Labor & Employment Update: COVID-19: Advice for California Employers

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As the Coronavirus Pandemic continues to impact California businesses, many employers are wondering how best to ensure the wellbeing of their staff. Marta Fernandez, hotel lawyer and partner in JMBM’s Labor & Employment department, discusses some of the key issues raised by employers and provides recommendations for complying with new mandates.

**COVID-19: Immediate Advice For California Employers**

**Top 7 Frequently Asked Questions**

by

Marta Fernandez

Most California employers are taking steps to keep employees safe during the Coronavirus Pandemic. These changes to workplace routines, policies and norms are the result of a mix of proactive steps, changes in demand, and government mandates. As labor and employment lawyers, our phones have been ringing off the hook. Here are the Top 7 most frequently asked questions by employers trying to ensure the health and safety of their workforce.

**#1 How should an employer respond to an employee who is not sick, but who refuses to come to work because they do not want to or do not feel safe coming to work?**

Generally speaking, an employer can require an employee to come to work and discipline the employee for refusing to do so, provided that the employee is not in imminent danger and is not sick, caring for a family member who is sick, adhering to a quarantine order, or absent some other legally protected reason, such as a medical condition protected by the Americans with Disabilities Act.

It is risky to require any employee who has been advised by the government to self-quarantine, including employees who are 65 and older and employees who have preexisting health conditions, to attend work. Note that the CDC is currently recommending, but not mandating that employees who are 65 and older self-quarantine. Where the circumstances allow, employers are encouraged to assess the availability of telecommuting options for employees and to keep communication lines open with employees to address any safety related concerns they may have. Employers need to carefully balance the risk that an employee may come to work despite feeling sick if they are worried about being disciplined.

Furthermore, a number of local “shelter in place” and no public or private gathering orders have impacted or mandated the shutdown of certain businesses. Most such ordinances have exclusions for essential businesses, however, each employer must individually assess, with the assistance of legal counsel, how these mandates and exceptions apply to each of their work locations.

**#2 How should an employer respond to an employee who cannot come to work because they have lost access to child care?**
While employers currently have no legal obligation to allow employees to work from home or not come to work because of a lack of child care as a result of the school closings, employers should try to explore any possible work from home options given the unprecedented circumstances. Alternatively, employers should consider allowing employees to use their accrued vacation leave or paid sick leave (as preventative care for their child) if a work from home option is not available. In addition, under California law, employees who work at worksites with at least 25 employees are already entitled to take off up to 40 hours each year for specific school-related events, including school closures or the unexpected unavailability of the school or child care provider; employees may tap into this entitlement to work from home or to take time off on an unpaid basis.

However, keep in mind that this answer may change drastically depending on the fate of a new piece of legislation, the Family First Coronavirus Response Act, which is making its way to the Senate. Should it be approved by the Senate and signed by President Trump in the coming days, the legislation would require private employers with fewer than 500 employees to provide employees who have been employed for at least 30 days with up to 12 weeks of family and medical leave if the employee cannot come to work, or telework, because he or she needs to care for a minor child whose school or child care is closed or unavailable due to the Coronavirus. Employers will be required to pay this family and medical leave at a rate of no less than two-thirds of the employee's regular rate of pay, though the first 10 days of the leave can be unpaid.

It is unclear if and when the bill will pass, if changes will be made to the bill prior to its passage, or if additional legislation providing relief for impacted workers will be introduced, so employers should stay abreast of any developments.

#3 If an employee cannot come to work because he or she is sick or the workplace shuts down, does the employer have to pay the employee for the time he/she is not working?

If a salaried employee performs any work during the workweek, the employee must be paid his/her full salary for the week, unless the employee is out of work for a full day due to personal reasons, vacation or illness and has no remaining vacation or sick time. While an employer may not reduce a salaried employee for partial days off due to illness, an employer may deduct the day from a salaried employee’s salary if the employee has exhausted all sick time and takes a full day off due to illness. In contrast, there is no legal obligation to pay hourly employees who cannot come to work because of a workplace shutdown, because of a quarantine order, or because they need to care for themselves or a family member. However, if an employee is sick or needs to attend to a family member who is sick, this may trigger paid sick leave pursuant to the same state and local laws that would normally apply. To this end, if an employee is sick, an employer may require the employee to use accrued and available sick time or vacation time, provided that doing so is in line with the employer’s existing written policy. Additionally, employees who cannot attend work because they have contracted, or been exposed to, COVID-19 may consider applying for short term disability under any employer offered plan or for State SDI and employees who cannot attend work because of a shut down operations due to COVID-19 may consider filing an Unemployment Insurance claim with the EDD.

If approved, the Family First Coronavirus Response Act (discussed in question #2 above) would require employers to provide 80 hours of paid sick leave to full-time employees, prorated for part-time employees, if the employee is unable to work (or telework) due to a need for leave. If an employee is using the paid sick leave to self-isolate due to a Coronavirus diagnosis, to obtain medical care for Coronavirus symptoms, or to comply with a quarantine recommendation or order, employers will be required to pay the employee their full salary, based on their regulate rate of pay. If an employee is
using the paid sick leave to care for a family member or child whose school or child care provider is closed or unavailable due to Coronavirus, employers will be required to provide the employee with at least two-thirds of the employee’s salary during the leave period.

#4 How can an employer best balance employees’ right to privacy against the need to request and share information in order to protect the workforce?

While employers work to contain the risk of exposure in the workplace and assuage their employees’ fear and uncertainty in this rapidly evolving environment, employers must be careful not to run afoul of restrictions under the ADA and other local or state disability laws, as well as medical privacy and consumer protection laws. A general rule of thumb for employers is to collect and disclose only the information that is absolutely necessary to take steps to assess and protect against risk to other employees. The following is a list of key dos and don’ts to best balance employees’ right to privacy against the need to maintain workplace safety:

- Employers may direct employees to stay home or leave work if they exhibit symptoms consistent with COVID-19 coronavirus. The CDC specifically advises that "[e]mployees who have symptoms of acute respiratory illness are recommended to stay home and not come to work until they are free of fever (100.4° F [38.0° C] or greater using an oral thermometer), 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)."
- Employers may require that an employee notify them if they have been exposed, have symptoms, and/or have tested positive for COVID-19 or have traveled to countries with level three CDC warnings.
- If an employee exhibits a bad cough or other symptoms consistent with COVID-19, do not ask the employee about their medical history or condition so as not to violate the ADA or other disability laws. You may ask the employee how they are feeling or suggest that they seek medical attention or go home for the day, but employers must be cautious about asking specific questions about the employee’s condition so as not to cross the line into the protected disability zone.
- Do not take employees’ temperatures. Taking an employee’s temperature is considered a “medical examination” under the ADA, and the ADA places restrictions on employer inquiries into an employee’s medical status. The ADA prohibits employers from requiring medical examinations and making disability-related inquiries unless (1) the employer can show that the examination or inquiry is job-related and consistent with business necessity, or (2) the employer has a reasonable belief, based on objective evidence, that the employee poses a “direct threat” to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. Therefore, taking employees’ temperatures may be unlawful if it is not job-related and consistent with business necessity, and whether that is the case must be determined on a case-by-case basis unless future guidance or directives from applicable local, state or federal public health authorities mandate or recommend otherwise. Furthermore, an employee could be infected with COVID-19 without exhibiting symptoms such as a fever, so mandated temperature checking may not be the most effective method for protecting employees.
- For the same reasons discussed above and unless otherwise required by applicable law or government directive, employers may not require employees to undergo testing for COVID-19.
- Do not disclose the identity of any employee who has tested or who is reasonably suspected of testing positive for COVID-19. If an employee has tested positive for COVID-19, employers should have the employee identify all individuals who worked in close proximity (three to six feet) with the employee in the previous 14 days. As a precaution, employers should consider sending home all employees identified to have worked in close proximity with
that employee for a 14-day period to protect against a spread of the virus. However, when sending employees home and otherwise communicating with other employees, do not identify the infected employee so as to avoid any risk of privacy violations.

- Generally, there is no obligation to report a suspected or confirmed case of COVID-19 to the CDC. The healthcare provider that receives confirmation of a positive test is a mandatory reporter and should be the one to handle that responsibility.

The foregoing is only a sampling of the many questions that employers may face as they continue to balance the health and safety of their workforce with employee privacy. Things are changing rapidly in this pandemic, and employers are encouraged to stay abreast of the latest developments as they continue to take steps to maintain workplace safety.

**#5 If an employee comes to work and is sent home because he or she is sick, is the employer obligated to pay the employee for the workday? What if a mandatory shelter in place order is issued?**

If an employer sends an employee home after he or she has arrived to work, before the employee has worked half of his or her usual or scheduled day’s work, because the employee is sick, the employer must pay the employee reporting pay. The employee is entitled to at least two hours of pay, but not more than four hours. For example, if an employee reports to work for an 8-hour shift and only works for 1 hour, the employer must pay that employee for the 1 hour worked and an additional 3 hours as reporting time pay so that the employee receives pay for at least half of the employee’s 8-hour shift. The California Labor Commissioner has taken the position that this law still applies even under a state of emergency, unless the state of emergency includes a recommendation to cease operations. If there is a mandatory shelter in place order issued in the employer’s city, the reporting pay requirements would not apply to any employees who leave work mid-day as a result of such order.

**#6 How should employers ensure that non-exempt employees are accurately recording their hours and complying with all meal and rest break requirements while working from home?**

Even when working remotely, non-exempt employees are entitled to meal and rest breaks in accordance with California law. This means that they must be provided with the opportunity to take one, uninterrupted thirty-minute meal period for every five hours of work beginning before the end of the employee’s fifth hour of work, and one, uninterrupted ten-minute rest period for every four hours or work or major fraction thereof.

To ensure that these laws are complied with while working from home, employees should still clock in and out for their meal periods. Further, to the extent that the employer has issued any written work from home correspondence or guidelines, these guidelines should specify that employees are still entitled to take their meal and rest breaks as if they were reporting to work in the physical office.

All employer-mandated policies and procedures should remain in force regarding meal and rest periods. For example, if the employer institutes a progressive discipline policy when employees fail to clock in and out for their meal periods, these types of policies should remain unchanged even though the employee is working remotely.

**#7 If the employer requires or public health officials mandate that employees work from home, what expenses must the employer reimburse?**
Pursuant to California’s labor laws, employers are required to reimburse their employees for all “necessary” business expenses and those expenses incurred at the direction of the employer. Accordingly, if employees must work from home, the employer is responsible for ensuring they have both the necessary physical equipment in order to perform their jobs (for example, computers) as well as infrastructure to perform their jobs (such as internet access). Equipment that is merely convenient is not required to be reimbursed by the employer unless the employer directs the employee to have access to such equipment. For example, if having a printer is merely convenient to the performance of an employee’s job, the employer has no obligation to reimburse the employee for the cost of a printer or provide a printer to the employee. On the other hand, if the employer requires employees to have a printer or the employee’s job requires physically printing material, the employer will be responsible for reimbursing the employee for the costs of a printer or supplying a printer.

Your specific business needs may vary and our team can assist you in assessing what expenses you may be responsible to provide on a case-by-case basis.

These Top 7 may not address the specific needs of your business or industry. Employers, particularly in healthcare, hospitality, food service, sanitation, financial services, and other essential services, may have additional unique challenges. The information above is accurate as of March 17, 2020. However, the legislature may modify the Families First Coronavirus Response Act in a way that alters the obligations of employers as they have been stated in this FAQ, or introduce additional legislation that may impact an employer’s obligations going forward. Additionally, this FAQ does not take into account all local orders that have been implemented throughout California. An employer’s obligations may vary depending on any specific directives provided in such orders. As the situation is quickly evolving, employers should remain tuned in to new developments. Our team remains available to assist you in navigating these unprecedented times.

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Marta Fernandez is a partner in JMBM’s Employment and Labor Department and a senior member of JMBM’s Global Hospitality Group®. As a management labor lawyer with more than 20 years of experience, Marta specializes in representing hospitality industry clients in all aspects of labor and employment including labor-management relations such as union prevention, collective bargaining for single as well as multi-employer bargaining units, neutrality agreements and defense of unfair labor practice charges before the NLRB. She defends employers in administrative and litigation claims, such as employee claims of sexual harassment and discrimination and counsels clients in preventative strategies such as executive training, arbitration enforcement, and policies and procedures. For more information, please contact Marta Fernandez at 310.201.3534 or at mfernandez@jmbm.com.

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