

Best Practices for Employers in the Age of Coronavirus COVID-19*

Presented By:



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* As of March 18, 2020. Subject to rapid change due to legislation.

Today's Presenters



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TOPICS

- Newly Passed Bill
- Employer's Duty
- CDC & WHO Guidance
- Sick Employees & Privacy
- Pay
- Working from Home and Leaves

“Families First Coronavirus Response Act” (H.R. 6201)

- Passed by the House of Reps. on March 16, 2020, passed by the Senate on March 18. President Trump to sign ASAP.
- PROVISIONS EFFECTIVE 15 DAYS AFTER THE BILL IS SIGNED AND EXPIRE DEC. 31, 2020.

“Families First Coronavirus Response Act” (H.R. 6201)

- Applies to all businesses with less than 500 employees; there is no minimum.
- Secretary of Labor shall issue regulations to allow businesses with fewer than 50 employees to seek waiver if compliance would jeopardize the viability of the business.
 - Modifies FAMILY AND MEDICAL LEAVE ACT &
 - Institutes EMERGENCY PAID SICK LEAVE ACT

“Families First Coronavirus Response Act” (H.R. 6201)

FAMILY AND MEDICAL LEAVE ACT

- 12 weeks of job-protected paid FMLA leave, the first 10 days unpaid, but employees can use accrued personal/sick days in that period if they choose.
- Can use this time to self-quarantine, care for family members who are quarantined, or care for children due to school closures.
- Employers must compensate employees at least 2/3 of regular pay rate, but “in no event shall such paid leave exceed \$200 per day and \$10,000 in the aggregate.”
- Benefit available to all employees who have been with company 30+ days.

“Families First Coronavirus Response Act” (H.R. 6201)

EMERGENCY PAID SICK LEAVE ACT

- Full time Employees: 80 (10 days) hours paid sick leave.
- Part time Employees: Eligible for leave equaling the average number of hours worked over a 2-week period (calculated over last 6 months).
- Can be used in 6 reasons:
 - 1) Gov’t Quarantine or Isolations Order; 2) Doctor-advised self-quarantine; 3) Experiencing COVID-19 Symptoms
 - 4) Caring for someone under categories 1-2; 5) Caring for child due to school/child care closure; 6) Other substantially similar condition as may be specified by Dept. Health and Human Services

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- Categories 1-3 at paid at regular rate; Categories 4-6 at paid at 2/3 of regular rate, but no less than minimum wage.
 - In no event shall paid sick time exceed: \$511 per day and \$5,110 total if 1-3 above; or \$200 per day and \$2,000 total if 4-6.

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EMERGENCY PAID SICK LEAVE ACT

- This emergency sick leave does **not** carry over year to year; immediately terminated when an employer returns to work following the leave.
- This is in addition to any leave program an employer might have, and an employer cannot require that “regular” sick leave be used first.

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HOW DOES THE EMPLOYER PAY FOR THIS? TAX CREDITS

- Under both FAMILY AND MEDICAL LEAVE ACT & EMERGENCY PAID SICK LEAVE ACT: Credit for 100% of wages paid under the act against quarterly payroll taxes under IRC Section 3111(a) or 3221(a). Credit cannot exceed the tax owed, but wages paid in excess of payroll taxes will be treated as a tax overpayment and refunded.
- Employers gross income to be increased by the amount of the credit to avoid a “double benefit.”
- Dept. of Treasury to issue regulations and guidance as to how to actually do these things.

General Duty Clause

- OSHA's General Duty Clause requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm."
- Employees may refuse to work only if they reasonably believe they are in imminent danger.
 - OSH Act: defines "imminent danger" to include "any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act."'"

CDC & World Health Organization (“WHO”) Guidance

The CDC has prepared interim guidance for businesses and employers

- **Actively encourage sick employees to stay home**
 - Employees who have symptoms of acute respiratory illness are recommended to stay home and not come to work until they are free of fever or any other symptoms for at least 24 hours. Ensure that your sick leave policies are flexible and consistent with public health guidance and that employees are aware of these policies.
 - Do not require a doctor’s note for employees who are sick with acute respiratory illness to validate their illness or to return to work, as doctor’s offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way.
 - Maintain flexible policies that permit employees to stay home to care for a sick family member.
- **Separate sick employees**
- **Emphasize staying home when sick, respiratory etiquette and hand hygiene by all employees**

CDC & WHO Guidance

The CDC has prepared interim guidance for businesses and employers

- **Perform routine environmental cleaning**
 - Routinely clean all frequently touched surfaces in the workplace, such as workstations, countertops, and doorknobs. No additional disinfection beyond routine cleaning is recommended at this time.
 - Provide disposable wipes so that commonly used surfaces (for example, doorknobs, keyboards, remote controls, desks) can be wiped down by employees before each use.
- **Advise employees before traveling to take certain steps, such as checking the CDC's traveler's health notices**

Employees Who Come To Work Sick

- If an employee reports to work and the company has a reasonable basis to believe he/she has flu symptoms, the company may *require* the employee to go home and may ask the employee to seek medical treatment.
- In deciding whether to send employees home, supervisors should focus their inquiry / evaluation on symptoms of the virus (fever, cough, difficulty breathing), and should avoid asking questions that may reveal underlying disabilities (e.g., as a weakened immune system due to cancer treatment or an underlying health condition such as diabetes).

Requesting Private Health Information

During a pandemic, can employers ask an employee's health care provider to share if the employee tested positive for COVID-19, even if the employee refuses to give permission?

- Yes. HIPAA contains an exception for disclosures necessary to prevent a serious and imminent threat.
- Health care providers may share patient information with anyone as necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public – consistent with applicable law (such as state statutes, regulations, or case law) and the provider's standards of ethical conduct
- The Office for Civil Rights, U.S. Department of Health and Human Services, has confirmed that providers may disclose a patient's health information to anyone who is in a position to prevent or lesson the serious and imminent threat, including family, friends, caregivers, and law enforcement without a patient's permission

Temperature Checks

During a pandemic, can we conduct temperature checks?

- Generally, measuring an employee's body temperature is a medical examination. Because COVID-19 has been declared a pandemic and is deemed to be severe, employers may measure employees' body temperature without violating the ADA.
 - Must be job-related
 - Must be justified by business necessity
- Employers should be aware that some people with COVID-19 will not have a fever. Other persons may intentionally or unintentionally hide fevers by taking common fever-reducing medications before being tested.
- Temperature checks should be as non-invasive as possible.

Screening Data

- Protect screening data (temperature / health declarations) as you would any medical data.
 - Use short retention times.
 - Limit access to and use of data.

Inquiring About Underlying Disabilities

- Once a severe pandemic is declared by CDC or local health authorities, even disability-related inquiries are permissible under the ADA.
 - Ask if employees have underlying health conditions that might make COVID-19 infection more dangerous.
 - Ask if employees will require accommodation / be able to work during the pandemic.
 - Don't make assumptions or comments about age or national origin.

When Must We Pay Employees?

Non-exempt employees:

- Must pay for all time worked, whether onsite or remote.
- No obligation to pay while not working.
 - Consider reporting time pay obligations if employees show up for work and are sent home early (unless civil authority orders a closure).
 - Consider contractual or CBA obligations to pay travel time, minimum shifts, minimum weeks, or advance notice of shift changes.
 - Are employees entitled to compensation if required by employer to self-quarantine or remain on-call ("subject to the control")?
 - Solution: Tell employees they cannot return to work rather than requiring them to self-quarantine.

When Must We Pay Employees?

Non-exempt employees:

- Other considerations:
 - If remote, ensure all time recorded accurately and reinforce meal period / rest break policies.
 - Reimburse for all expenses incurred because of remote work – required by the labor code even if the employee's actual expense (e.g., Broadband internet) doesn't increase.
 - Consider sick leave laws / vacation usage requirements.

When Must We Pay Employees?

Exempt employees:

- Must be paid full week's salary for any week in which work performed.
- Employer may deduct from salary if employee absent for full day or more for personal reasons.
 - Partial day deductions not permitted.
 - May reduce accrued leave balances if employee misses part of day for personal reasons, as long as employee receives full salary for the day.
- Furloughs should be a minimum of one week to protect exempt status.
- Reimburse for remote work expenses.

Sick Leave

- Can employees use California Paid Sick Leave?
 - Yes. If employee has paid sick leave available, employer must provide such leave and compensate employee under paid sick leave laws.
 - “Preventative care” may include self-quarantine, per Cal. Dept. of Industrial Relations.
 - Preventative care may include time off following COVID-19 exposure or after returning from travel to high risk areas.
 - Employer cannot require employees to use sick leave.

FMLA Designations

- Employers subject to FMLA should determine whether employees who are out of work due to coronavirus qualify for FMLA leave for their own serious health condition or the serious health condition of a covered family member.
- Continue following FMLA guidelines, including designation, notices and documentation.
- Include fitness for duty requirement in designation notice.

Disability Laws

- Must provide the same accommodations to remote workers as for onsite workers.
 - E.g., if employee uses screen reader software at the office because of vision disability, employer must provide same for laptop issued during remote work/office closure.
- Must engage in interactive process and provide reasonable accommodations.
 - Work from home if deficient immune system?
 - Anxiety / panic disorders?

School leave

- Employees at worksites with 25 or more employees must provide up to 40 hours of unpaid leave per year for specific school-related emergencies, such as the closure of a child's school or day care by civil authorities (see Labor Code section 230.8).
 - May require employees to use vacation during leave.
 - Employees may elect to use sick leave, but employers cannot require sick leave usage.

Unemployment

- Employees unable to work due to COVID-19 exposure may qualify for state disability benefits.
- Employees unable to work while caring for ill or quarantined family member with COVID-19 may qualify for Paid Family Leave benefits.
- If an employer reduces an employee's hours or shuts down operations due to COVID-19, employee may qualify for unemployment benefits. Recent Executive Order by the Governor eliminate waiting time and requirement that employee actively look for another job.
- Employment Development Department: offers work-sharing to avoid layoffs.

Do Employers Have a Reporting Requirement If an Employee Tests Positive for COVID-19?

- Individual employers in the US do not, at the moment, appear to have an affirmative duty to report an employee with symptoms or with a positive diagnosis to either the state or local health authorities (or to the CDC).
- The current CDC reporting requirements apply only to (a) state health departments and (b) healthcare providers, and not to employers or employees.
- The CDC directs *state health departments* that have identified a PUI (person under investigation) or laboratory-confirmed case to complete a Person Under Investigation (PUI) Case Report Form.

Other Business Issues

- Ongoing contracts with vendors, etc. should be examined for force majeure or “acts of God” provisions that might allow them to be terminated or extended until business can resume.
- Firms with Business Interruption Insurance should examine their policies to determine if they might have coverage and should submit a claim as soon as possible.
- U.S. Small Business Administration -
<https://www.sba.gov/page/coronavirus-covid-19-small-business-guidance-loan-resources>

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Resources

- Center for Disease Control - <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
- CalOSHA guidance - <https://www.dir.ca.gov/dosh/Coronavirus-info.html>
- Federal OSHA - <https://www.osha.gov/SLTC/covid-19/>
- World Health Organization - <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>
- EEOC - <https://www.eeoc.gov/>
- COVID-19 Testing Kits – <http://www.diseasedetector.net>
- Los Angeles County Department of Public Health - <http://publichealth.lacounty.gov/>
- Beach Cities Health District - <https://www.bchd.org/>
- Dept. of Labor Standards Enforcement – <https://www.labor.ca.gov/coronavirus2019/>
- Unemployment - https://edd.ca.gov/about_edd/coronavirus-2019.htm

Questions?



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