-3886
Hearing impaired (TTY): 1-800-547-9565
Outside the U.S. or Canada: 1-916-464-3502

Health and Safety Requirements

All employers are charged with providing a safe and healthy workplace for employees. Guidance issued by Cal/OSHA has confirmed this obligation extends to the outbreak of COVID-19, to the extent the disease poses 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. In other words, can you reasonably anticipate that your employees are at risk of being exposed to the virus? Given the current state of affairs, Cal/OSHA appears to believe the answer is likely yes for most employers. In light of this, Cal/OSHA opines that general industry employers should implement measures to prevent or reduce infection hazards, such as implementing CDC recommendations, and also provide training to employees on their COVID-19 infection prevention method. The CDC's infection prevention measures include:

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- Actively encouraging sick employees to stay home;
- Sending sick employees, particularly those with respiratory illness symptoms, home immediately;
- Training employees on important topics such as:
 - Hand hygiene,
 - Cough and sneeze etiquette,
 - Avoiding close contact with sick persons,
 - Avoiding touching eyes, nose, and mouth with unwashed hands,
 - Avoiding sharing personal items with coworkers, and
 - Checking the CDC's Traveler's Health Notices;
- Providing tissues, no-touch disposal trash cans, and hand sanitizer for use by employees; and
- Performing routine environmental cleaning of shared workplace equipment and furniture.

Cal/OSHA also encourages employers to implement the CDC's recommendation for creating an infectious disease outbreak response plan. Such plans may include canceling group activities or events, increasing telecommuting opportunities, and other methods of minimizing exposure among employees (and with the public).

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This is Pettit Kohn Ingrassia Lutz & Dolin PC's employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Ryan Nell, Shannon Finley, Jennifer Suberlak, Blake Woodhall, Carol Shieh, Shelby Harris, Brittney Slack, or Rio Schwarting at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Andrew Chung, Jennifer Weidinger, Rachel Albert, or Mihret Getabicha at (310) 649-5772.