Employers and Coronavirus: An Overview of Current Guidance

Presented by:

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Disclaimer

We wish to express confidence in the information contained here. Used with discretion, by qualified individuals, it should serve as a valuable management tool in assisting employers to understand the issues involved and to adopt measures to prevent situations which commonly give rise to legal liability. However, this text should not be considered a substitute for experienced labor counsel, as it is designed to provide information in a highly summarized manner. The reader should consult with Barsamian & Moody at (559) 248-2360 for individual responses to questions or concerns regarding any given situation.
Overview

- Cal/OSHA Guidance Concerning Health and Safety Measures
- CDC Outbreak Response Plans
- California EDD Guidance Concerning Time Away from Work
- Labor Commissioner Guidance
- DFEH Information on Coronavirus
Cal/OSHA Guidance Concerning Health and Safety Measures
Cal/OSHA Guidance

• Infection prevention measures:
  – Actively encouraging sick employees to stay home;
  – Sending employees with coronavirus symptoms (fever, chills, cough, etc.) home immediately;
  – Providing information and training to employees on:
    • Cough and sneeze etiquette;
    • Hand hygiene;
    • Avoiding close contact with sick persons;
    • Avoiding touching eyes, nose, and mouth and washing hands immediately after; and
    • Avoiding sharing personal items with co-workers (i.e., dishes, cups, utensils, towels).
More Infection Prevention Measures

• Providing tissues, no-touch disposal trash cans and hand sanitizer for use by employees;
• Performing routine environmental cleaning of shared workplace equipment and furniture (disinfection beyond routine cleaning is not recommended); and
• Advising employees to check CDC’s Traveler’s Health Notices prior to travel.
OSHA Reportable?

• If the employee passes away; or
• Requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation…

as a result of coronavirus contracted from performing work-related duties.

How will we know?
Reporting Guidelines

• The normal criteria for reporting serious injuries applies even to coronavirus cases.
• Employers must report any worker fatality within 8 hours and any hospitalization of a worker within 24 hours.
OSHA Recordable?

• Was work environment the likely cause or contributing factor of the illness?
  – Medical treatment (beyond first aid) is provided, such as prescription medication is issued
  – Restricted duty is imposed by the physician or employer
  – Days away from work (lost time) is imposed by the treating physician
CDC Outbreak Response Plans
CDC Recommendations

• Outbreak response plan:
  – Allowing flexible worksites, telecommuting and flexible work hours to increase physical distance among employees;
  – Using other methods of minimizing exposure between employees, and between employees and the public; and
  – Postponing or canceling large work-related meetings or events.
California EDD Guidance Concerning Time Away from Work
EDD Guidance for Workers

• Sick or Quarantined: If employees are unable to work due to having or being exposed to COVID-19 (certified by a medical professional), they 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 a non-work-related illness.
Caregivers

• If employees are unable to work because they are caring for an ill or quarantined family member, employees can file a Paid Family Leave (PFL) claim.

• PFL provides up to six weeks of benefit payments (through State Disability Insurance) 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.
Reduced Work Hours

• If employer has reduced hours or shut down operations due to coronavirus, employees can file an Unemployment Insurance (UI) claim.

• UI provides partial wage replacement benefit payments to workers who lose their job or have their hours reduced, through no fault of their own. Workers who are temporarily unemployed and expected to return to work with their employer within a few weeks are not required to actively seek work each week.

• However, they must remain able and available and ready to work during their unemployment for each week of benefits claimed and meet all other eligibility criteria.
EDD Guidance for Employers

- Reduced Work Hours: Employers experiencing a slowdown in their businesses or services as a result of the coronavirus impact on the economy may apply for the UI Work Sharing Program. This program allows employers to seek an alternative to layoffs — retaining their trained employees by reducing their hours and wages that can be partially offset with UI benefits. Workers of employers who are approved to participate in the Work Sharing Program receive the percentage of their weekly UI benefit amount based on the percentage of hours and wages reduced, not to exceed 60 percent.
Closure and Layoffs

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

- Additionally, employers covered by the Worker Adjustment and Retraining Notification (WARN) Act must consider its regulations.
Tax Assistance

• Employers experiencing a hardship as a result of coronavirus 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.
Labor Commissioner Guidance
Labor Commissioner Guidance


• PSL can be used for illness, the diagnosis, care or treatment of an existing health condition or preventative care for the employee or family member.

• Can employees use PSL for coronavirus?
  – Yes: If the employee has paid sick leave available, the employer must provide such leave and compensate the employee for California PSL.
Preventative Care

- Preventative care may include self-quarantine as a result of potential exposure to coronavirus if quarantine is recommended by civil authorities. In addition, there may be other situations where an employee may exercise their right to take paid sick leave, or an employer may allow paid sick leave for preventative care. For example, where there has been exposure to coronavirus or where the worker has traveled to a high-risk area.
  - Contrast to federal Emergency FMLA paid sick leave
Exhausting PSL

• If an employee does not qualify to use paid sick leave, or has exhausted sick leave, other leave may be available. If there is a vacation or paid time off policy, an employee may choose to take such leave and be compensated provided that the terms of the vacation or paid time off policy allows for leave in this circumstance.
Requiring Employees To Use PSL

• The employer cannot require that the worker use paid sick leave; that is the worker’s choice. If the worker decides to use paid sick leave, the employer can require they take a minimum of two hours of paid sick leave per day. The determination of how much paid sick leave will be used per workday is up to the employee.
Employee Travel Information

• Employers can request that employees inform them if they are planning or have traveled to countries considered by the Centers for Disease Control and Prevention to be high-risk areas for exposure to the coronavirus. However, employees have a right to medical privacy, so the employer cannot inquire into areas of medical privacy.
Reporting Time Pay

• Generally, if an employee reports to their regularly scheduled shift but is required to work fewer hours or is sent home, the employee must be compensated for at least two hours or no more than four hours of reporting time pay.
Reporting Time Pay

• For example, a worker who reports to work for an eight-hour shift and only works for one hour must receive four hours of pay, one for the hour worked and three as reporting time pay so that the worker receives pay for at least half of the expected eight-hour shift. An exception to reporting time pay is where operations cannot commence or continued when recommended by civil authorities.
Exempt Employees

• Federal regulations require that an exempt employee (paid at least the minimum required salary) who performs any work during a week must be paid their full weekly salary, if they do not work the full week because the employer failed to make work available.

• An exempt employee who performs no work at all during a week may have their weekly salary reduced.
DFEH Information on Coronavirus
Protection of Race/National Origin

• It is unlawful for an employer to discriminate against or treat an employee less favorably than another employee because of the employee’s race or national origin. National origin includes geographic places of origin, ethnic groups, and tribal affiliations.
Protection of Race/National Origin

• For example, it is unlawful for an employer to refuse to hire, segregate, or send employees home because of their actual or perceived race or national origin, or because of their association (including marriage or co-habitation) with someone based on race or national origin.

• Employers must take reasonable steps to prevent and promptly correct unlawful conduct in the workplace.
Sending Employees Home

• The CDC states that employees who become ill with symptoms of coronavirus at work should leave the workplace. Employers may ask employees who exhibit symptoms to go home.

• Employers must provide paid sick leave and compensate the employee under paid sick leave laws.

• If sick leave is exhausted, employees may be entitled to other paid leave (including vacation or paid time off), or job-protected unpaid leave.
Asking for Information

• Employers may ask employees if they are experiencing coronavirus symptoms, such as fever or chills and a cough or sore throat. Employers must maintain all information about employee illness as a confidential medical record.
Taking Employee Temperature

- Generally, measuring an employee’s body temperature is a medical examination that may only be performed under limited circumstances. However, based on current CDC and local public health information and guidance, employers may measure employees’ body temperature for the limited purpose of evaluating the risk that employee’s presence poses to others as a result of the pandemic.
Asking for Absence Information

• Asking why an individual did not report to work is not a disability-related inquiry. An employer is entitled to ask why an employee has not reported for work. If an employee discloses an illness or medically-related reason for absence, employers must maintain that information as a confidential medical record.
Revealing Information

• If an employee is quarantined, tests positive or has come in contact with someone with the virus, the employer should not identify the employee by name to comply with privacy laws.

• Contact local health department for advice.

• Employers may be required to close the worksite, deep clean, and permit or require telework.
Communicating Risk to Employees

- Employers may notify affected employees in a way that does not reveal the personal health-related information of an employee.
- Employers may not confirm the health status of employees or communicate about employees’ health.
Sample Email

• “[Employer] has learned that an employee at [office location] tested positive for the COVID-19 virus. The employee received positive results of this test on [date]. This email is to notify employees that employees have potentially been exposed to COVID-19 and employees should contact the local public health department for guidance and any possible actions to take based on individual circumstances.”
Personal Protective Equipment

• An employer may require employees to wear personal protective equipment during a pandemic. However, where an employee with a disability needs a related reasonable accommodation (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.
CFRA Leave

• Employees may be entitled to up to 12 weeks of job-protected leave under the California Family Rights Act for their own serious health condition, or to care for a spouse, parent, or dependent child with a serious health condition.

• COVID-19 will qualify as a serious health condition if it results in inpatient care or continuing treatment or supervision by a health care provider.
Health Certification for Leave

• In the context of a pandemic, it is not typically practicable for employees to provide advance notice, or for employees to obtain certifications when health care providers are working to address urgent patient needs.
• Employers must use their judgment and recommendations from public health officials to waive certification requirements when granting leave.
Reasonable Accommodations

• If an employee is unable to work due to coronavirus, telework or unpaid leave may be reasonable accommodations. Evaluate on a case by case basis.
Reasonable Accommodations

• Employers should consider telework and leave as reasonable accommodations for employees with illness related to COVID-19 unless doing so imposes an undue hardship. Factors considered when deciding whether providing leave is an undue hardship include: the number of employees, the size of the employer’s budget, and the nature of the business or operation.
Medical Documentation

• During the current pandemic, it may be impracticable for employees to obtain medical documentation of a COVID-19-related disability from their medical provider. To the extent employers require medical documentation in order to grant reasonable accommodations, DFEH recommends waiving such requirements until such time as the employee can reasonably obtain documents.
Resources

✓ www.theemployerslawfirm.com
✓ LWDA Resources for COVID-19
✓ Cal/OSHA Guidance
✓ AgSafe Resource Page
✓ Western Growers Resource Page
✓ Dept of Labor FAQ
✓ IRS Guidance on Tax Credits
✓ Employee Leave Rights Poster & Spanish
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