Workers' Compensation Liability & Employment Law Practices for the Coronavirus

presented by:

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Plan For This Session

Today we will discuss:

- What the coronavirus is.
- Why the coronavirus matters.
- When an employer may be liable for it.
- What employers can do to protect themselves and their employees.
- Issues related potentially infected employees.
  - When to provide a claim form.
  - Whether benefits must be paid to quarantined employees.
  - State benefits available to employers and employees.
- Limited time but questions are encouraged.

Where to get information about COVID-19

- The Centers for Disease Control (CDC) website:

  https://www.cdc.gov/coronavirus/2019-ncov/index.html

- The World Health Organization (WHO) website:

  https://www.who.int/emergencies/diseases/novel-coronavirus-2019

- The California Department of Public Health website:

  https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx

- These resources, along with others, were used to prepare this presentation.

What is COVID-19?

- Coronaviruses are a large family of viruses that cause illness ranging from the common cold to more severe diseases.
- A novel coronavirus is new strain that has not been previously identified.
- COVID-19 is the infectious disease caused by the most recently discovered coronavirus.
- The outbreak began in Wuhan, China, in December 2019.
- In COVID-19, “CO” stands for “corona,” “VI” for “virus,” “D” for disease, and “19” for the year it was identified.

How does COVID-19 spread?

- The virus is spread mainly from person-to-person.
  - People who are in close contact with one another (within about 6 feet).
  - Through respiratory droplets produced when an infected person coughs or sneezes.
- People are thought to be most contagious when they are most symptomatic (the sickest). Some spread might be possible before people show symptoms.
- It may be possible to get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes, but this is not thought to be the main way the virus spreads.

Symptoms of COVID-19

- Symptoms may appear 2-14 days after exposure.
- The most common symptoms are fever, tiredness, and dry cough.
- Some patients may have aches and pains, nasal congestion, runny nose, sore throat, diarrhea or shortness of breath.
- These symptoms are usually mild and begin gradually.
- Some people become infected but don’t develop any symptoms and don't feel unwell.

COVID-19 Pandemic

- On March 12, 2020, the WHO declared COVID-19 a global pandemic, which is "the worldwide spread of a new disease."

- "An influenza pandemic occurs when a new influenza virus emerges and spreads around the world, and most people do not have immunity."

Why COVID-19 matters?

- While the true mortality rate cannot be determined at this early stage, the WHO reported an early mortality rate of 3.4%. Subsequent studies have reported lower mortality rates of 1.6%.
- For seasonal influenza, mortality is usually well below 0.1%.
- Illness due to COVID-19 infection is generally mild, especially for children and young adults.
- It can cause serious illness: about 1 in every 5 people who catch it need hospital care.
- Older people and people with pre-existing medical conditions (such as high blood pressure, heart disease, lung disease, cancer or diabetes) appear to develop serious illness more often than others.

Why COVID-19 matters?

- According to one article, the death rate based on a study by the Chinese CDC was as follows:

AGE	DEATH RATE ALL CASES
80+ yrs old	14.8%
70-79 yrs old	8.0%
60-69 yrs old	3.6%
50-59 yrs old	1.3%
40-49 yrs old	0.4%
30-39 yrs old	0.2%
20-29 yrs old	0.2%
10-19 yrs old	0.2%
0-9 yrs old	0 fatalities

PRE-EXISTING CONDITION	DEATH RATE ALL CASES
Cardiovascular Disease	10.5%
Diabetes	7.3%
Chronic Respiratory Disease	6.3%
Hypertension	6.0%
Cancer	5.6%
No Pre-Existing Condition	0.9%

https://www.worldometers.info/coronavirus/coronavirus-age-sex demographics/

COVID-19 and its impact on employment-based immigration and global travel

- **First**: don't panic. Take a measured and balanced approach.

- **Second**: narrow the scope of analysis to its impact on global travel restrictions and the resulting effect on immigration policies for your employer and employees.

- **Third:** key questions
  - What are the travel restrictions in place?
  - What specific visa types will be impacted?
  - How do work-from-home policies effect H-1B procedures?
  - Where does corporate compliance fit into the equation?

Impact on employers

- The international travel restrictions, and all of the ensuing chaos, will have an impact on employers that are trying to bring workers to the United States, and on workers trying to get back home.
- Businesses who have instructed their employees to work from home must ensure they still comply with Department of Labor rules about the geographic scope of positions;
  - For example, as specified for H-1B (specialty occupation) employees on the labor condition application. In general, H-1B and E-3 employees may work from home in the same metropolitan statistical area (MSA) as their approved work locations without an amended petition.
- L-1, TN, and O-1 nonimmigrants may work from home for brief periods of time without an amended petition.
- USCIS has stated that they will not be conducting H-1B or L-1 site visits for companies that are closed due to COVID-19

Anticipating delays

- Petitioning employers should document and date any coronavirus-related instructions from either the petitioning employer or the end-client in third-party worksite scenarios.
- Government office closings are another potential issue, as appointments and decisions are delayed.
- USCIS has posted an announcement telling ill people not to come to an appointment regardless of whether they were exposed to the coronavirus.
  - The announcement tells people to follow the instructions on their appointment notices to reschedule appointments or interviews.
- US Citizenship and Immigration Services (USCIS) is implementing a nationwide “remote work program” for its employees, which may increase adjudication delays.
  - A USCIS letter announcing the program makes no mention of the virus, but it is likely that the agency will make greater use of the program as containment strategies are rapidly implemented in many sectors nationwide.

Workers' Compensation Liability for Nonoccupational Diseases

- Why do we care? People get better.
- A nonoccupational disease are defined as "one that is not contracted solely because of an exposure to work or because it is related to a particular type of work."
- Nonoccupational diseases include the common cold or flu.
- As a generally rule, a nonoccupational disease does not arise out of the employment and is noncompensable.

Workers' Compensation Liability for Nonoccupational Diseases

- In *Latourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644, the Supreme Court stated, "[I]n the area of nonoccupational disease, '[t]he fact that an employee contracts a disease while employed or becomes disabled from the natural progress of a nonindustrial disease during employment will not establish the causal connection.'"

- The Supreme Court explained, "The narrower rule applicable to infectious diseases arises from the obvious problems of determining causation when the source of injury is of uncertain etiology, the product of invisible and often widespread viral, bacterial, or other pathological organisms. The potentially high costs of avoidance and treatment for infectious diseases, coupled with the fact that such illnesses often cannot be shown with certainty to have resulted from exposure in the workplace, also explain the different line-drawing by our courts in the area of nonoccupational disease."

Exceptions to the Rule of Noncompensability

Two exceptions to the general rule of noncompensability for nonoccupational disease. An injury resulting from a nonoccupational disease may be compensable if:

1. The employment subjects the employee to an increased risk compared to that of the general public; or

2. The immediate cause of the injury is an intervening human agency or instrumentality of the employment.

Exception #1 – *Bethlehem Steel Co. v. Industrial Acci. Com.* (1943) 21 Cal.2d 742

Facts of the Case:

- Ten cases were consolidated for review involving shipyard workers who contracted the contagious eye disease known as kerato conjunctivitis.

- It was undisputed the disease among shipyard workers amounted to an epidemic.

- Defendant asserted the proof was conclusive that the disease was also epidemic in San Francisco and other places such that claimants could not prove that the disease was contracted during and because of their employment.

Exception #1 – *Bethlehem Steel Co. v. Industrial Acci. Com.* (1943) 21 Cal.2d 742

The Supreme Court upheld awards in favor of the workers.

- It found, "The evidence is quite convincing that the disease in the community outside of the shipyards was of much less proportion compared to the population."

- "The epidemic in the shipyards constituted a special exposure in excess of that of the commonalty."

- It found the employees met their burden of proving the risk of contracting the disease by virtue of the employment was materially greater than that of the general public.

Exception #1 – *Bethlehem Steel Co. v. Industrial Acci. Com.* (1943) 21 Cal.2d 742

Analysis of the Decision:

- If an employee can demonstrate that he/she had a greater risk of exposure at the workplace compared to that of the general public, the courts could find an employee's exposure to the coronavirus compensable.

- Per *Bethlehem Steel*, this could be established if the evidence establishes a greater proportion of the employees at the worksite were exposed than the general population such that they were subject to special exposure.

- If an office or worksite has a higher percentage of coronavirus cases than the general public, then that employer could be liable for injuries or deaths related to the virus.

Exception #1 – *Pacific Employers Ins. Co. v. Industrial Acci. Com. (Ehrhardt)* (1942) 19 Cal.2d 622

Facts of the Case:

- A traveling salesman lived in San Francisco but traveled to various places as part of his job, including the San Joaquin Valley.
- He contracted a respiratory illness caused by a mold or fungus that exists in California's San Joaquin Valley and in Arizona, commonly known as San Joaquin Valley fever.
- Before his employment, the salesman had never been to either region.
- The defendant asserted the evidence was insufficient to support an award, and even if he did contract it in the San Joaquin Valley and in Arizona, it cannot be said to have arisen out of his employment or have been incidental to it.

Exception #1 – *Pacific Employers Ins. Co. v. Industrial Acci. Com. (Ehrhardt)* (1942) 19 Cal.2d 622

The California Supreme Court found the injury compensable.

- It concluded that if the employee's duties had not taken him to the endemic area, then he would not have contracted the disease.

- "It was by reason of and incident to his employment that he came in contact with the infection."

- "The risk to which he was subjected by his employment was not the same as that of the public in the endemic area inasmuch as the great majority of the inhabitants there possessed an immunity to the disease which Ehrhardt, living outside the area, lacked."

Exception #1 – *Pacific Employers Ins. Co. v. Industrial Acci. Com. (Ehrhardt)* (1942) 19 Cal.2d 622

Analysis of the Decision:

- If the employment places an employee in a position of greater risk to the coronavirus than the general public, the courts could also find an employee's exposure to the coronavirus compensable.

- Doctors, nurses, or other health care workers, who are required to treat patients with the coronavirus could potentially file their own workers' compensation claim if they contract the virus.

- Employees who are required to work close to large numbers of people could also argue they are subject to an increased risk compared to that of the general public.

Exception #2 – *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729

Facts of the Case:

- A nurse's assistant had pre-existing tuberculosis, which she was required to treat to continue working.

- While undergoing treatment, she developed a significant adverse reaction to the drugs, and she filed a claim for workers' compensation benefits based on the disability she sustained as a result of her treatment for tuberculosis.

- The WCAB found that the injuries were not compensable since the tuberculosis patch test was merely diagnostic and had been given to Maher before she commenced her duties at the hospital.

Exception #2 – *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729

The California Supreme Court found the injury compensable.

- It held an injury sustained as a result of medical treatment required by her employer was compensable.
- It cited the long-established rule in workers' compensation cases that "an employer takes the employee as he finds him at the time of the employment."
- "California law does not require that employment be the sole cause of an injury, only that it be a concurrent or contributory cause."
- The injury was compensable because there was no dispute that it was the *treatment* to which applicant submitted, which caused her illness, was required as a condition of her continued employment.

Exception #2 – *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729

Analysis of the Decision:

- Even if the employee cannot establish the coronavirus occurred at work, or even if it was established the infection occurred outside of the employment, the employer could be liable if the employment aggravated the condition.

- If the coronavirus causes the death of an employee, the death may be compensable so long as the employment was a contributing cause.

- Not only should employers take actions to protect the employees from contracting the coronavirus, they should take actions to make sure that employees who are potentially infected with the virus do not aggravate their conditions at work.

Labor Code § 3208.05 – Health Care for Prevention of Occupational Illness

- Labor Code § 3208.05 provides "injury" includes a reaction to or a side effect arising from health care provided by an employer to a health care worker, which is intended to prevent the development or manifestation of any bloodborne disease, illness, syndrome, or condition recognized as occupationally incurred by Cal-OSHA, the CDC, or other appropriate governmental entities.

- The statute applies to preventive health care provided to a health care worker under the following circumstances:

    1. Prior to an exposure because of risk of occupational exposure to such a disease, illness, syndrome, or condition, or

    2. Where the preventive care is provided as a consequence of a documented exposure to blood or bodily fluid containing blood that arose out of and in the course of employment.

Labor Code § 3208.05 – Health Care for Prevention of Occupational Illness

- Under § 3208.05, such preventive health care, and any disability indemnity or other benefits required as a result of the preventive health care provided by the employer, shall be compensable under the workers' compensation system.

- "Health care worker" includes any person who is an employee of a provider of health care, and who is exposed to human blood or other bodily fluids contaminated with blood in the course of employment, including janitors and housekeeping workers.

- This statute essentially extends the rule in *Maher* any injury sustained as a result preventive health care provided by an employer.

What is the government doing?

- On March 4, 2020, Governor Newsom declared a state of emergency to help prevent the spread of COVID-19.
- It was declared to make additional resources available, formalize emergency actions already underway across multiple state agencies and departments, and help the state prepare for broader spread of COVID-19.
- It also included provisions that protect consumers against price gouging, allow for health care workers to come from out of state to assist at health care facilities, and give health care facilities the flexibility to plan and adapt to accommodate incoming patients.
- Eighteen public health labs in California are testing for COVID-19.
- Millions of Californians are now eligible for free medically necessary COVID-19 testing.

What is the WCAB doing?

- Court Calendar the next three weeks
- Physical distancing
- CourtCall
- What's next?

What can you do to slow the spread of the virus?

- Wash your hands for at least 20 seconds after you have been in a public place, or after blowing your nose, coughing, or sneezing.
  - If soap and water are not readily available, use a hand sanitizer that contains at least 60% alcohol.
  - Avoid touching your eyes, nose, and mouth with unwashed hands.
- Avoid close contact with people who are sick.
- Put distance between yourself and other people if COVID-19 is spreading in your community.
- Stay home if you're sick.

What can you do to slow the spread of the virus?

- Cover coughs and sneezes with a tissue or use the inside of your elbow.
  - Throw used tissues in the trash.
  - Immediately wash your hands with soap and water for at least 20 seconds or use hand sanitizer.
- Wear a facemask if you are sick. If you are not sick, you do not need to wear a facemask unless you are caring for someone who is sick.
- Clean and disinfect frequently touched surfaces (tables, doorknobs, phones, keyboards, etc.)

What can employers do to prevent the spread of COVID-19?

- The CDC provides guidance for business and employers to respond to COVID-19. These recommendations include:

- **Actively encourage sick employees to stay home.**
  - Employees who have symptoms of acute respiratory illness should stay home until they are free of fever, signs of a fever, and any other symptoms for at least 24 hours, without the use of fever-reducing or other symptom-altering medicines (e.g. cough suppressants).
  - Have flexible sick leave policies and make sure employees are aware of these policies.
  - Do not require a healthcare provider's note for employees who are sick with acute respiratory illness to validate their illness, as 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.

What can employers do to prevent the spread of COVID-19?

- **Separate sick employees.**

  Employees who appear to have acute respiratory illness symptoms (i.e. cough, shortness of breath) upon arrival to work or become sick during the day should be separated from other employees and be sent home immediately.

- **Emphasize staying home when sick, respiratory etiquette and hand hygiene by all employees.**
  - Place posters that encourage staying home when sick, cough and sneeze etiquette, and hand hygiene.
  - Provide tissues and no-tough disposal receptacles.
  - Instruct employees to clean their hands often.
  - Provide soap and water and alcohol-based hand rubs.

- **Perform routine environmental cleaning.**
  - Clean all frequently touched surfaces in the workplace, such as workstations, countertops, and doorknobs.
  - Provide disposable wipes so that commonly used surfaces (for example, doorknobs, keyboards, remote controls, desks) can be wiped down by employees before each use.

What can employers do to prevent the spread of COVID-19?

Advise employees before traveling to take certain steps.

- Check the CDC's notices if traveling out of the country.
- Advise employees to check themselves for symptoms of acute respiratory illness before starting travel and notify their supervisor and stay home if they are sick.
- Ensure employees who become sick while traveling understand that they should notify their supervisor and should promptly call a healthcare provider for advice if needed.

Postponing or canceling large work-related meetings or events.

■Flexible work policies.

- Flexible worksites (e.g., telecommuting).
- Flexible work hours (e.g., staggered shifts).
- Increase the distance between employees.
- Establish infrastructure needed to support multiple employees who may be able to work from home.

What should employers do if an employee is diagnosed with COVID-19?

- If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA).
  - All employees who worked closely with the infected employee should stay home for 14 days.
  - Deep clean the affected workspaces.
- Employees who are well but who have a sick family member at home with COVID-19 should notify their supervisor.
  - The above actions should be taken.
- CDC does not recommend testing, symptom monitoring or special management for people exposed to asymptomatic people with potential exposures.

Duty to Provide a Claim Form

- Per Labor Code § 5401(a), a claim form must be provided, "Within one working day of receiving notice or knowledge of an injury under Section 5400 or 5402, which injury results in lost time beyond the employee's work shift at the time of injury or which results in medical treatment beyond first aid …."

- In *Honeywell v. Workers' Comp. Appeal Bd.* (2005) 35 Cal.4th 24, the California Supreme Court held that an employer's duty to provide a claim form arises when the employer has been notified by the injury in writing by the employee or has knowledge of the injury or claim from another source.

- It rejected a standard that would have required the provision of a claim form if the employer was reasonably certain.

- **The duty arises when the employer knows of an injury or claim, not when it should have known.**

Duty to Provide a Claim Form

- In *Honeywell*, the California Supreme Court explained there was a four-step process for reporting and investigating claims:

1. The employee bears the initial burden of notifying the employer of an injury, unless such notice is unnecessary because the employer already knows of the injury or claimed injury from other sources.

2. The employer then bears the burden of informing the worker of his or her possible compensation rights and providing a claim form.

3. It is up to the *employee* whether and when to initiate a claim for compensation by filing the prescribed form with the employer.

4. Only when the form has been filed is the employer (or its insurer) put to the additional burden of promptly investigating the claim and determining whether to contest liability, an investigation that must be completed within 90 days.

When should you provide a claim form to an employee with COVID-19?

- Pursuant to *Honeywell,* an employer does not have to provide a claim form to an employee with COVID-19 until it **knows** of an injury or claim. It does not have to provide a claim form just because it "reasonably certain" of an industrial injury or claim.

- Generally, the employee must ask for the claim form or tell the employer he/she believes the was contracted on an industrial basis to trigger the duty to provide a claim form.

- Because knowledge can come from "any source," if an employer receives a medical report or any other information documenting the COVID-19 virus was contracted at work, that would also trigger the duty to provide a claim form.

Do workers' compensation benefits have to be provided if an employee is quarantined?

- As discussed earlier, employees should be sent home or quarantined because of potential exposure for a period of 14-days.
- Some employees can work from home and continue to earn money during this time. But this is not feasible for all employees.
- Employers are not required to provide workers' compensation benefits to an employee who is sent home during the quarantine period.
- Per § 3208.1, an injury must cause disability or the need for medical treatment to be compensable.

Aromin v. Workers' Comp. Appeals Bd. (1983) 48 Cal.Comp.Cases 453 (writ denied)

Facts of the Case:

- A nurse was exposed to chicken pox at work. She was not previously exposed.

- The employer notified her she could not return to work until there was no longer any possibility she might be infectious.

- Applicant received three days of accrued sick leave but did not receive any TD benefits for the 10 days she was off work.

- Applicant did not contract chicken pox as a result of her work exposure.

Aromin v. Workers' Comp. Appeals Bd. (1983) 48 Cal.Comp.Cases 453 (writ denied)

The WCAB held applicant was not entitled to workers' compensation benefits.

■The WCAB explained a prophylactic layoff did not constitute an injury within the meaning of the Labor Code.

■Disability as used in § 5412 does not mean lost time from work.

■Section 3208.1 does not suggest an injury can occur absent some form of pathology.

Armenta v. SSA Pacific, Inc. (2019) 2019 Cal. Wrk. Comp. P.D. LEXIS 173

Facts of the Case:

■Applicant claimed injury to his chest, nervous system and respiratory system as a result of "asbestos exposure."

■The treating physician reported applicant had an increased risk of developing asbestos-related lung disease in the future, but this may take decades to develop.

■The QME concluded the applicant had no evidence of asbestos-related disease.

■Applicant requested an award of medical care in the form of "monitoring his substantially increased susceptibility" to asbestosis.

Armenta v. SSA Pacific, Inc. (2019) 2019 Cal. Wrk. Comp. P.D. LEXIS 173

The WCAB concluded applicant did not have a compensable injury.

■Applicant claim for monitoring of asbestosis was premature because he had not established an actual diagnosis of asbestosis or some other industrial basis to support the claim.

■Although the need for medical treatment alone may entitle an employee to workers' compensation benefits, the need for monitoring alone did not rise to the level of a compensable injury.

Voluntary Provision of Benefits to Quarantined Employees

- In order to assist employees, employer can choose to voluntarily provide benefits to employees.

- On March 10, 2020, Walmart announced a policy to support employees as a result of the virus

https://corporate.walmart.com/newsroom/2020/03/10/new-covid-19-policy-to-support-the-health-of-our-associates

- Employees, who are required to quarantine by a government agency or Walmart, would receive two weeks of pay and that absences during the time they are out would not count against attendance.

- Walmart announced that employees with a confirmed case of the virus could be compensated for up to 26 weeks.

BENEFITS FOR WORKERS IMPACTED BY COVID-19

In the face of the coronavirus, the California Labor & Workforce Development Agency (LWDA) wants to keep workers, employers, communities and families safe. What employees are entitled to may be confusing. The purpose of this chart is to make make it easier to understand what resources may be available.

Labor.ca.gov/Coronavirus2019

Program	Why	What	Benefits
Disability Insurance	If you're unable to work due to medical quarantine or illness related to COVID-19 (certified by a medical professional)	Short-term benefit payments to eligible workers who have a full or partial loss of wages due to a non-work-related illness, injury, or pregnancy.	Approximately 60-70 percent of wages (depending on income); ranges from $50-$1,300 a week for up to 52 weeks.
Paid Family Leave	If you're unable to work because you are **caring for** an ill or quarantined family member with COVID-19 (certified by a medical professional)	Up to six weeks of benefit payments to eligible workers who have a full or partial loss of wages because they need time off work to care for a seriously ill family member.	Approximately 60-70 percent of wages (depending on income); ranges from $50-$1,300 a week for up to 6 weeks.
Unemployment Insurance	If you have lost your job or have had your hours reduced for reasons related to COVID-19	Partial wage replacement benefit payments to workers who lose their job or have their hours reduced, through no fault of their own.	Range from $40-$450 per week for up to 26 weeks.
Paid Sick Leave	If you or a family member are sick or for preventative care when civil authorities recommend quarantine	The leave you have accumulated or your employer has provided to you under the Paid Sick Leave law.	Paid to you at your regular rate of pay or an average based on the past 90 days.
Workers' Compensation	If you are unable to do your usual job because you were exposed to and contracted COVID-19 during the regular course of your work, you may be eligible for workers' compensation benefits.	Benefits include temporary disability (TD) payments, which begin when your doctor says you can't do your usual work for more than three days or you are hospitalized overnight. You may be entitled to TD for up to 104 weeks. TD stops when either you return to work, your doctor releases you for work, or your doctor says your illness has improved as much as it's going to.	TD generally pays two-thirds of the gross wages you lose while you are recovering from a work-related illness or injury, up to maximum weekly amount set by law. In addition, eligible employees are entitled to medical treatment and additional payments if a doctor determines you suffered a permanent disability because of the illness.

Application for EDD benefits

- The California Employee Development Department (EDD) is encouraging individuals who are unable to work due to exposure to COVID-19 to file a Disability Insurance claim.

  https://www.edd.ca.gov/about_edd/coronavirus-2019.htm

- Employees who are unable to work due to having or being exposed to COVID-19 (certified by a medical professional) can file a Disability Insurance claim.

- Employees who are unable to work to care for an ill or quarantined family member (certified by a medical professional) can file a Paid Family Leave claim for up to six weeks of benefits.

- If an employer had reduced hours or shut down operations due to COVID-19, employees can file an Unemployment Insurance claim.

Relief for Employers

- The EDD is also encouraging employers who are experiencing a slowdown in their businesses as a result of the coronavirus to apply for an Unemployment Insurance 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.
- Employers planning a closure or major layoffs as a result of the coronavirus can get help through the Rapid Response program.
- Employers experiencing a hardship as a result of COVID-19 may request up to a 60-day extension of time from the EDD to file their state payroll reports and/or deposit state payroll taxes without penalty or interest.
- Information on these programs is available on the EDD website.

Disability-Related Inquiries and Medical Examinations

- The ADA prohibits an employer from making disability-related inquiries and requiring medical examinations of employees, except under limited circumstances, as set forth below.

- Definitions: Disability-Related Inquiries and Medical Examinations

  An inquiry is **"disability-related"** if it is likely to elicit information about a disability.

  For mexaple, asking an individual if his immune system is compromised is a disability-related inquiry because a weak or compromised immune system can be closely associated with conditions such as cancer or HIV/AIDS.

  By contrast, an inquiry is not disability-related if it is not likely to elicit information about a disability. For example, asking an individual about symptoms of a cold or the seasonal flu is not likely to elicit information about a disability.

Disability-Related Inquiries and Medical Examinations

A "medical examination" is a procedure or test that seeks information about an individual's physical or mental impairments or health.

Whether a procedure is a medical examination under the ADA is determined by considering factors such as whether the test involves the use of medical equipment; whether it is invasive; whether it is designed to reveal the existence of a physical or mental impairment; and whether it is given or interpreted by a medical professional.

Disability-Related Inquiries and Medical Examinations

- The ADA regulates disability-related inquiries and medical examinations in the following ways:

- Before a conditional offer of employment: The ADA prohibits employers from making disability-related inquiries and conducting medical examinations of applicants before a conditional offer of employment is made.

- After a conditional offer of employment, but before an individual begins working: The ADA permits employers to make disability-related inquiries and conduct medical examinations if all entering employees in the same job category are subject to the same inquiries and examinations.

Disability-Related Inquiries and Medical Examinations

During employment: The ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity. Generally, a disability-related inquiry or medical examination of any employee is job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that:

- An employee's ability to perform essential job functions will be impaired by a medical condition; or
- An employee will pose a direct threat due to a medical condition.

- This reasonable belief "must be based on objective evidence obtained, or reasonably available to the employer, prior to making a disability-related inquiry or requiring a medical examination."

Disability-Related Inquiries and Medical Examinations

A "direct threat" is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." If an individual with a disability poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA.

Assessments of whether an employee poses a direct threat in the workplace must be based on objective, factual information, "not on subjective perceptions . . . [or] irrational fears" about a specific disability or disabilities. The EEOC's regulations identify four factors to consider when determining whether an employee poses a direct threat: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm.

Reasonable Accommodation

A "reasonable accommodation is a change in the work environment that allow an individual with a disability to have an equal opportunity to apply for a job, perform a job's essential functions, or enjoy equal benefits and privileges of employment.

An accommodation poses an "undue hardship" if it results in significant difficulty or expense for the employer, taking into account the nature and cost of the accommodation, the resources available to the employer, and the operation of the employer's business. If a particular accommodation would result in an undue hardship, an employer is not required to provide it but still must consider other accommodations that do not pose an undue hardship.

Generally, the ADA requires employers to provide reasonable accommodation for known limitations of applicants and employees with disabilities.

Before a Pandemic

Are there ADA-compliant ways for employers to identify which employees are more likely to be unavailable for work in the event of a pandemic?

- Yes. Employers may make inquiries that are not disability-related. An inquiry is not disability-related if it is designed to identify potential non-medical reasons for absence during a pandemic (e.g., curtailed public transportation) on an equal footing with medical reasons (e.g., chronic illnesses that increase the risk of complications). The inquiry should be structured so that the employee gives one answer of "yes" or "no" to the whole question without specifying the factor(s) that apply to him. The answer need not be given anonymously.

ADA-Compliant Pre-Pandemic Employee Survey

Directions: Answer "yes" to the whole question without specifying the factor that applies to you. Simply check "yes" or "no" at the bottom of the page.

In the event of a pandemic, would you be unable to come to work because of any one of the following reasons:

- If schools or day-care centers were closed, you would need to care for a child;
- If other services were unavailable, you would need to care for other dependents;
- If public transport were sporadic or unavailable, you would be unable to travel to work; and/or;
- If you or a member of your household fall into one of the categories identified by the CDC as being at high risk for serious complications from the pandemic influenza virus, you would be advised by public health authorities not to come to work (e.g., pregnant women; persons with compromised immune systems due to cancer, HIV, history of organ transplant or other medical conditions; persons less than 65 years of age with underlying chronic conditions; or persons over 65).

Answer: YES_____ , NO_____

New Hire Employees

- May an employer require new entering employees to have a post-offer medical examination to determine their general health status?

- May an employer rescind a job offer made to an applicant based on the results of a post-offer medical examination if it reveals that the applicant has a medical condition that puts her at increased risk of complications from influenza?

New Hire Employees

During an influenza pandemic

May an ADA-covered employer send employees home if they display influenza-like symptoms during a pandemic?

- Yes. The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat.

During an Influenza Pandemic

During a pandemic, how much information may an ADA-covered employer request from employees who report feeling ill at work or who call in sick?

- ADA-covered employers may ask such employees if they are experiencing influenza-like 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 in compliance with the ADA.

- If pandemic influenza is like seasonal influenza or spring/summer 2009 H1N1, these inquiries are not disability-related. If pandemic influenza becomes severe, the inquiries, even if disability-related, are justified by a reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat.

During an Influenza Pandemic

During a pandemic, may an ADA-covered employer take its employees' temperatures to determine whether they have a fever?

Generally, measuring an employee's body temperature is a medical examination. If pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature. However, employers should be aware that some people with influenza, including the 2009 H1N1 virus, do not have a fever.

When an employee returns from travel during a pandemic, must an employer wait until the employee develops influenza symptoms to ask questions about exposure to pandemic influenza during the trip?

No. These would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for several days until it is clear they do not have pandemic influenza symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal.

During an Influenza Pandemic

During a pandemic, may an ADA-covered employer ask employees *who do not have influenza symptoms* to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to influenza complications?

No. If pandemic influenza is like seasonal influenza or the H1N1 virus in the spring/summer of 2009, making disability-related inquiries or requiring medical examinations of employees *without* symptoms is prohibited by the ADA. However, under these conditions, employers should allow employees who experience flu-like symptoms to stay at home, which will benefit all employees including those who may be at increased risk of developing complications.

What if an employee voluntarily discloses (without a disability-related inquiry) that he has a specific medical condition or disability that puts him or her at increased risk of influenza complications?

If an influenza pandemic becomes more severe or serious according to the assessment of local, state or federal public health officials, ADA-covered employers may have sufficient objective information from public health advisories to reasonably conclude that employees will face a direct threat if they contract pandemic influenza.

During an Influenza Pandemic

May an employer encourage employees to telework (i.e., work from an alternative location such as home) as an infection-control strategy during a pandemic?

During a pandemic, may an employer require its employees to adopt infection-control practices, such as regular hand washing, at the workplace?

During an Influenza Pandemic

May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?

Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it.

During an Influenza Pandemic

During a pandemic, must an employer continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship?

Yes. An employer's ADA responsibilities to individuals with disabilities continue during an influenza pandemic. Only when an employer can demonstrate that a person with a disability poses a direct threat, even after reasonable accommodation, can it lawfully exclude him from employment or employment-related activities.

If an employee with a disability needs the same reasonable accommodation at a telework site that he had at the workplace, the employer should provide that accommodation, absent undue hardship. In the event of undue hardship, the employer and employee should cooperate to identify an alternative reasonable accommodation.

During an Influenza Pandemic

All employees with disabilities whose responsibilities include management during a pandemic must receive reasonable accommodations necessitated by pandemic conditions, unless undue hardship is established.

During a pandemic, may an employer ask an employee why he or she has been absent from work if the employer suspects it is for a medical reason?

Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work.

After a Pandemic

May an ADA-covered employer require employees who have been away from the workplace during a pandemic to provide a doctor's note certifying fitness to return to work?

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees.

As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, 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 pandemic virus.

Wage/Hour Compliance

Can an employee use California Paid Sick Leave due to COVID-19 illness?

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.

Wage/Hour Compliance –con't

If an employee exhausts sick leave, can other paid leave be used?

Yes, 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.

Can an employer require a worker who is quarantined to exhaust paid sick leave?

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. The determination of how much paid sick leave will be used is up to the employee.

Wage/Hour Compliance –con't

What options do I have if my child's school or day care closes for reasons related to COVID-19?

Employees should discuss their options with their employers. There may be paid sick leave or other paid leave that is available to employees. Employees at worksites with 25 or more employees may also be provided up to 40 hours of 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). Whether that leave is paid or unpaid depends on the employer's paid leave, vacation or other paid time off policies. Employers may require employees use their vacation or paid time off benefits before they are allowed to take unpaid leave, but cannot mandate that employees use paid sick leave. However, a parent may choose to use any available paid sick leave to be with their child as preventative care.

Can an employer require a worker to provide information about recent travel to countries considered to be high-risk for exposure to the coronavirus?

Yes. 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.

Wage/Hour Compliance –con't

Is an employee entitled to compensation for reporting to work and being sent home?

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.

If a state of emergency is declared, does reporting time apply?

Reporting time pay does not apply when operations cannot commence or continue when recommended by civil authorities. This means that reporting time pay does apply under a state of emergency, unless the state of emergency includes a recommendation to cease operations.

Wage/Hour Compliance –con't

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

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.

Deductions from salary may 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.

H.R. 6201: Families First Coronavirus Response Act

- A relief package that, among other things, contains several provisions affecting employers. The Senate has not yet voted.

- **Paid Job-Protected Leave Under the Family and Medical Leave Act**
  - Employees of employers *with fewer than 500 employees* with the right to take up to 12 weeks of job-protected leave under the FMLA.

  - 10 of these 12 weeks be paid at a rate of no less than two-thirds of the employee's usual rate of pay. (FMLA leave for all other purposes remains unpaid.)

H.R. 6201: Families First Coronavirus Response Act

Employees may use for the following:

- To adhere to a requirement or recommendation to quarantine due to exposure to or symptoms of coronavirus;
- To care for a family member who is adhering to a requirement or recommendation to quarantine due to exposure to or symptoms of coronavirus; and
- To care for a child of an employee if the child's school or place of care has been closed, or the childcare provider is unavailable, due to the coronavirus.

The first two weeks of leave may be unpaid;

Employers must continue paid FMLA leave at a rate of no less than two-thirds of the employee's usual rate of pay.

H.R. 6201: Families First Coronavirus Response Act

Exceptions:

- Employers with less than 25 employees if the employee's job no longer exists due to the coronavirus pandemic.

- The bill grants the Secretary of Labor the authority to issue regulations exempting: (1) certain health care providers and emergency responders from taking leave under the bill; and (2) small business with fewer than 50 employees from the requirements of the bill if it would jeopardize the viability of the business.

H.R. 6201: Families First Coronavirus Response Act

14 Days of Paid Sick Leave

▪employers *with fewer than 500 employees* will be required to provide full-time employees with 2 weeks (80 hours) of paid sick leave for the following reasons:

- To self-isolate because of a diagnosis of COVID-19, or to comply with a recommendation or order to quarantine due to exposure or exhibition of symptoms;

- To obtain a medical diagnosis or care if the employee is experiencing symptoms of the coronavirus;

H.R. 6201: Families First Coronavirus Response Act

- To care for a family member who is self-isolating due to a diagnosis of coronavirus, experiencing symptoms of coronavirus and needs to obtain medical diagnosis or care, or quarantining due to exposure or exhibition of symptoms; or

- To care for a child whose school has closed, or childcare provider is unavailable, due to the coronavirus.

H.R. 6201: Families First Coronavirus Response Act

- Employers must compensate employees for any paid sick time they take at their regular rates of pay (unless the leave is being used to care for a family member or child, in which case the employee is only entitled to two-thirds of his or her regular rate of pay).

- The sick leave is available for immediate use by employees, regardless of length of employment.

H.R. 6201: Families First Coronavirus Response Act

- Additionally, part-time employees are entitled to the number of hours of paid sick time equal to the number of hours they work, on average, over a 2-week period.

- employers who already provide paid leave to employees on the day before the bill is enacted must provide this paid leave *in addition to* any paid leave already provided—and may not change their paid leave policies on or after the date of enactment to avoid compliance.

- employers cannot require employees to utilize other paid leave before using the paid leave provided by this bill.

Local Ordinances

Ex: San Francisco businesses will be eligible, with up to 20% of funds reserved for small businesses with 50 or fewer employees. The City will contribute up to one week (40 hours) at the city's minimum wage of $15.59 per hour per employee, or $623 per employee. The employer will be responsible for paying the difference between the minimum wage and an employee's hourly wage.

Available for employees:

- Sick,
- Self-quarantined to prevent spread,
- Caring for a sick family member,
- Home because of a temporary work closure in response to a public official's recommendation, or
- Caring for a child who is home because of school/daycare closures in response to a public official's recommendation.

Federal & State WARN Act

The Federal WARN Act's requirements are triggered if, within a 90-day period (or in certain circumstances a 30-day period):

1. Plant Closing: 50 or more full-time employees experience an employment loss at a single site of employment as a result of a permanent or temporary shutdown of a single site of employment or one or more facilities or operating units within a single site of employment; or
2. Mass Layoff: At least 33% of the active full time employees, but at least 50 full time employees, experience an employment loss at a single site of employment; however, if 500 or more employees are affected, the 33% requirement does not apply.

If one of the above requirements will be triggered, the Federal WARN Act requires the employer to provide at least 60 days' advance notice to all employees who will experience an employment loss

OSHA

- While there is no specific federal OSHA standard covering COVID-19 exposure, the General Duty Clause, may apply if an employer has not taken adequate steps to prevent the spread of this virus.

- The General Duty Clause requires employers to provide employees with a workplace free from recognized hazards likely to cause death or serious physical harm. In the event of an inspection, the employer may be cited if (1) the employer failed to keep the workplace free of a hazard to which employees of that employer were exposed, (2) the hazard was recognized, (3) the hazard was causing or was likely to cause death or serious physical harm, and (4) there was a feasible and useful method to correct the hazard.

Thanks for listening!!

Questions?

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