FAQS FOR CALIFORNIA EMPLOYERS IN THE COVID-19 LANDSCAPE

We first prepared this FAQ in March to guide California employers with formulating and implementing their workplace policies and procedures in response to the myriad of orders, laws and guidance issued by federal, state and local authorities in the wake of the COVID-19 pandemic. Then, as Shelter-In-Place orders gradually lifted, and businesses resumed onsite operations, California employers were tasked with developing re-launching plans to address the new normal of face coverings, symptom screenings, social distancing, and other measures to safeguard employee health and safety. Now, with the recent rise in infection rates, many employers are being required to move backward in their phased reopening plans. This updated FAQ will help employers navigate the continuing and new issues associated with the pandemic. Because the COVID-19 legal landscape continues to evolve with changing guidance from the state, municipalities, and counties, the information below is subject to change and employers should consult with legal counsel before implementing new policies.

I. Guidance on Returning to Work

A. What are the current federal guidelines on returning to work?

On April 16, 2020, the White House issued guidelines for "Opening Up America Again." Once states meet certain "gating criteria" the guidelines contemplate a three-stage reopening. More details can be found at https://www.whitehouse.gov/openingamerica/.

Under the Centers for Disease Control and Prevention's (CDC) Interim Guidance for Business and Employers responding to COVID-19 (https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html), employers are advised to maintain healthy business operations by 1) identifying a workplace coordinator, 2) implementing flexible sick leave and supportive policies and practices, 3) protecting employees at higher risk for severe illness through supportive policies and practices, 4) communicating supportive workplace polices clearly, frequently, and via multiple methods, 5) assessing the employers' essential functions, 6) determining how to operate if absenteeism spikes, and 7) establishing policies and practices for social distancing. The CDC has also released a poster on how employees can protect themselves and others (https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention-H.pdf).

Recently, the CDC issued more specific guidance for employers returning to work in office buildings, in which it recommends that employers conduct a hazard assessment of their workplaces and develop hazard controls to reduce the risk of transmission of COVID-19 among workers. The CDC suggests two types of controls (engineering and administrative), including modifying seating and furniture to maintain social distancing, using signs, tapes or other visual cues—placed 6 feet apart—to let employees know where to stand in common areas, conducting daily health checks of employees before they enter the workplace, cleaning and disinfecting high-touch surfaces, and advising employees to wear cloth face coverings in all areas of business. Employers are encouraged to communicate with and educate employees and supervisors about COVID-19 hazards at work and protective measures. More details can be found at https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html.

The CDC also released its Resuming Business Toolkit. Employers who are not sure whether they are ready to resume business can use CDC's decision Toolkit tools as a start. More details can be found at https://www.cdc.gov/coronavirus/2019-ncov/community/resuming-business-toolkit.html

B. What are the current California state and local guidelines for returning to work?

1. California's Resilience Roadmap and Industry Specific Guidance

On April 28, 2020, California Governor Gavin Newson unveiled his four-staged

approach, titled “Resilience Roadmap,” for reopening California. Under the Roadmap, statewide stay-at-home orders are modified in stages, starting with the most restrictive stage, until the public is able to freely move about. As of May 8, 2020, and Governor Newsom’s Executive Order N-60-20, California moved into Stage 2 which entailed a gradual opening of lower risk workplaces, starting with retail, manufacturing, offices (when telework is not possible), outdoor museums, and limited personal services. Stage 3, allows for reopening of higher-risk workplaces, and Stage 4 signifies the end of the stay-at-home orders with gradual opening of larger gathering venues. More details can be found at https://covid19.ca.gov/roadmap/. On June 5, 2020, Governor Newsom announced that a subset of Stage 3 businesses (schools, day camps, bars, gyms, campgrounds and professional sports) will be allowed to reopen, with modifications, on June 12, 2020. The rules on schools and day camps will apply statewide, but only counties that have met certain thresholds on the number of cases, testing and preparedness will be allowed to start reopening the other sectors.

On July 13, 2020, the California Department of Public Health issued a statewide order in response to statewide data demonstrating a recent “significant increase in the spread of COVID-19,” noting that the number of counties on the County Monitoring List increased from 16 as of July 1, 2020 to 32 as of July 16, 2020. The July 13, 2020, order went into effect immediately, ordering as follows:

Effective July 13, 2020, ALL counties must close indoor operations in these sectors:

- Dine-in restaurants
- Wineries and tasting rooms
- Movie theaters
- Family entertainment centers (for example: bowling alleys, miniature golf, batting cages and arcades)
- Zoos and museums
- Cardrooms

Additionally, bars, brewpubs, breweries, and pubs must close all operations both indoor and outdoor statewide, unless they are offering sit-down, outdoor dine-in meals. Alcohol can only be sold in the same transaction as a meal.

Counties that have remained on the County Monitoring List for 3 consecutive days will be required to shut down the following industries or activities unless they can be modified to operate outside or by pick-up:

- Gyms and Fitness centers
- Places of Worship
- Protests
- Offices for Non-Critical Infrastructure Sectors
- Personal Care Services (including nail salons, massage parlors, and tattoo parlors)
- Hair salons and barbershops
- Malls

The current list of counties on the County Monitoring List can be found here: https://covid19.ca.gov/roadmap-counties/

California has also issued a series of industry-specific guidance for reopening (https://covid19.ca.gov/industry-guidance/). Employers must review the guidance that is relevant to their workplace, prepare a plan based on the guidance for their industry, and put it into action. Before reopening, all employers must:

1. Perform a detailed risk assessment and implement a site-specific protection plan
2. Train employees on how to limit the spread of COVID-19, including how to screen themselves for symptoms and stay home if they have them
3. Implement individual control measures and screenings
4. Implement disinfecting protocols
5. Implement physical distancing guidelines

The guidance also noted that it is critical that employees needing to self-isolate because of COVID-19 are encouraged to stay at home, with sick leave policies to support that, and cross-referenced additional information on government programs supporting sick leave and worker’s compensation for COVID-19 (https://www.dir.ca.gov/dlse/Comparison-COVID-19-Paid-Leave.html).

2. Cal-OSHA Guidance Regarding Injury and Illness Prevention Plans (IIPP)

Cal/OSHA has long mandated that all employers establish and implement a written Injury, Illness Prevention Program ("IIPP") pursuant to Section 3203 of the California Code of Regulations (8 CCR § 3203) that includes: 1) identity of the individual(s) with authority and responsibility for implementing the IIPP; 2) a system for ensuring that employees comply with safe and healthy work practices; 3) a system for communicating with employees on all matters related to occupational safety and health; 4) procedures for identifying and evaluating workplace hazards; 5) procedures to investigate occupational injury or illness; 6) methods for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard; and 7) training and instructions for all employees.

As part of an effective IIPP, Cal-OSHA requires California employers to determine if COVID-19 infection is a hazard in their workplace, and if so, to implement infection control measures. Practically speaking, given how widespread COVID-19 is in the community, most employers will be subject to this requirement. Cal/OSHA's Interim General Guidelines on Protecting Workers from COVID-19 list numerous infection prevention measures that should be included in a written IIPP. These range from actively encouraging sick employees to stay home, immediately sending employees home or to medical care as needed, teleworking, physical distancing, cloth face coverings, limiting shared workspaces, procedures for cleaning and disinfecting and steps to take if an employee is confirmed to have a COVID 19 infection. More details can be found at https://www.dir.ca.gov/dosh/coronavirus/General-Industry.html

Employers also are advised to provide employees with training on the following topics as part of an effective IIPP:

- General description of COVID-19, symptoms, when to seek medical attention, how to prevent its spread, and the employer's procedures for preventing its spread at the workplace.
- How an infected person can spread COVID-19 to others even if they are not sick.
- How to prevent the spread of COVID-19 by using cloth face covers.
- Cough and sneeze etiquette.
- Washing hands with soap and water for at least 20 seconds, after interacting with other persons and after contacting shared surfaces or objects.
- Avoiding touching eyes, nose, and mouth with unwashed hands.
- Avoiding sharing personal items with co-workers (i.e., dishes, cups, utensils, towels).
- Providing tissues, no-touch disposal trash cans and hand sanitizer for use by employees.
- Safely using cleaners and disinfectants.

Regardless of COVID-19 risk, *all* employers must provide handwashing facilities that have an adequate supply of suitable cleansing agents, water, and single-use towels or blowers and conduct a hazard assessment to determine if any PPE is needed protect employees from potential or actual hazards. Finally, employers must provide employees with properly fitting and sanitary PPE and ensure that appropriate PPE is provided to and used by employees who use cleaners and disinfectants.

3. Local Public Health Orders

In order to progress through the stages of reopening, each county must first meet the state's readiness criteria if it wants to move further ahead on the resilience roadmap. Counties must demonstrate that they have a low prevalence of COVID-19, that they meet testing and contact tracing criteria, that their health care system is prepared in case they see a sudden rise in cases, and that they have plans in place to protect vulnerable populations. Counties must also create and submit a written attestation that they have met the readiness criteria. More details can be found at https://covid19.ca.gov/roadmap-counties/. Therefore, each county could

have its own specific guidelines for reopening, and employers are advised to consult with local orders first.

As the result of the recent statewide significant increase in the spread of COVID-19 counties have been taking a step backward from their previous reopening progress.

For example, San Francisco's most recent health order updated on July 13, 2020, reflects a shift in the County's approach to focus more on risk reduction while at the same time keeping to an incremental, health-data-driven plan for resuming business and other activity. The Order includes the following requirements for all businesses:

- Allows only listed businesses to operate onsite, including essential businesses, outdoor businesses, healthcare operations, and certain additional businesses:
- Allows other businesses only to operate Minimum Basic Operations (as defined in the Order) onsite;
- Requires that businesses continue to maximize the number of people who work remotely from home to the extent possible;
- Requires businesses to complete and post a Social Distancing Protocol checklist in the form attached to the Order as Appendix A;
- Requires businesses to direct personnel to stay home when sick and prohibits adverse action against personnel for doing so;
- Requires businesses and governmental entities to report to the San Francisco Department of Public Health when three or more personnel test positive for the virus that causes COVID-19 within a two-week period;
- Allows for customers to use reusable shopping bags at businesses; and
- Requires businesses to cancel reservations or appointments without a financial penalty when a customer has a COVID-19 related reason.

The full text of the Order is available at https://www.sfdph.org/dph/alerts/files/C19-07f-Shelter-in-Place-Health-Order.pdf

On July 14, 2020, Los Angeles County issued a revised health order superseding all prior Safer At Home orders issued by the County of Los Angeles Health Officer. The Order was issued to align the County of Los Angeles with State Executive Orders and State Health Officer Orders. The Order explicitly provides that for any Non-Essential office-based business, all indoor portions and operations must cease in-person operations until further notice. The Order further specifies that only outdoor operations of the following are allowed until further notice: indoor malls and shopping centers; hair salons and barbershops; fitness facilities; and personal care establishments (including nail salons, tanning salons, esthetician, skin care, and cosmetology services, electrology, body art professionals, tattoo parlors, piercing shops and massage therapy). The Order adds to the list of permitted activities attendance at in-person faith-based services, provided that the faith-based service is held outdoors, and participating in an in-person protest as long as the protest is held outdoors. The full text of the Order is available at: http://publichealth.lacounty.gov/media/Coronavirus/docs/HOO/2020.07.14_HOO_Safer%20at%20Home_Cessation%20of%20Indoor%20Ops.pdf. On July 16, 2020, Los Angeles Mayor Eric Garcetti issued a new Public Order Under City of Los Angeles Emergency Authority outlining new restrictions consistent with the Los Angeles County July 14, Public Health Order. A copy of Mayor Garcetti's order is available at: https://www.lamayor.org/sites/g/files/wph446/f/page/file/20200716MayorPublicOrderSAFERLA%28REV2020.07.16%29.pdf.

San Diego County's Health Officer issued a new order effective July 15, 2020, requiring all residents to stay home except for employees or customers traveling to and from essential businesses, reopened businesses, or essential activities, or to participate in individual or family outdoor activity as allowed by the Order. The new order requires all essential businesses that allow members of the public to enter a facility to prepare and post a "Social Distancing and Sanitation Protocol" on the

form available at: https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/covid19/SOCIAL_DISTANCING_AND_SANITATION_PROTOCOL_04022020_V1.pdf, or a similar form, for each of their facilities open to the public in the county. In addition, the order requires all brewpubs, breweries, bars and pubs to close unless they comply with specific requirements, and all other restaurants, bars, wineries, distilleries and breweries to close indoor service in conformance with the requirements set forth in the Statewide Public Health Officer Order, issued by the California Department of Health Services on July 13, 2020. A copy of the full text of the San Diego Order is available here: https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/HealthOfficerOrderCOVID19.pdf

II. Workplace Safety For Teleworking and Employees Returning to the Workplace

A. Can employees refuse to come to work even if they are not ill and have not been exposed to COVID-19?

Generally, employees have the right to refuse to come to work only when they believe they are in imminent danger. Currently, even with widespread community transmission of COVID-19, the workplace conditions in California do not meet the definition an "imminent danger" which requires an imminent or immediate threat (i.e. the employee must believe that death or serious physical harm could occur within a short time). Therefore, employees do not have a right to refuse to report physically to work unless dictated by statewide or local stay-at-home orders requiring employees of non-essential businesses (or those employees who can telework) to stay home. Practically, however, even where not dictated by emergency decree, employers should consider allowing employees to work remotely to the extent possible.

B. Can an employer require employees to telework during the COVID-19 pandemic?

Yes, the EEOC, the CDC, and local public health authorities have encouraged employers to facilitate telecommuting and/or telework as a countermeasure to the spread of the virus. For essential businesses, there is no requirement that employers allow employees to telework where possible; however, if this is a viable request and the employee is able to telework, this option should be allowed to promote social distancing. Employers should also be aware that employees might request to telecommute as a reasonable accommodation for a physical or mental disability during the pandemic. Employers who face such a request have an obligation to engage in the interactive process just as they would with any reasonable accommodation request.

C. Can employers require an employee to report contact with potentially infected individuals?

Yes. As long as the employer is not asking about a medical condition, an employer can ask employees if they believe they have been exposed to or have been in contact with individuals with COVID-19 or if they have traveled to a high risk area for COVID-19. Employers should exercise care in doing so to avoid claims that any employee was subject to discrimination or retaliation based on an employer's knowledge of such exposure. Employers who ask employees to self-report contact with infected persons should ensure that the identity of the infected person is kept confidential in accordance with all state and federal privacy laws.

D. Can employers require employees to wear masks or face coverings in the workplace?

Generally, yes, and a clear yes when required by local or state mandate. Employers may set workplace uniform and dress requirements, and demand that employees wear masks or other protective gear in the workplace, so long as the requirement is uniformly enforced without regard to an employee's protected status or classification and so long as the mask or dress requirement does not pose a safety hazard. Any employees who seek modification of these requirements as an accommodation for a disability or a religious belief should be engaged in the interactive process to determine whether the employee's requested accommodation, or an available alternative accommodation, can be provided absent undue hardship.

Face covering and mask orders are being revised and updated continuously by county and state officials and employers must continue to stay abreast of the changes. *On June 18, 2020, Governor Newsom issued a statewide order mandating that face coverings be worn under certain circumstances, including by employees when in the workplace or at a worksite whenever interacting with any member of the public, in any public space visited by the public (even when no one from the public is present), when working or walking through common areas, and in enclosed rooms or spaces when unable to physically distance*. https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Guidance-for-Face-Coverings_06-18-2020.pdf.

E. Do Employers have to Pay for Face Coverings for Their Employees?

Yes, at least in some cases. An April 7, 2020, Los Angeles City Ordinance requires employers to procure and pay for face coverings for their employees. Likewise, San Francisco County requires businesses to provide face coverings for their employees.

Employers who require their employees to wear face coverings or masks in the absence of an applicable order mandating employees to wear face coverings should either procure them for their employees or pay for the coverings their employees procure on their own. Moreover, if they require employees to make their own masks or coverings, they likely would be obligated to reimburse employees under California Labor Code section 2802 for any necessary expense incurred by employees in procuring or making these items. Further, employers may be required to pay non-exempt employees at their hourly rate for time spent creating a mask or face covering required by their employer.

III. Inquiries and Exams

A. Can I require employees to inform the company if they test positive for COVID-19?

Probably. Under the California Family Rights Act (CFRA), employers cannot ask employees requesting family or medical leave to provide a diagnosis of a medical condition. On the other hand, employers have a right to make reasonable inquiries about an employee's medical condition under both the Americans with Disabilities Act ("ADA") and the California Fair Employment and Housing Act ("FEHA") if the inquiry is job related and consistent with business necessity. The 2009 Equal Employment Opportunity Commission (EEOC) Guidelines for "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" explain that in the event public health officials declare a pandemic, employer inquiries regarding an employee's symptoms are not "disability related" and if the pandemic is "severe" enough, as determined by the CDC, even disability-related questions are justified by a reasonable belief that the pandemic poses a direct threat. Because the EEOC has since updated these Guidelines to declare that the COVID-19 pandemic meets the "direct threat" standard, both the EEOC and the DFEH have indicated that employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms without violating federal or state law. In addition, in a webinar posted to the EEOC website on March 27, 2020, the EEOC also stated that employers may ask employees directly if they have COVID-19. Although the DFEH has not directly answered this question, it is likely the DFEH will follow the EEOC in this regard while COVID-19 pandemic continues to meet the direct threat standard.

B. Can I send an employee home if he or she is exhibiting symptoms of the Covid-19 virus in the workplace?

Yes. An employer has a right to exclude workers who may pose a direct threat to the health and safety of their coworkers. According to guidance issued by the EEOC, "[d]uring a pandemic, employers should rely on the latest CDC and state or local public health assessments." 29 CFR § 1630(2)(B). Accordingly, an employee in the workplace who exhibits symptoms of COVID-19 should be sent home as recommended by public health officials and such actions would be excluded from the discrimination protections under the ADA and FEHA. The CDC frequently updates the symptoms associated with the virus. As of June 3, those symptoms are: fever, chills, cough, shortness of breath/difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or

smell, sore throat, congestion/runny nose, nausea/vomiting, and diarrhea. https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html

It is important to note that employees sent home after reporting to work may be entitled to minimum compensation under state or local laws or an applicable collective bargaining agreement. (See Section VI. C below for more information on reporting time).

C. Can employers require a COVID-19 test and/or medical certification before an employee who displayed symptoms or tested positive for COVID-19 returns to work?

Yes. In a short question and answer document published by the EEOC on April 9, 2020 and updated on April 23, 2020 ("What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws"), the EEOC stated that employers may "administer" COVID-19 testing to employees before they enter the workplace to determine if they have the virus. The EEOC explained that the ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity" and "[a]pplying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others." Thus, such tests not only may be required, they may be administered by employers, although the EEOC does not provide any practical guidance on how this should be done, stating only that employers should ensure that the tests are accurate and reliable and that employers should look to the U.S. Food and Drug Administration, the CDC, and public health authorities for information regarding safe and accurate testing. The DFEH has yet to issue the same guidance with respect to COVID-19 testing by employers, but it is expected that the state agency will follow in the EEOC's footsteps and determine such mandatory testing to be permissible under the current circumstances.

Under the ADA and FEHA, and the federal Family and Medical Leave Act (FMLA) and CFRA, an employer may require a return to work certification; however, during a pandemic, doctor appointments may not be easily obtainable due to high demand. Employers will therefore need to be flexible. In its April 9th Q & A, the EEOC confirmed that employers may ask for fitness-for-duty certificates for employees returning to the workplace following a suspected or confirmed case of COVID-19, but advised employers to be open to new approaches for such documentation, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the virus.

As a practical matter, some individuals with COVID-19 may never develop serious symptoms – making it hard to distinguish between a common illness or the virus. In such situations, employers should weigh carefully whether an employee should be allowed to return to the workplace once they are no longer symptomatic (like a normal illness) or be asked to provide a formal return to work certification from a health care provider. Each case should be addressed on an individual basis, depending on whether there is an actual diagnosis of COVID-19, the severity of the symptoms, length of absence, and local availability of testing and medical treatment, keeping in mind the importance of ensuring that a potentially still-contagious employee is not allowed back into the workplace too soon. To assist with this individualized assessment, employers should consult the guidance of the CDC at https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html.

D. Can employers require employees who have not exhibited symptoms or tested positive for COVID-19 to be tested and/or provide medical certification prior to returning to work?

Yes. The EEOC's April 23, 2020 updated COVID-19 guidance expressly states that employers can require employees to participate in COVID-19 testing before they are allowed to enter the workplace, even if they do not or have not exhibited symptoms of the virus.

E. What are the legal risks, if any, associated with temperature checks for employees entering the company's job site?

Generally, taking employee temperatures would be considered a medical examination that is prohibited by the ADA and FEHA. Both the EEOC *and the DFEH, however, published guidelines giving employers the green light to implement temperature checks* during the COVID-19 pandemic for the limited purpose of evaluating the risk that an employee's presence poses to others in the workplace. Moreover, some jurisdictions in California (including San Diego and Mariposa) now require some form of temperature screening before employees are permitted to enter the workplace. Employers considering temperature checks should carefully consider the practical issues associated with performing these checks, including additional staffing, training, and equipment costs. In addition, employers subject to the California Consumer Privacy Act (CCPA) may need to provide a CCPA-compliant notice to employees prior to or at the time of collection of the temperature data.

In the event employees refuse a thermal scan as a condition for entry to the workplace, the basis of their refusal may have important legal implications. For example, if employees refuse based on religious objections, the employer must analyze whether a reasonable accommodation is possible. Similarly, a coordinated refusal to be tested on the part of more than one employee may constitute protected concerted activity under the National Labor Relations Act. If the employer has a unionized workforce, any thermal testing may also be subject to negotiation with an applicable labor union, or run afoul of an existing collective bargaining agreement.

Recent litigation involving compensation of employees for time spent in security checkpoints at retailers and industry sites also raises the prospect of similar arguments that any meaningful time spent in a line for and undergoing a thermal scan may be compensable work time. The analysis of this issue will likely turn on (1) how much control an employer exercises in the temperature screening process (e.g., where the scan is conducted, if the screening is mandatory, and if discipline is imposed on those who refuse the scan), (2) the purpose of the scan, i.e. temporary public health emergency as opposed to a tangible benefit to the employer, and (3) the application of such a policy to all persons entering the work site and not just employees. In California, time spent standing in line and undergoing health screening such as temperature checks is very likely compensable. (See also Section VI. E below.)

On July 11, 2020, the CDC released updated guidance on how to safely administer temperature screenings in the workplace. The guidance suggests two separate approaches, one that relies on physical barriers and partitions, and one that relies on social distancing and the use of personal protective equipment. The CDC further urges employers to consider encouraging individuals planning to enter the workplace to self-screen prior to coming onsite and to not attempt to enter the workplace if any of a number of enumerated conditions exist. It also provides guidance regarding what screening questions to ask. To view the CDC's recommendations, click here.

F. Are you required to report suspected COVID-19 cases to public health authorities?

In the absence of a state or local order, no, but some localities have ordered mandatory reporting under certain circumstances:

City and County of San Francisco: San Francisco businesses and governmental entities must require that all personnel immediately alert the business or governmental entity if they test positive for COVID-19 and were present in the workplace within the 48 hours before onset of symptoms or within 48 hours of the date on which they were tested. If a business or governmental entity has three or more personnel who test positive for COVID-19 within a two week period, then the business or governmental entity is required to call the San Francisco Department of Public Health at 415-554-2830 immediately to report the cluster of cases.

Santa Clara County: In Santa Clara County businesses and governmental entities must

require that all personnel immediately alert the business or governmental entity if they test positive for COVID-19 and were present in the workplace within 48 hours prior to onset of symptoms or within 48 hours of the date on which they were tested. In the event that a business or governmental entity learns that any of its personnel is a confirmed positive case of COVID-19 and was at the workplace in this timeframe, the business or governmental entity is required to report the positive case within four hours to the Public Health Department at www.sccsafeworkplace.org. Businesses and governmental entities must also comply with all case investigation and contact tracing measures by the County, including providing any information requested.

Los Angeles County: In the event that an owner, manager, or operator of any business knows of three (3) or more cases of COVID-19 among their employees within a span of 14 days the employer must report this outbreak to the Department of Public Health at (888) 397-3993 or (213) 240-7821.

Healthcare providers are mandatory reporters and are burdened with reporting to the proper agencies.

Additionally, OSHA requires that employers report certain workplace injuries and illnesses. In its May 19, 2020 Enforcement Guidance, OSHA made clear that employers must inquire into whether instances of COVID-19 in the workplace are work related. In order to determine work-relatedness, employers must perform a reasonable investigation into the causes of the incident of the virus which includes asking employees how they believe they contracted the virus, whether the employee has been around individuals that could have exposed them to the virus and more. For a more in depth analysis of OSHA's updated guidance and employer's duties to investigate, see our additional alert here**.**

California employers must also report to Cal/OSHA any serious illness, serious injury or death of an employee that occurred at work or in connection with work within eight hours of when they knew or should have known of the illness. This includes a COVID-19 illness that requires inpatient hospitalization for other than medical observation or diagnostic testing, or that results in serious illness or death. In guidance posted by Cal/OSHA, the organization specified that if an employee develops symptoms at work related to COVID-19 and otherwise meets the serious illness or death test, employers must report the illness or death to Cal/OSHA regardless of whether the illness or death is work-related or not. Similarly, even if an employee begins showing symptoms outside of work, an employer must report a serious COVID-related illness or death if there is cause to believe the illness may be work-related. https://www.dir.ca.gov/dosh/coronavirus/Reporting-Requirements-COVID-19.html

IV. FMLA Leave and ADA/FEHA Accommodation

A. Are employees entitled to serious health condition leave under the FMLA/CFRA based on fears of contracting COVID-19?

In most cases, no. Generally, employees are not entitled to FMLA/CFRA leave out of fear of contracting an illness. The FMLA and CFRA definitions of "serious health condition," however, are broad and are intended to cover both physical and mental conditions that affect an employee's health to the extent that he or she must be absent from work on a recurring basis or for more than a few days for treatment and recovery. As such, an employee's anxiety about COVID-19 could be considered a serious health condition under the FMLA and CFRA if it results in the employee needing time away from work to seek inpatient care in a health care facility or continuing treatment or supervision by a health care provider.

B. Are employees entitled to FLMA/CFRA leave if they or a family member are diagnosed with COVID-19?

Maybe. The FMLA and the CFRA provide for an employee's leave to care for themselves or to care for a family member with a "serious health condition." Whether an employee or family member with COVID-19 has a serious health condition requires an individualized assessment, particularly since individuals diagnosed with COVID-19 can exhibit a range of mild to severe symptoms. DFEH guidance states that employees or family members suffering from COVID-19 will have a serious health condition under the CFRA if the condition results in inpatient care or continuous treatment or supervision by a healthcare provider. Additionally, it may

be a serious health condition if the employee or family member contracts pneumonia. As such, employers should not make any decisions before considering the facts of each request.

C. The Families First Coronavirus Response Act

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (FFCRA) which creates two new emergency paid leave requirements specifically related to COVID-19 for private employers employing fewer than 500 employees and for most public employers. The FFCRA took effect on April 1, 2020 and will remain in place through December 31, 2020. The legislation empowers the Department of Labor ("DOL") to exempt small businesses with fewer than 50 employees from provisions of the Act related to childcare or school closures if the imposition of the Act's requirements would "jeopardize the viability of the business." It also permits covered employers to exclude health care providers and emergency responders from taking emergency family or paid sick leave under the Act.

The Emergency Paid Sick Leave Act: Division E of the FFCRA creates the "Emergency Paid Sick Leave Act" which requires covered employers to provide up to 80 hours of Emergency Paid Sick Leave ("EPSL") (or the equivalent of two weeks for part-time employees) to employees who cannot work or telework because they: (1) are subject to a Federal, state or local quarantine or isolation order due to COVID-19; (2) have been advised by a health care provider to self-quarantine related to COVID-19; (3) are experiencing COVID-19 symptoms and seeking a medical diagnosis; (4) are caring for an individual (note: this does not need to be a family member) who is ordered or advised to self-isolate due to COVID-19; (5) are caring for their child whose school or child care facility is closed or whose childcare provider is unavailable due to a COVID-19 public health emergency; or (6) are experiencing a substantially similar condition as specified by the Secretary of Health and Human Services. For reasons (1), (2), and (3), EPSL is paid out 100% at the employee's regular rate of pay up to a $511 per day limit and a $5,110 total per employee. For reasons (4), (5), and (6) EPSL is paid out at two-thirds (2/3) the employee's regular rate, up to a cap of $200 per day and a total maximum of $2,000 per employee. EPSL is in addition to the paid sick leave the employer already provides, and for purposes of reason (5), provides pay for the first two weeks of unpaid EFMLA (see below). The Act specifically prohibits employers from requiring employees to exhaust their existing sick leave or PTO before using EPSL, and employees need not have worked for covered employers for 30 days to be eligible for ESPL.

The Emergency Family and Medical Leave Expansion Act. Division C of the FFCRA creates "The Emergency Family and Medical Leave Expansion Act" which amends Title I of the Family and Medical Leave Act, 29 U.S.C. 2601 et seq. (FMLA), to provide up to 12 weeks of leave to eligible employees who are unable to work or telework due to their need to care for a child if the child's school or child care facility is closed or the child's care provider is unavailable due to a public health emergency ("EFMLA"). The first 10 days of the EFMLA is unpaid, during which time the employee may substitute available accrued sick or vacation time or the employee may use available EPSL. After the first 10 days of EFMLA, employers must provide eligible employees with paid leave at two-thirds the employee's regular rate for the number of hours the employee would normally be scheduled to work. The Act limits the pay entitlement for EPSL and EFMLA for school or childcare closure/unavailability to $200 per day and $12,000 in the aggregate per employee.

More about the FFCRA. For purposes of the EPSL, a "Federal, state or local quarantine or isolation order" includes state and local shelter-in-place orders. Employees, however, are only entitled to EPSL leave if being subject to one of these orders prevents that employee from working or teleworking for the employer. If the employer does not have work for the employee due to a shelter-in-place order that prevents the employer from operating its business, or the employer's business closed due to the impact of the shelter-in-place order on the business, the employee would not be entitled to EPSL leave. Likewise, employees who were furloughed or laid off prior to or after the April 1, 2020

FFCRA effective date are not entitled to EPSL or EFMLA. Although employees may not use EPSL or EFMLA simply because their child's school or child care provider is closed for summer vacation, if that employee's summer childcare provider, including a camp, recreational program, or day care center, is closed due to a COVID-19 related reason, the employee would be eligible for both types of FFCRA leave.

The DOL also clarified that although intermittent leave is not required under the FFCRA, the employer and a teleworking employee may mutually agree to such intermittent use. For those employees still required to report physically to the worksite, however, intermittent FFCRA leave is only permissible if the employee is unable to work due to the need to care for a child whose school or childcare facility is closed, or childcare provider is unavailable, due to a public health emergency. The DOL also declared that its usual "continuous workday rule," whereby all time between an employee's first and last principal activity for the day is considered compensable work time, is inconsistent with the objectives of the FFCRA and is temporarily suspended for purposes of the Act. While this is good news for most employers subject to the FFCRA—because they no longer have to treat the entire day as compensable work time, but can break a non-exempt employee's day into compensable and non-compensable working periods—courts may not defer to the DOL's guidance. Moreover, California employers are still subject to the requirement to provide a split shift premium to employees who work a split shift for the benefit of the employer.

Finally, local laws at the county and city levels, such as Los Angeles and San Francisco, have been passed or are being considered to provide paid sick leave to employees during the COVID-19 pandemic that may not be covered under the FFCRA. For more information, please see our detailed alert summarizing the ordinances here and continue to consult local and state laws in addition to the FFCRA for the latest developments during the pandemic.

D. Is COVID-19 a disability or condition that must be accommodated under the ADA or FEHA?

This question remains unanswered. In a March 27 webinar, the EEOC released guidance that stated it is unknown whether COVID-19 constitutes a disability under the ADA. The ADA defines a disability as a physical or mental impairment that substantially limits one or more major life activities. FEHA removes the "substantial" requirement and defines a disability as a condition that limits a major life activity. One could make an argument that COVID-19 limits a life activity such as breathing because it affects the respiratory system. On the other hand, temporary conditions such as influenza, generally are not "disabilities" under the ADA or FEHA but may be if they are sufficiently severe. A short-term illness that has lasting consequences also may be covered under the ADA and FEHA. As such, employers should make an individualized assessment if accommodation requests are received.

E. Is an employee's anxiety because of the COVID-19 outbreak a disability that must be accommodated?

COVID-19 could present other disability questions outside of actually contracting the virus. Employees with anxiety or stress related disorders could request accommodations from employers arguing that their stress or anxiety resulting from the COVID-19 pandemic manifests as a mental disability that must be accommodated under FEHA and the ADA. These are likely to be viable claims that employers should take seriously, especially if an employee with mental health limitations has been accommodated in the past. Employers must engage in a good faith interactive process in order to individually assess all accommodation requests and should consult with legal counsel as necessary.

F. Should employers take extra precautions when bringing higher-risk employees back to work?

Yes. On May 7, 2020 the EEOC issued updated its Technical Assistance Guidance on Disability Accommodation to address questions related to employees with a higher risk of contracting a serious illness from COVID-19. Individuals that are age 65 and older and people who have serious underlying health conditions are considered to be at higher risk for developing serious complications from COVID-19. The updated

guidance recommends that employers be ready to field accommodation requests from these higher risk employees. While the EEOC encourages employers to engage in this interactive process, it also makes clear that an employer may not exclude high risk employees from the workplace or take any adverse action against them merely because they have a disability identified by the CDC that puts the employee at higher risk of developing complications from the virus. Employers may exclude employees from the workplace only if an employee's disability poses a "direct threat" to the employee's health that cannot be eliminated or reduced by reasonable accommodation.

The guidance suggests that employers must consider accommodations for higher risk employees such as working from home, providing leave, or reassigning the employee. If, after exhausting these options, the employer determines based on an individualized assessment and reasonable medical advice that the significant risk of substantial harm to the employee cannot be reduced or eliminated, then (and only then) may the employer exclude the employee from the workplace.

V. Travel

A. Can an employer restrict travel by its employees to all locations on the CDC travel advisory?

Employers in California generally cannot discipline employees for engaging in lawful off-duty conduct, including personal travel. Employers who have re-opened may continue to restrict business travel to the extent they feel necessary and can and should discourage personal travel to restricted, higher risk areas. Travel is allowed under the Stage 2 Order for urgent matters or if such travel is essential to permitted work, and while employers cannot absolutely restrict employees from travelling, employees should be discouraged from traveling for pleasure to help reduce the spread of the virus.

The best practice regarding travel is to focus on self-reporting. Employers can ask employees to disclose their travel destinations and method of travel (for instance, air travel may be more of a concern than car travel), and in particular, if they have traveled to locations the CDC has identified as a Level 3 travel risk or higher. Employers can also ask whether an employee has travelled to any location where local health officials have recommended that visitors self-quarantine after visiting. If employees have traveled to Level 3 travel areas, employers should implement a 14-day quarantine period during which employees either work from home or take a leave of absence.

For an up-to-date list of Level 3 risk areas, visit https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html for more information.

VI. Wage and Hour

A. Does an employer have to pay an employee if the employee is not working because of COVID-19?

Generally no, unless the employee chooses to use available paid leave, or the employee is eligible for paid leave under the FFCRA. Employees also may be entitled to other paid benefits, see section VII below.

California and federal wage laws require employees to be compensated for time actually worked. Therefore, if employees are not working, and are not otherwise subject to their employer's control while not at work, then they are not generally entitled to compensation. (See Question B and E below for exceptions). However, employers must be careful when dealing with exempt employees. Exempt employees must be paid on a salary basis, which requires that employees be paid for an entire week's salary if they perform at least some work during the work week.

B. Must employees who are required to self-quarantine be paid?

Notwithstanding the above questions and application of the FFCRA, employers might have to pay employees who are self-quarantined and not working if there are enough restrictions placed on the employee during this self-quarantine period that the employee is, in essence, under the "control" of the employer. In California, an employee must be paid for all hours worked. "Hours worked" is defined to include all the time during which an employee is subject to the control of an employer. The concept of control for purposes of compensation has a 2-part test:

1. Whether the restrictions placed on the employee are primarily directed toward fulfillment of the employer's requirements and policies, and
2. Is the employee substantially restricted so as to be unable to attend to private pursuits?

What the employer says to the employee regarding the quarantine period is pivotal in determining whether sufficient control exists to trigger the obligation to compensate the employee. For example, telling the employee they have to stay home and have to limit attending events, or have to make themselves available for work or to answer questions, likely will meet the test. On the other hand, if "self-quarantine" means to stay out of the work place for a time to see if the employee develops symptoms, without any expectation that the employee work, report to work, or be available to work—and no other restrictions apply—then the employee is not likely under the employer's control and would not require compensation.

C. Are employees in California entitled to reporting time pay if they report for work at the request or permission of the employer, and are then required to return home due to concerns about the virus?

Maybe. Generally, if an employee is scheduled to report to work, and is sent home, the employee must be paid half of the usual or scheduled day's work at a minimum of two hours but no more than 4 hours. The California Department of Industrial Relations has a coronavirus FAQ page that answers the same question as follows:

> **Q. Is an employee entitled to compensation for reporting to work and being sent home?**
>
> **A.** Generally, if an employee reports for 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. 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.

However, the state's reporting time regulations apply to instances where the employer sends an employee home because it does not have enough work for the employee that day or because it *chooses* to only utilize the employee's services for a short time, such as for a meeting. If an employee is being sent home because they have failed a temperature test or other screening, they may pose a threat to the health and safety of other employees and potentially the public at large. Thus, it is less than clear whether reporting time pay would apply in such a circumstance.

Note that if an employer requires employees to temperature screen at home and submit those test results *before* reporting to work, it is possible that the time an employee spends on that procedure would be compensable, depending on the circumstances and the amount of burden that is placed on employees.

D. Must employers reimburse employees for expenses incurred while working or teleworking?

Yes. California employers are required to reimburse employees for "all necessary expenditures or losses incurred by the employee" in the course of the employee's job, as well as for any expenses arising out of an employer's directive. Cal. Labor Code §2802. This question is likely to be implicated if employees are asked to work from home. The actual amount that must be reimbursed is not set by law, but must be "reasonable" based on the circumstances. Employers should be careful to delineate between necessary expenses and other expenses that may not be necessary. For example, a reasonable portion of required technology expenses associated with work-required internet and phone usage, printing, faxing, etc. would require reimbursement, but expenses related to costs associated with meal times likely are not "necessary" even if an employer regularly provides employees with complementary meals as part of their job. Employers should draft a clear statement of what will be considered necessary expenses for reimbursement purposes and that also allows employees to

raise concerns about expenses that do not appear on the employer's list that employees feel should be reimbursable. Employers can then assess expense requests as necessary.

E. Must an employer provide employees with masks or pay for time spent on temperature checks and symptom screenings?

As explained above, California employers are required to reimburse employees for all necessary expenditures and also may be required to provide personal protective equipment under Cal/OSHA. Therefore, if an employer re-opens and, absent a local order, *requires* employees to wear masks/face coverings while at work, it must provide those masks or reimburse employees who purchase their own masks. Currently, masks are "recommended" by the Federal and California state authorities, but many California localities have provisions which require face coverings for employees and/or customers, and some (e.g., San Francisco and Los Angeles) specifically require employers to purchase masks for their employees. It is less clear if employers must reimburse employees for do-it-yourself type face coverings where a local order (e.g., Sacramento County) specifically states that businesses are not required to provide face coverings. (See discussion above in II.B and C.)

Time spent during a mandatory temperature checks and symptom screenings at the workplace is work time for which employees must be paid, and such time may also be deemed "work time" if employees are mandated to conduct a self-temperature check and/or other symptom screening at home before reporting to the workplace. Whenever an employer restrains the employee's action and the employee has no plausible way to avoid the activity, such as during a mandatory security/bag check, that time must be paid. In addition, if the employer mandates that employees conduct a self-temperature check before arriving to work, the employer likely has a duty to reimburse the employees for the reasonable cost of a thermometer to the extent an employee does not already possess one.

F. Must employers allow employees to use California Paid Sick Leave if requested due to COVID-19 illness or quarantine?

Yes. The Department of Industrial Relations has directly answered this question as well. It answered as follows:

> **Q. Can an employee use California Paid Sick Leave due to COVID-19 illness?**
>
> A. Yes. If the employee has paid sick leave available, the employer must provide such leave and compensate the employee under California paid sick leave laws.
>
> Paid sick leave can be used for absences due to illness, the diagnosis, care or treatment of an existing health condition or preventative care for the employee or the employee's family member.
>
> Preventative care may include self-quarantine as a result of potential exposure to COVID-19 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 COVID-19 or where the worker has traveled to a high-risk area.

G. Can an employer require an employee to use available paid sick leave if the employee is quarantined?

No, the use of state or locally-mandated paid sick leave is left to the employee's discretion. If the worker decides to use available California/local paid sick leave, employers in California may require that it be taken at a minimum interval of two hours (unless local leave laws, such as those in San Francisco, Oakland and Berkeley require a shorter increment), but the total number of hours used is up to the employee's discretion. Employers can, however, require the use by eligible employees of EPSL under the Families First Coronavirus Response Act.

H. If an employee exhausts sick leave, can other forms of paid leave be used instead?

Yes if the employer's other leave policies allow. There is no law that directly requires an employer to allow a worker to substitute vacation or paid time off if an employee exhausts sick leave, however, if your internal policies allow such a practice, then they should be followed. Additionally, as a practical matter, allowing exhaustion of other forms of leave could engender good faith during the COVID-19 outbreak.

I. If an employee is exempt, are they entitled to a full week's salary for work interruptions due to a shutdown of operations?

An employee is exempt if they are paid at least the minimum required salary under federal and state law and meet the other qualifications for exemption. Federal regulations require that employers pay an exempt employee performing any work during a week 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.

Deductions from salary for absences of less than a full day for personal reasons or for sickness are not permitted. If an exempt employee works any portion of a day, there can be no deduction from salary for a partial day absence for personal or medical reasons.

Federal regulations allow partial day deductions from an employee's sick leave bank so that the employee is paid for their sick time by using their accrued sick leave. If an exempt employee has not yet accrued any sick leave or has exhausted all of their sick leave balance, there can be no salary deduction for a partial day absence.

The Federal DOL is allowing employers, during this crisis, to reduce an exempt employee's accrued vacation leave bank in the case of an office closure (full or partial days) so long as the employee receives payment in an amount equal to their guaranteed salary. An exempt employee who has no accrued benefits in the leave bank account, or has limited accrued leave and the reduction would result in a negative balance in the leave bank account, must receive the employee's guaranteed salary for any absence(s) occasioned by the office closure in order to remain exempt.

Deductions from salary may also be made if the exempt employee is absent from work for a full day or more for personal reasons other than sickness and accident, so long as work was available for the employee, had they chosen to work.

Employers should also be aware that if an employer's operations are not halted but instead just slowed and, as a result, an exempt employee's job duties are altered during the pandemic and the employee's "primary duties" for any one workweek are more properly classified as non-exempt, then that employee should be considered non-exempt for the week. This status change will result in the employee having a right to meal and rest periods and being subject to overtime pay just as any non-exempt employee.

J. Other Considerations for Non-exempt Employees Teleworking During the Pandemic

During the COVID-19 pandemic, employers who ask or permit their non-exempt employees to work remotely will need to take steps to properly track and record the "hours worked" by these employees to minimize risks of overtime and missed meal and rest break claims under federal and state wage and hour laws. Employers should put into place clear policies and rules regarding teleworking that set forth the employer's standard working hours, time reporting (including clocking in and out) and recordkeeping requirements, and that make clear employees are still subject to the employer's meal and rest period requirements and overtime rules while working from home.

Additionally, California employers who allow employees to work modified schedules at home due to the employee's needs to care for their children or for other purposes should be cognizant of California's split-schedule premiums. These premiums require employers to pay employees an additional one hour of pay if the employee is required to work a split schedule, generally meaning that the employee has a one hour

or longer break during a workday that is not a bona fide meal period. Generally, however, if an employee requests the break for the employee's own convenience, then it is not a split shift under California law. As such, it is not clear if California employers would be required to pay a split shift to employees who cannot work a continuous workday due to reasons related to the COVID-19 crisis (e.g., caring for a child whose school is closed or whose childcare provider is unavailable due to stay-at-home orders).

VII. What benefits are available to employees?

A. Disability Insurance

California employees who are unable to work due to exposure to COVID-19 (certified by a medical professional) can apply for state-sponsored disability insurance ("DI"). DI provides short-term benefit payments to eligible workers who have full or partial loss of wages due to a non-work-related illness, injury, or pregnancy. DI can provide workers up to 60-70% of the worker's wages, up to a maximum of $1,300 per week. Governor Newsom's Executive Order regarding COVID-19 waives the one-week waiting period for DI benefits so that eligible employees may start receiving benefits the first week they are out of work.

B. Paid Family Leave

California employees who are unable to work due to the need to care for an ill or quarantined family member with COVID-19 (certified by a medical professional) may file a Paid Family Leave ("PFL") claim. PFL is a state-sponsored benefit that provides up to eight weeks of paid benefits to eligible workers in order to care for an ill family member or to bond with a new child. Similar to DI, PFL benefits are approximately 60-70% of a worker's wages up to a maximum of $1,300 per week.

C. Reduced Work Hours Unemployment Claims

California unemployment insurance allows for partial wage replacement for workers who lose their job or have their hours reduced through no fault of their own. Workers under this policy could be eligible for unemployment wages between $45-$450 per week.

For employees working a reduced schedule, unemployment insurance benefits are paid in an amount equal to the employee's weekly benefit amount less the smaller of the following: (1) the amount of wages in excess of twenty-five dollars ($25) payable to the employee for services rendered during the week; or (2) the amount of wages in excess of 25 percent of the amount of wages payable to the employee for services rendered during that week. Essentially, the first $25 or 25% of wages allocated during a week are disregarded. The remaining amount, the earnings over $25 or 75% of the individual's earnings, are deducted from the individual's weekly benefit amount to get the benefit owed.

D. Coronavirus Aid, Relief, and Economic Security (CARES) Act Unemployment Insurance

The CARES Act is the federal government's "phase three" legislative response to the COVID-19 crisis. At $2.2 trillion (more than 10 percent of U.S. GDP), the CARES Act is the most significant piece of federal disaster and economic relief ever passed in American history. It **expands Unemployment Insurance** for eligible workers pursuant to state law and provides federal funding of UI benefits to those not usually eligible for UI (e.g., self-employed individuals, contractors, and those with a limited work history). Employees eligible for UI under California law will receive a $600 per week increase in benefits for up to four months. The federal government also will fund an additional 13 weeks of unemployment benefits through December 31, 2020 after workers have run out of state unemployment benefits.

VIII. What Assistance is available to Employers?

A. Guidance for Reopening Workplaces.

OSHA has issued a Guidance on Preparing Workplaces for COVID-19, which is available here. The guidance provides steps to reduce exposure risk, including developing an infectious disease preparedness and response plan, implementing basic infection prevention measures, and developing policies and procedures for identification and isolation of infected employees.

As detailed in Section I, California has issued statewide industry guidance to help businesses reduce the risk of spreading COVID-19 in accordance with its Resilience Roadmap. The industry guidance can be found here, and industry-specific guidance issued by Cal-OSHA can also be found here. However, because there is variance between the counties in California, employers should also be review the county-by-county guidance, which is available here.

B. Assistance for Reduced Work Hours

Employers experiencing business slowdowns because of COVID-19 and the impact on the economy can apply to the Unemployment Insurance Work Sharing Program. This program allows employers to attempt to avoid layoffs by retaining employees but reducing their hours and wages, which can then be partially offset with Unemployment Insurance benefits. Workers of employers that are approved to participate in the Work Sharing Program receive a percentage of their weekly UI benefit amount based on the percentage of hours and wages reduced, up to 60 percent. This program has the dual benefit of cutting employer costs during the recovery from the impacts of COVID-19 while giving employees an opportunity to supplement any lost wages and hours.

C. Tax Assistance

California employers may request a 60-day extension from the EDD to file their state payroll reports and/or to deposit payroll taxes without interest or penalty.

D. Coronavirus Aid, Relief, and Economic Security (CARES) Act

The CARES Act provides economic aid to individuals, businesses, and industries and additional support for hospitals, health care workers, and other elements of the health care system. The bill has many facets intended to help large and small businesses survive and recover during this time period. For information on the CARES Act, see our in depth summary alert here. Businesses also should be aware that on the evening of June 5, 2020, a portion of the CARES Act concerning the Paycheck Protection Program was amended to provide additional benefits. Please see our in depth summary alert of the changes to the Paycheck Protection Program here.

IX. Miscellaneous

A. What information may be shared with an employer's staff if an employee is quarantined or tests positive for COVID-19?

If an employee or worker is confirmed to have contracted COVID-19, you should inform your staff of their potential exposure to COVID-19 in the workplace. However, you should not disclose the identity of the quarantined employee based on privacy laws.

B. Can employers force California employees to use accrued but unused vacation or PTO hours if they experience work shortages, or if employees cannot come to work due to state or local restrictions and are not able or asked to work remotely?

Maybe. The U.S. Department of Labor (DOL) takes the position that because employers are not required under the FLSA to provide any vacation time to employees, there is no prohibition on an employer giving vacation time and later requiring that such vacation time be taken on a specific day(s) when employees cannot work due to inclement weather or temporary shutdowns. In contrast, accrued vacation and PTO hours are considered a vested benefit in California. The California Department of Labor Standards Enforcement ("DSLE") has opined that employers can only force employees to use vested benefits such as vacation and PTO if the employees are given "reasonable notice." The DSLE has opined that reasonable notice requires at least 90 days or one quarter. As such, it appears the plain answer is no under the DSLE approach. However, it should be noted that DLSE opinions are only enforcement guidelines and do not bind courts. A state court may not necessarily accept the DSLE approach, particularly in light of the coronavirus pandemic. Since this is a complicated issue with significant consequences, employers should consult with legal counsel before implementing a policy requiring accrued PTO or vacation be used.

C. If an employer is forced to conduct a mass layoff (50 or more employees) due to the COVID-19 pandemic, do the California WARN Act notice requirements apply?

Yes, but the requirements have been relaxed. On March 17, 2020, Governor Newsom signed Executive Order N-31-20 which suspends the usual sixty (60) day notice requirements set forth in the California Warn Act but still requires employers to provide notice as soon as practicable to affected employees and certain government agencies, including the Economic Development Department (EDD), and to explain why additional notice could not be provided due to business circumstances related to the pandemic. Notices also must comply with the requirements of Labor Code Section 1401(a)-(b), and must include the following statement, "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."

In addition to complying with Cal-WARN, employers must evaluate whether a plant closing, mass layoff, temporary layoff, or reduction in employees' hours due to COVID-19 triggers the Federal WARN requirements and whether any of the exceptions to Federal WARN (e.g., unforeseen business circumstances) apply. These questions are complicated and employers are encouraged to seek the advice of counsel to help determine if and when notice must be provided.

D. If an employee contracts COVID-19 while at work, will it be a compensable workers' compensation injury?

Yes, if an employee can prove that the virus was contracted in the scope of employment, then it will be a compensable injury. Practically, given that COVID-19 is being spread throughout the community, it may be difficult for most employees—other than healthcare workers or first responders—to prove where and when they contracted the virus. However, if an employee suspects they contracted the virus at work, they should be provided a workers' compensation claim form and allowed to apply.

On May 6, 2020, California Governor Gavin Newsom signed an executive order facilitating access to workers' compensation benefits for essential workers who contract COVID-19 on the job. Executive Order N-62-20 (order) creates a rebuttable presumption that an employee's illness arose out of and in the course of employment if the employee tests positive for COVID-19 or was diagnosed with COVID-19 after March 19, 2020, and within 14 days after they performed labor or services at a place of work, and the diagnosis is confirmed with a positive test within 60 days of diagnosis. The employee must have worked outside the home during the relevant time period. The presumption remains in place for 60 days after issuance of the order (May 6, 2020). For more information, please see our alert here.

E. Does an employer have a duty to prohibit discrimination, harassment and retaliation during the pandemic?

An employer's duty to prohibit discrimination, harassment, and retaliation remain unchanged during the pandemic. Employers should take careful steps to ensure employees are not engaging in discrimination and harassment and to provide training to employees on these issues. For purposes of the COVID-19 outbreak, employers should be particularly vigilant as it pertains to harassment and discrimination because of a person's disabilities, whether actual or perceived, and their race, color, ethnicity, or national origin.

F. Can an employer require a COVID-19 antibody test before employees re-enter the workplace?

No, not at this time. Based on the current CDC guidance indicating that antibody test results "should not be used to make decisions about returning persons to the workplace," the EEOC issued updated guidance on June 17, 2020 that an antibody test does not meet the ADA's "job related and consistent with business necessity" standard for medical examinations or inquiries for current employees "at this time". Therefore, requiring antibody testing before allowing employees to re-enter the workplace currently is not allowed under the ADA. The EEOC did indicate that it will continue to monitor CDC recommendations

and will update its guidance if those recommendations change.

G. Am I required to rehire employees that I laid off due to COVID-19 when my business reopens?

Possibly, in San Francisco. The San Francisco Board of Supervisors passed an emergency ordinance on June 23, 2020, that imposes rehiring, notice and reporting obligations onto San Francisco employers who have recently conducted, or who plan on conducting, layoffs related to COVID-19. The essence of the ordinance is that it requires large employers to offer laid-off workers their old jobs back, before offering employment to new applicants, under certain circumstances. The ordinance also requires that employers who have recently conducted, or who plan on conducting, layoffs related to COVID-19 provide notice of their right to reemployment.