COZEN O'CONNOR

COVID-19 FAQs For California Employers

We have prepared the following FAQ to guide California employers with respect to their workplace policies and their response to the orders and laws that have been passed at the federal, state and local level to contend with the COVID-19 pandemic. The following is a summary of the commonly asked questions, both with respect to businesses in the "critical" sectors (as identified by Governor Newsom's March 19, 2020 Stay-In-Place Executive Order) who have employees at work, and those businesses not in critical sectors that, at this time, cannot require an employee's physical presence at work. The impact of this pandemic continues to change at a rapid pace. Accordingly, all the information below is subject to change and employers should consult with legal counsel before implementing new policies.

I. Statewide Stay-At-Home Order

A. What does the Statewide Stay-At-Home Order Mandate?

On March 19, 2020, California Governor Gavin Newsom issued Executive Order N-33-20 ("Order") ordering all California residents to "stay at home or their place of residence except as needed to maintain continuity of operations of federal critical infrastructure sectors." Governor Newsom's Order took effect immediately and continues indefinitely. While all residents are ordered to stay at home, the Order excepts workers of the 16 critical infrastructure sectors, as outlined by the U.S. Department of Homeland Security. Details can be found at https://www.cisa.gov/critical-infrastructure-sectors (hereinafter referred to as "critical sectors" or "essential businesses"). While not stated in the Order, the Governor indicated that California citizens will still be allowed to engage in essential activities such as grocery shopping, going for walks, and walking pets as long as people maintain a safe social distancing space of six (6) feet.

The Order is enforceable pursuant to California law and makes violations a misdemeanor crime under California Government Code section 8665, punishable by a fine not to exceed one thousand dollars ($1,000) or by imprisonment not to exceed six months. Employers should carefully examine whether their operations fall under one of the 16 critical infrastructure sectors to determine whether they can continue to require employees to report to work. (For more information on recent extensions to local stay at home orders, see our recent article on California COVID-19 Developments here.)

B. What should I do if I am an essential business under one of the 16 critical infrastructure sectors?

Governor Newsom expressly acknowledged the vital services the businesses within these sectors provide. To the extent possible, however, essential business should explore whether teleworking or remote work is possible. This will not be available to some employees such as factory workers, grocery store employees, restaurant workers necessary for takeout services, healthcare workers, emergency responders, and transportation workers. If you have questions regarding whether your business is in a critical sector or provides an essential service, please consult with counsel. Employers can also consult the Department of Homeland Security's recent memorandum explaining critical infrastructure sectors at https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf

II. Workplace Safety

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 the COVID-19 pandemic, the workplace conditions in the United States do not meet the definition of creating 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 there is a statewide or local stay-at-home or shelter-in-place order requiring employees of non-essential businesses 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 and CDC 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. 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. 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.

On April 7, 2020, Los Angeles Mayor Eric Garcetti signed a Worker Protection Order that ***requires*** essential workers in the City of Los Angeles to wear face coverings over their noses and mouths while at

work. The order is clear that workers do not need to wear medical-grade masks (unless they are medical workers or first responders) or N95 masks, but they must wear fabric coverings such as scarves or bandanas. Workers are also required to wash any reusable face coverings at least once per day. Most relevant to employers, the order also requires that "employers must provide, at their expense, non-medical grade face coverings for their employees." As such, Los Angeles employers have a heavy burden to supply non-medical coverings for all essential employees.

Other counties, such as San Francisco, Marin and Contra Costa, have since passed similar ordinances, requiring workers at essential businesses to wear face coverings of the "do-it-yourself" type, and requiring customer or visitors to those businesses to do the same. For essential businesses, the ordinances require that employees wear face coverings when (1) interacting with the public, (2) working in any space visited by the public, (3) working in any space where food is prepared or packaged, (4) working in or walking through common areas, including hallways, elevators, and parking spaces, and (5) working in any room or enclosed area where other people are present (employees do not need to wear face coverings when working in a private office but must don their face covering when someone enters the private office space). The ordinances make exceptions for employees who can show either that (1) a medical professional has advised that wearing a face covering may pose a risk to a person wearing the mask for health-related reasons; or (2) wearing a face covering would create a risk to the person related to their work, as determined by applicable regulations or workplace safety guidelines. Essential businesses must also take all reasonable measures, including positing signs, to prohibit any member of the public from waiting in line or entering the premises without a face covering. Unlike the LA ordinance, the San Francisco, Contra Costa and Marin ordinances do not indicate that employers must pay for or procure face coverings for their employees.

In localities where no face covering ordinance has passed, employers may receive requests by employees to wear masks in the workplace, or employers may want to require their employees to wear masks or face coverings to mitigate against the spread of the virus. Generally, employers should not deny an employee's request to wear a mask without a business or safety reason. Employers who require their employees to wear face coverings in the absence of an applicable order should take steps to procure masks or face coverings for their employees. If they cannot do so, however, and 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?

Not currently, but employers may require employees to inform the company if they have symptoms associated with COVID-19.

Under the California Family Rights Act (CFRA), an employer 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. On March 19, 2020, the EEOC updated these Guidelines to declare that the COVID-19 pandemic meets the "direct threat" standard and that employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms. The EEOC did not answer the question whether employers can ask employees if they have tested positive for COVID-19. On March 20, 2020, the California Department of Fair Employment and Housing (DFEH) issued its own guidance stating that California employers may ask about COVID-19 related symptoms. To ensure compliance with California law and following the EEOC Guidelines, employers should ask employees to report if they are experiencing symptoms of the COVID-19 virus—such as fever, sore throat, chills, cough, shortness of breath, difficulty breathing, and gastrointestinal problems—instead of asking employees to report a diagnosis of COVID-19. And, because the CDC has now identified new loss of smell or taste, repeated shaking with chills, muscle aches, and headaches as additional symptoms associated with the virus, employers may ask about these symptoms as well.

As the COVID-19 pandemic is a continually evolving situation, employers should seek guidance from legal counsel for the latest federal, state, and local developments and information.

B. Can I send an employee home if he or she is exhibiting symptoms of the Covid-19 virus or the seasonal flu 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 and/or the seasonal flu (cough, fever, runny nose, chills, sore throat, difficulty breathing, new loss of smell or taste, headaches, muscle aches) 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. 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 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 consider the guidance of the CDC at https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html.

D. 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, recently 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, several jurisdictions in the United States (e.g., Delaware, and several counties in California, including Fresno, Mariposa, and Tuolumne) 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.

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

No. There currently is no requirement to report suspected or confirmed cases of COVID-19 to the CDC or other agency. Healthcare providers are mandatory reporters and are burdened with reporting to the proper agencies.

However, OSHA does require that employers report certain workplace injuries and illnesses. If it is clear that an employee contracted COVID-19 while at work, there may be a requirement to report the COVID-19 illness to OSHA. OSHA has recently released new guidance for employers to help determine their obligations to record COVID-19 related illnesses. For more information on whether employee illnesses must be reported, see our additional alert here.

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 (see also III.C below, which discusses expanded FMLA leave under the Families First Coronavirus Response Act).

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 Family and Medical Expansion Act (EFMLEA). Division C of the FFCRA creates "The Emergency Family and Medical Leave Expansion Act" (EFMLEA), 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 ("EFMLEA leave"). The first 10 days of the EFMLEA leave is unpaid, during which time the employee may substitute available accrued sick or vacation time. After the first 10 days of EFMLEA leave, 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 EFMLEA leave to $200 per day and $10,000 in the aggregate per employee.

The Act relaxes the normal FMLA eligibility requirements for employees needing EFMLEA leave, requiring the employee to have worked for the employer for only 30 days and disposing of the requirement that the employee have worked 1,250 hours in the 12 months preceding the leave, or that the employee work at a facility with 50 employees within a 75 mile radius. An employee who has otherwise exhausted FMLA leave during the 12-month period is not entitled to an additional 12 weeks of EFMLEA leave, but would be entitled to emergency paid sick leave under the FFCRA for a qualifying reason (see below). In order for employees to receive their full rate of pay during the EFMLEA leave period, employers and eligible employees may agree to have the employee use EFMLEA leave concurrently with other available leave, such as vacation or paid time off.

The Emergency Paid Sick Leave Act (EPSLA): Division E of the FFCRA creates the "Emergency Paid Sick Leave Act" (EPSLA) which requires covered employers to provide up to 80 hours of Emergency Paid Sick Leave (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 due to exposure 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 ("EPSLA leave"). For reasons (1), (2), (3) and (6), EPSLA leave 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) and (5), EPSLA leave 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. EPSLA leave 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 EFMLEA leave. The Act specifically prohibits employers from requiring employees to exhaust their existing sick leave or PTO before using EPSLA leave. Employees need not have worked for covered employers for 30 days to be eligible for ESPLA leave.

More about the FFCRA. On April 1, 2020, the U.S. Department of Labor issued Final Temporary Rules providing guidance regarding the interpretation of the FFCRA. The DOL clarified that for purposes of the EPSLA, a "Federal, state or local quarantine or isolation order" includes state and local shelter-in-place orders. Employees, however, are only entitled to EPSLA 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 EPSLA leave. Likewise, employees who were furloughed or laid off prior to or after the April 1, 2020 FFCRA effective date are not entitled to EPSLA or EFMLEA leave.

The DOL also clarified that intermittent leave is not required under the FFCRA, however 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 nonexempt 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. 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.

V. Travel

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

Employers in California generally cannot discipline employees for engaging in lawful off-duty conduct. During the pandemic, however, an employer may restrict business travel to the extent it feels necessary and can and should discourage personal travel to restricted, higher risk areas. Additionally, employers likely can restrict employees from travelling anywhere to the extent that the travel is non-essential as dictated by Governor Newsom's stay-at-home order as such non-essential activities are punishable as a misdemeanor offense.

The best practice regarding travel is to focus on self-reporting. Employers can ask employees 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.

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 that are required to self-quarantine by their employer 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, if an employee is scheduled to report to work, and is sent home, the employee must be paid 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:

> **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.

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 utilizes the employee's services for a short time, such as for a meeting. In this instance, the employee is being sent home because they pose a threat to the health and safety of other employees and potentially the public at large and, in many cases, due to a government order to do so. Thus, it is less than clear whether reporting time pay would apply in such a circumstance.

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. Employers should be careful to delineate between necessary expenses and other expenses that may not be necessary. For example, a 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 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:

> **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.

F. 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 EPSLA leave under the Families First Coronavirus Response Act.

G. 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.

H. 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.

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.

I. Other Considerations for Nonexempt Employees Teleworking During the Pandemic

During the COVID-19 pandemic, employers who ask or permit their nonexempt 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. Retaliation and Discrimination

A. What protections does an employee have if they suffer retaliation for using their paid sick leave?

The California Labor Commissioner's Office enforces several laws that protect workers from retaliation if they suffer adverse action for exercising their labor rights, such as using paid sick leave or time off related a specified school activity. In addition, under the FFCRA, employers may not discharge, discipline, or discriminate against any employee who (a) takes paid sick leave or (b) has filed a complaint or proceeding or testified in any such proceeding related to the benefits and protections provided by the new Act.

Making immigration-related threats against employees who exercise their rights under these laws is unlawful retaliation.

B. Does an employer have a duty to prohibit discrimination/ harassment during the COVID-19 pandemic?

Yes, 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. 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.

VIII. 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 also is a state-sponsored benefit that provides up to six 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.

IX. What Assistance is available to Employers?

A. 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.

B. 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.

C. 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.

X. 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 or mass layoff due to COVID-19 triggers the Federal WARN requirements.

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.

Los Angeles
601 S. Figueroa Street | Suite 3700
Los Angeles, CA 90017

San Diego
501 West Broadway | Suite 1610
San Diego, CA 92101

San Francisco
101 Montgomery Street | Suite 1400
San Francisco, CA 94104

Santa Monica
1299 Ocean Avenue | Suite 900
Santa Monica, CA 90401

For more information, please contact:

Michele Ballard Miller
(415) 262-8301
mbmiller@cozen.com

Walter M. Stella
(415) 262-8339
wstella@cozen.com

Elena K. Hillman
(415) 262-8314
ehillman@cozen.com

Austin G. Dieter
(415) 593-9613
adieter@cozen.com

Bethany A. Vasquez
(415) 593-9621
bavasquez@cozen.com