2021 LABOR & EMPLOYMENT SEMINAR

WEBINAR I JANUARY 27, 2021

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If you wish to review any particular case in detail, please contact your Hanson Bridgett Labor & Employment attorney. Thank you.

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HANSON BRIDGETT LABOR & EMPLOYMENT SEMINAR

Agenda

9:00 a.m. – 9:05 a.m.	Introduction and Welcome Remarks
9:05 a.m. – 10:05 a.m.	New Employment Laws for 2021
10:05 a.m. – 10:10 a.m.	Break
10:10 a.m. – 11:10 a.m.	COVID-19: Issues, Laws, and Best Practices
11:10 a.m. – 11:20 a.m.	Leave Benefits for Workers Impacted by COVID-19
11:20 a.m. – 11:30 a.m.	Break with Office Yoga
11:30 a.m. – 12:30 p.m.	Workplace Issues in the COVID Era

HANSON BRIDGETT LABOR & EMPLOYMENT SEMINAR

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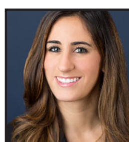
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NEW EMPLOYMENT LAWS FOR 2021
(NON-COVID-RELATED)

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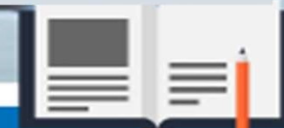


California Family Rights Act (CFRA) Expansion (SB 1383)

- More employers: Those with five or more employees
- More bases for leave: To care for broader range of family members
  - Child (including adult children)
  - Spouse/Domestic Partner
  - Parent
  - Grandparent
  - Grandchild
  - Sibling
- More bases for leave: Military exigency
- More protection: No exception for reinstatement of key employees

Small Employer Mediation For CFRA Claims (AB 1867)

- DFEH pilot program for employers with between 5 and 19 employees
- Only for family/medical leave related claims
- Either party can request mediation within 30 days of a right-to-sue notice
- Employee cannot pursue any civil action until mediation is complete

Handwashing Requirements for Food Workers (AB 1867)

- Employees who work in a "food facility" must be allowed to wash hands at least every 30 minutes, and additionally as needed
  - Farms
  - Grocery stores
  - Warehouses with food storage
  - Food delivery
  - Cafeterias

California Consumer Privacy Act's Employer Exemption Extended (AB 1281)

- AB 25 amended the CCPA to require businesses to provide consumers (including employees and applicants) with notices about what categories of consumer information they collect and their purposes for collecting the information.
- AB 1281 extends the employer exemption from certain provisions to **January 2022**
  – Employers must still satisfy the notice provision of the CCPA
- If you answer yes to any of the following, you should be providing a notice:
  – Does your company have an annual gross revenue in excess of $25 million, adjusted for inflation?
  – Does your company annually buy, receive for a commercial purpose, sell or share the personal information of 50,0000 or more consumers, households, or devices? or
  – Does your company derive 50% or more of its annual revenues from selling consumers’ personal information?

Kin Care – Designated At Employee's Discretion (AB 2017)

- Sick leave is available for:
  - Employees to care for themselves
  - Employees to care for a family member
  - Employees who are victims of domestic violence, sexual assault or stalking
- At least half of an employee's annual entitlement to sick leave is protected from discipline
- AB 2017 leaves it up to the employee to designate the purpose of their sick leave

Mandatory Minority Representation on Board of Directors (AB 979)

- California currently requires publicly traded corporations with principal executive offices in California to have at least one female director on their board (SB 826).
- The amount must increase to two or three female board members **by the end of 2021**, depending on the size of the board.
- Diversification requirements are also expanded by requiring that at least one director be from an underrepresented community **by the end of 2021**.
  - "Director from an underrepresented community" is defined as an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.
- Takes effect "no later than the close of the 2021 calendar year."

Pay Data Report Required By March 31, 2021 (SB 973): *Equal Pay 2.0*

California Taking Matters Into Its Own Hands

- Stated intent of the Legislature in enacting SB 973:

  To implement EEO pay data reporting requirement that had been announced by the Obama Administration but was halted by the Trump Administration

- Stated intent of the Legislature is to address the gender pay gap:

  "Despite significant progress made in California in recent years to strengthen California's equal pay laws, the gender pay gap persists, resulting in billions of dollars in lost wages for women each year in California."

Pay Data Report Required By March 31, 2021 (SB 973)

- New CA Gov't Code Sec. 12999 requires annual pay data report to be submitted to the CA Dep't of Fair Employment and Housing (DFEH) by March 31, 2021
  - To be submitted annually on or before March 31 each year thereafter
- Applies to private employers that:

(1) Have 100 or more employees during Reporting Year or Snapshot Period, and

(2) Are required to file an annual Employer Information Report (EEO-1 report)

  - Part-time & full-time employees located inside and outside of California are counted when determining whether an employer has 100 or more employees.
  - DFEH FAQs suggest that it expects pay data to be reported for all employees working both in and outside of California, including teleworking employees

Pay Data Report Required By March 31, 2021 (SB 973)

- Pay data report must include earnings, hours worked and number of employees by
  Race, Ethnicity, Sex, Job Category
- Must cover executives, senior-level officials and managers; first or mid-level officials and managers; professionals; technicians; sales workers; administrative support workers; craft workers; operatives; laborers and helpers; service workers
  - Tracks EEO-1 Form job categories
- If employer already files the same or substantially the same data in its EEO-1 report, it can submit the same report to the DFEH

Pay Data Report Required By March 31, 2021 (SB 973)

- Pay data tracks prior “Component 2” EEO data collected by EEOC in 2017 & 2018
- “Reporting Year” covers prior calendar year
- “Snapshot” is data taken in a pay period between October 1 and December 31
  - Employer can choose the single pay period to use as the Snapshot
- Snapshot will be used to identify the employees to be reported on in pay data report

Pay Data Report Required By March 31, 2021 (SB 973)

What Exactly Do We Need To Report?

- Number of employees by race, ethnicity, and sex
  - Whose annual W-2 earnings during Reporting Year fall within each of the pay bands used by U.S. Bureau of Labor Statistics in the Occupational Employment Statistics survey
- Total earnings during Reporting Year, as shown on IRS Form W-2, for each employee in Snapshot, regardless of whether employee worked full calendar year
- Total number of hours worked by each employee counted in each pay band during the Reporting Year

Pay Data Report Required By March 31, 2021 (SB 973)

Agency Guidance? Read the DFEH FAQs

DFEH Data Form?

Access the DFEH Data Submission Portal, User Guide & Template

"Coming soon" https://www.dfeh.ca.gov/paydatareporting/

- Data Submission Portal will be available on 2/15/21
- User Guide and Template will be available by 2/1/21

Stay tuned!

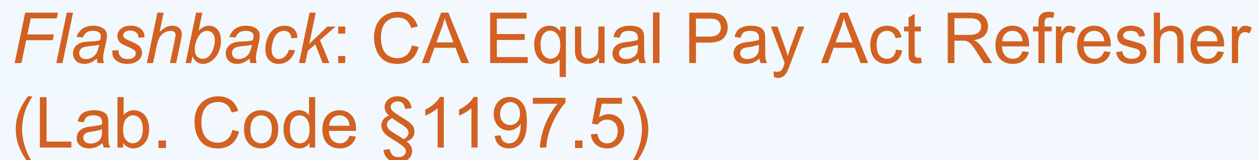
Significance of Pay Data Report (SB 973)

- DFEH must maintain the pay data reports for a minimum of 10 years
  - DFEH enforces anti-discrimination laws, which can include wage/pay-based claims
  - DFEH states: "Employers' pay data reports will allow DFEH to more efficiently identify wage patterns and allow for effective enforcement of equal pay or anti-discrimination laws..."
  - DFEH will make reports available to Division of Labor Standards Enforcement (DLSE); *i.e.*, the Labor Commissioner's office
  - DLSE enforces wage/hour laws, including Equal Pay Act claims alleging that wages discriminate on the basis of gender, race, or ethnicity

    Flashback: CA Equal Pay Act revamped in 2018 (Labor Code §1197.5)

Flashback: CA Equal Pay Act Refresher (Lab. Code §1197.5)

- CA Equal Pay Act (EPA) applies to all California employers, regardless of size
  - Covers all employees except outside salespersons
  - Fair Employment and Housing Act (FEHA) applies only to employers with ≥ 5 employees
- Prohibits pay disparities based on gender, race, and ethnicity
  - Modified in 2017 and 2018 to provide more employee protections than federal law
- Employee must show:
  - Employer paid an employee of another race, gender, or ethnicity higher pay **"for substantially similar work."**
  - **No need for employee to prove discriminatory intent**

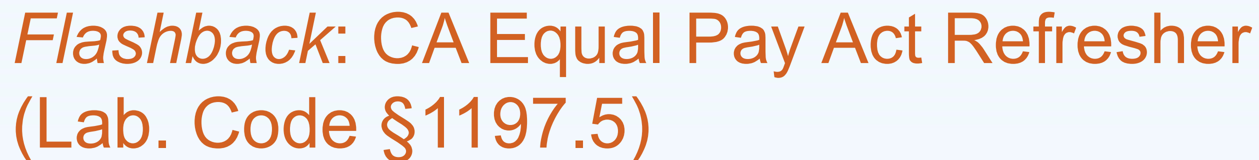


Flashback: CA Equal Pay Act Refresher (Lab. Code §1197.5)

- Employer bears the burden of proving that any wage differential is based on one or more of the following:
  - (a) a seniority system;
  - (b) a merit system;
  - (c) a system that measures earnings by quantity or quality of production; or
  - (d) a bona fide factor other than sex, race, or ethnicity,
    such as education, training, or experience
- Factor must be job-related concerning the position at issue and consistent with "business necessity."

Flashback: CA Equal Pay Act Refresher (Lab. Code §1197.5)

- Employer may not rely on or seek prior salary information as justification
  (Lab. Code § 1197.5(a)(4), (b)(4))
- Employers are *barred* from relying on or seeking out an applicant's salary history information in determining either whether to offer employment or what salary to offer
  (Lab. Code § 432.3)
- Employers can make compensation decisions based on a current employee's existing salary, so long as any wage differential is justified by at least one other factor listed in Lab.C. § 1197.5(a) or (b)



Flashback: CA Equal Pay Act Refresher (Lab. Code §1197.5)

Enforcement and Recoverable Damages?

- Employees can bring civil lawsuit without first filing complaint with DLSE
  - Statute of limitations is 2 years; or 3 years for "willful violation"
- Can recover back pay, equal amount of liquidated damages, interest, costs and attorney fees
- Employees also can file a complaint with the DLSE for EPA violation (but not required)

More Time To File DLSE Complaints (AB 1947)

- More Time: Lengthens the period of time in which employees can file retaliation complaints with the DLSE to one-year
- Attorney's Fees: Authorizes reasonable attorney's fees to a plaintiff who prevails in a whistleblower action under Labor Code § 1102.5

Expanded Protection For Employee Victims Of Crime Or Abuse (AB 2992)

- Employers prohibited from discharging, or discriminating/retaliating against employee victims:
  - Victims of stalking, domestic violence, or sexual assault
  - Victims of crime that caused physical injury or mental injury + threat of physical injury
  - Person whose immediate family member is deceased as a direct result of a crime
- Employees can take time off work to obtain relief for themselves or their children
  - No action against employee for unscheduled absence if employee provides certification

“No Rehire” Provisions (AB 2143)

- Modifies the current ban on "no rehire" provisions and requires
  - that the aggrieved person has filed the claim in good faith in order for the prohibition to apply, and
  - the employer must have made the determination of sexual assault or sexual harassment before the grievant filed the claim.
- Expands the exception to include a good faith determination that the aggrieved person engaged in any criminal conduct.
  - There is no definition of good faith determination in the statute, so employers act "at their peril" and will have to wait for some case law to flesh out that meaning.

Labor Commissioner Representation at Arbitration? (SB 1384)

- Labor Commissioner currently can represent employees in wage claim appeals
  - *i.e.*, appeals to trial *de novo* in Superior Court
- Labor Commissioner now can represent employees, upon request, in arbitration
  - If Court has issued an order to compel arbitration in a wage claim brought before DLSE;
  - Employee is financially unable to afford counsel; and
  - Labor Commissioner determination that claim has merit

Lab. Code § 98.4

Successor Employer Liability for Unpaid Wage Judgments (AB 3075)

Successor employer is liable for unpaid wage judgments of predecessor (Lab. Code § 200.3)

- Under certain circumstances only
- Successorship means any of the following criteria:
  - "Uses substantially the same facilities or substantially the same workforce to offer substantially the same services" as predecessor;
    - Not applicable if employer maintains same workforce
  - Has substantially the same owners or managers that control the labor relations as predecessor;
  - Employs as "managing agent" any person who directly controlled the wages, hours, or working conditions of the affected workforce of predecessor; **OR**
  - Operates a business in same industry, and the business has an owner, partner, officer, or director who is an immediate family member of any owner, partner, officer, or director of predecessor.

Limited Industry-Specific Rest Break Exceptions (Lab. Code §§ 226.7, 226.75): Limited Abrogation of *Augustus v. ABM Security Servs, Inc.* 2 Cal. 5th 257 (2016)

- Security Guards Registered Under Private Security Services Act (AB 1512)
- Security guards can be required to:
  - -Remain on premises during rest breaks
  - -Remain on-call during rest breaks
  - -Remain on-duty during rest breaks
  - -Carry/monitor communication device
- If rest break is interrupted, they can restart
- If not permitted to take uninterrupted rest break of 10 minutes every 4 hrs, then 226.7 premium pay is triggered

Effective immediately; sunsets January 1, 2027

- Petroleum Facilities Only – Safety Sensitive Positions (AB 2479)
- Safety-sensitive employees can be required to:
  - -Remain on premises during rest breaks
  - -Respond to emergencies during rest breaks
  - -Carry/monitor communication device (Radio, pager, etc.)
- If rest break is interrupted, they can restart
- If not permitted to take rest 226.7 premium pay is triggered
- Only applies to employees covered by CBA and subject to Wage Order No. 1 (Manufacturing)

Sunsets January 1, 2026

The Status Of Independent Contractors in California
More on *Dynamex* and AB 5 (*Vasquez* & AB 2257)

- Reminder: AB 5 adopted the "ABC test" in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex)* for independent contractors in California:
  - (a) The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
  - (b) The worker performs work that is outside the usual course of the hiring entity's business; **and**
  - (c) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.
- On January 14, 2021, in *Vasquez v. Jan-Pro Franchising, Inc.,* 2021 WL 127201 (Cal.) ("*Vasquez")*, the California Supreme Court held that *Dynamex* applies retroactively
  - ABC test applies to pending and not yet filed wage order related misclassification claims

The Status Of Independent Contractors in California
More on AB 5 (AB 2257)

- AB 2257 added more exemptions to AB 5, including:
  - Creative work: recording artists; musicians; freelance writers and similar occupations
  - Digital content aggregators; data aggregators;
  - Professions: landscape architects; appraisers and home inspectors; professional foresters; field services (inspections, audits, risk management, or loss control work) for the insurance and financial services industries; interpreters/translators; competition judging
- There are now 109 statutory exemptions, as well as an exemption for app-based drivers/couriers created by Proposition 22

Business-to-Business Exception to ABC Test Clarified (AB 2257)

- Business-to-business arrangements (including those with public agencies and quasi-public corporations) are exempt from ABC test if 12 conditions are met:
    1. The "business service provider" (*i.e.*, contractor) is free from the control and direction of the "contracting business entity" in connection with the performance of the work, both under the contract for the performance of the work and in fact.
    2. **The business service provider is providing services directly to the contracting business, rather than to customers of the contracting business, UNLESS**
        a) **The service provider's employees are solely performing the services under the name of the business service provider AND**
        b) **The service provider regularly contracts with other businesses.**
    3. **The contract with the business service provider must be in writing.**
       Contract must specify the amount of payment, applicable rate of pay, and due date for payment
    4. The business service provider has all required business licenses or business tax registration.

Business-to-Business Exception to ABC Test Clarified (AB 2257)

5. **The business service provider maintains a business location that is separate from the business or work location of the contracting business.**
    - **Service provider's "business location" may be their residence.**
6. The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.
7. **The business service provider can contract with other businesses to provide the same or similar services and can maintain a clientele without restrictions from the contracting business.**
8. The business service provider advertises and holds itself out to the public as available to provide the same or similar services.
9. **When consistent with the nature of the work, the business service provider provides its own tools, vehicles, and equipment to perform the services.**
10. The contractor can negotiate its own rates.
11. The contractor can set its own hours and location of work.
12. The business service provider is not performing the type of work for which a license from the Contractor's State License Board is required.

Referral Agency/Service Provider Exception to ABC Test Clarified (AB 2257)

- Referral Agency/Service Provider Exemption expanded to include, among others: consulting, youth sports coaching, caddying, wedding or event planning, services provided by wedding and event vendors, and interpreting services.
  - List of covered services is not exclusive
  - Specifically excluded industries: janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, construction services other than minor home repair, or high-hazard industries

COVID-19: ISSUES, LAWS, AND BEST PRACTICES

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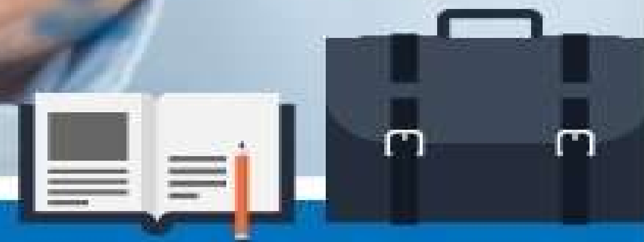


COVID-19 Vaccines: Employer Issues

- COVID-19 Vaccine Data

Helps protect you from getting COVID-19

"Get a COVID-19 vaccine, wear a mask, stay at least 6 feet apart, avoid crowds, and wash your hands to protect against COVID-19."

- Source: CDC Centers for Disease Control and Prevention "COVID-19 Vaccine"

COVID-19 Vaccines: Employer Issues

COVID-19 Vaccine Data

Total Doses Distributed	Total Doses Administered
35,990,150	16,525,281

Updated Jan 20, 2021 9:00am ET

Source: CDC COVID-19 Vaccine Data

COVID-19 Vaccines: Employer Issues

- Mandatory v. Voluntary Programs
  - EEOC Guidance
  - Accommodations
  - Emergency Use Authorization
- Pay
- Leave

COVID-19 Vaccines: Employer Issues

- Collective Bargaining
- Workers’ Compensation
- Applicants
- Lawsuits

AB685

Assembly Bill 685 made permanent and temporary changes, that include:

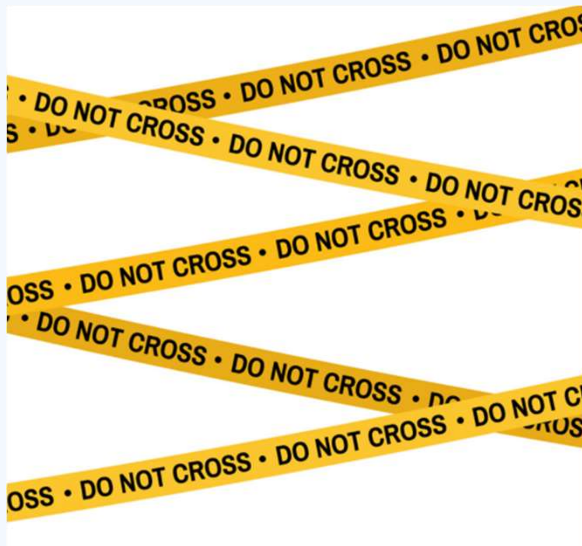
- Employers are required to notify all employees at a worksite of potential exposures, COVID-19-related benefits and protections, and disinfection and safety measures that will be taken at the worksite in response to the potential exposure.
- Employers are required to notify local public health agencies of all workplace outbreaks, which are defined as three or more laboratory-confirmed cases of COVID-19 among employees who live in different households within a two-week period.
- From January 1, 2021 until January 1, 2023, Cal/OSHA can issue an Order Prohibiting Use (OPU) to shut down an entire worksite or a specific worksite area that exposes employees to an imminent hazard related to COVID-19.
- From January 1, 2021 until January 1, 2023, Cal/OSHA can issue citations for serious violations related to COVID-19 without giving employers 15-day notice before issuance.

AB685's Detailed (and Time Sensitive) Notice Requirements

- Who must be notified?
- What if we have an "outbreak?"
- What information needs to be included in the notice?
- When and how does the employer have to give notice? (within **one business day**)
- Recordkeeping

AB685 and Orders Prohibiting Use (OPU)

- AB685 provides Cal/OSHA with increased enforcement abilities to control COVID-19 hazards in the workplace



ORDER PROHIBITING USE
(California Labor Code Sections 6325, 6326, 6327)

Upon an inspection and/or investigation on ________ (Date) the Division of Occupational Safety and Health has determined that this place of employment, located at ________ (Address) ________ CA, or a portion thereof (exact description of that portion), ________ or this machine, device, apparatus or equipment at this location, described as follows: ________ is in a dangerous condition, is not properly guarded, or is dangerously placed so as to constitute an imminent hazard to employees. THEREFORE, ENTRY INTO OR USE OF SAID PLACE OF EMPLOYMENT, OR THE PORTION DESIGNATED AS DANGEROUS, OR USE OF SAID EQUIPMENT DESCRIBED ABOVE IS PROHIBITED.

Standard, Order or Code Sections Violated	Description of Hazard

(Continue on back side)

WARNING

Labor Code Section 6326 provides that: Every person, who, after such notice is attached, enters any place of employment, or uses or operates any such place of employment, machine, device, apparatus or equipment before it is made safe and the required safeguards or safety appliances or devices are provided, or who defaces, destroys or removes any such notice without the authority of the division, is guilty of a misdemeanor, punishable by a fine of up to one thousand dollars ($1,000), or up to one year in the county jail, or both.

NOTICE OF HEARING

Notice is hereby given that if you so request, you will be provided a hearing within 24 hours thereafter on the validity of the Order Prohibiting Use.

Order issued by: ________ Date and time issued: ________

Yellow tags attached: ________ (Number)

Region ________ District ________ SE/SH Identification No. ________ Optional Report No. ________ CAL/OSHA FORM 1 Report No. ________

AB685 and Serious Citations

- Cal/OSHA can now more quickly issue citations for serious violations related to COVID-19.
- AB 685 removed the possibility of a negative inference being drawn if Cal/OSHA does not send a pre-citation notice to the employer at least 15 days prior to issuing a citation for a serious violation related to COVID-19.

Cal/OSHA Emergency Temporary Standard (ETS)

- Three key requirements:
  - Establish a COVID-19 prevention program;
  - Provide compensation to employees who are excluded from the workplace;
  - Provide testing to employees in certain circumstances.

§3205. COVID-19 Prevention.

Which Employees Are Covered?

- The ETS applies to all employers, employees, and to all places of employment with three exceptions:
  - Workplaces where there is only one employee who does not have contact with other people
  - Employees who are working from home
  - Employees who are covered by the Aerosol Transmissible Diseases regulation
- Cal/OSHA's newest FAQs clarified that once an employee is vaccinated, the employee is still subject to the employer's prevention measures but added that "the impact of vaccines will likely be addressed in a future revision to the ETS."

COVID-19 Prevention Plan (CPP)

- Communication and COVID-19 Response
- COVID-19 Hazards
- PPE, Administrative Controls, Engineering Controls
- Distancing & Face Coverings
- Provide COVID-19 training to employees
- Testing
- Exclusion and Return to Work

Identifying, Evaluating, and Correcting COVID-19 Hazards

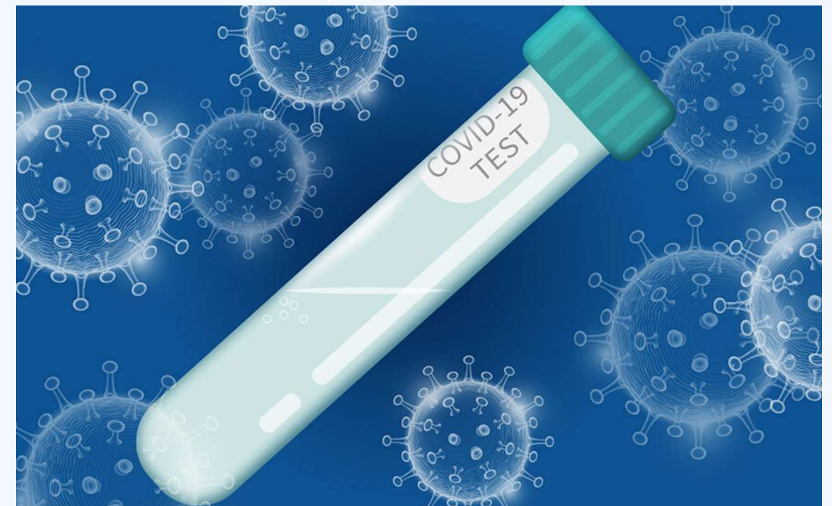
Employers must

- Have procedures for viewing existing practices for controlling COVID-19
- Conduct a site-specific evaluation of where COVID-19 transmission could occur
- Allow employees or employees' authorized representatives to participate in hazard identification and evaluation
- Ensure a process is in place to immediately address COVID-19 cases
- Conduct periodic inspections of the workplace to ensure compliance with the ETS and check for new hazards

HAZARD ALERT

Employee Testing

- Inform all employees on how they can obtain testing. Offer testing to an employee at no cost and during working hours in the event of a potential COVID-19 work-related exposure.
- Provide periodic (at least weekly or twice per week depending on the magnitude of the outbreak) COVID-19 testing to all employees in an “exposed workplace” during an outbreak.
- Testing must be provided in a manner that ensures employee confidentiality.



Paid Employee Benefits

If an employee is excluded from the workplace due to an **exposure** or **positive test**, and they are otherwise “***able and available to work***,” the employer must continue to provide the employee’s **pay** and **benefits.**

COVID-19 Outbreaks and Major Outbreaks

- Additional testing requirements
- Additional notice requirements
- Ventilation
- Respiratory protection

Legal Challenges to the ETS

- *National Retail Federation, et al., v. CalOSHA, et al.*, (Superior Court of California, County of San Francisco)
- *Western Growers Association, et al., v. CalOSHA, et al.*, (Superior Court of California, County of Los Angeles)

LEAVE BENEFITS FOR WORKERS IMPACTED BY COVID-19

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California Employee Leave and Benefit Information Relating to COVID-19

Program	Why	What	Benefits	Worker Eligibility Requirements
Disability Insurance	If an employee is unable to work due to medical quarantine or illness related to COVID-19 (certified by a medical professional).	Short-term benefit payments to eligible California workers who have a full or partial loss of wages due to a non-work-related illness, injury, or pregnancy.	Weekly benefit amount is approximately 60-70 percent (depending on income) of wages earned 5 to 18 months before claim start date up to maximum weekly benefit amount; for claims beginning on or after January 1, 2021, weekly benefits range from $50-$1,357 for up to 52 weeks. **Note**: Typically, the first seven days of every new claim is a non-payable waiting period. For claims submitted due to COVID-19, the Governor's Executive Order waives the one-week unpaid waiting period, so employees can collect DI benefits for the first week out of work.	Employees who: ❖ Are unable to do their regular or customary work for at least eight days. ❖ Have lost wages because of their disability. ❖ Are employed or actively looking for work at the time their disability begins. ❖ Have earned at least $300 from which State Disability Insurance (SDI) deductions were withheld during their base period. ❖ Are under the care and treatment of a licensed physician/practitioner or accredited religious practitioner within the first eight days of their disability. The date their claim begins can be adjusted if it does not meet this requirement. The employee must remain under care and treatment to continue receiving benefits. ❖ Complete and submit a Claim for Disability Insurance (DI) Benefits (DE 2501) no earlier than nine days after your first day of disability begins but no later than 49 days, or the employee may lose benefits. ❖ Have their physician/practitioner complete the medical certification portion of their disability claim.

California Employee Leave and Benefit Information Relating to COVID-19

Program	Why	What	Benefits	Worker Eligibility Requirements
Paid Family Leave	If an employee is unable to work because they are caring for an ill or quarantined family member with COVID-19 (certified by a medical professional).	Benefit payments to eligible California 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 (depending on income) of wages earned 5 to 18 months before their claim start date for up to 8 weeks within any 12-month period; for claims beginning on or after January 1, 2021, weekly benefits range from $50-$1,357.	Employees who: ❖ Are unable to do their regular or customary work. ❖ Have lost wages because of the need to provide care for a seriously ill family member, bond with a new child, or participate in a qualifying event resulting from a family member's military deployment to a foreign country. ❖ Are employed or actively looking for work at the time their family leave begins. ❖ Have earned at least $300 from which SDI deductions were withheld during their base period. ❖ Complete and submit their claim form no earlier than the first day their family leave begins, but no later than 41 days after family leave begins, or the employee may lose benefits. ❖ Provide a medical certificate on the employee's care claim for the seriously ill family member. The certificate must be completed by the care recipient's physician/practitioner.

California Employee Leave and Benefit Information Relating to COVID-19

Program	Why	What	Benefits	Worker Eligibility Requirements
Unemployment Insurance (and any extended UI benefits programs)	If an employee's employment status has been affected by COVID-19 and the employee is fully or partially unemployed as a result.	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 (plus additional weeks under extended UI benefits programs). **Note**: Typically, the first seven days of every new claim is a non-payable waiting period. For claims submitted due to COVID-19, the 7-day waiting period is waived.	Employees who earned enough wages during the base period (i.e., a specific 12-month term the EDD uses to see if an employee earned enough wages to establish a UI claim) and are: ❖ Totally or partially unemployed. ❖ Unemployed through no fault of your own. ❖ Physically able to work. ❖ Available for work. ❖ Ready and willing to accept work immediately. If an employee is not eligible for UI benefits because they are sick or injured, they should file a claim with Disability Insurance. To receive UI benefit payments, the employee must meet all eligibility requirements when filing a claim and when certifying for benefits. Due to the impact of COVID-19, employees are not required to look for work each week to be eligible for benefits.

California Employee Leave and Benefit Information Relating to COVID-19

Program	Why	What	Benefits	Worker Eligibility Requirements
Pandemic Emergency Unemployment Compensation (PEUC)	If an employee's employment status has been affected by COVID-19 and the employee is fully or partially unemployed as a result.	Extended UI benefits. Provides partial wage replacement benefit payments to workers who lose their job or have their hours reduced through no fault of their own.	Provides up to 24 additional weeks of payments if an employee has used all of their available UI benefits. Same payments as for regular UI claim. The first 13 weeks were available from March 29, 2020, until December 26, 2020. The additional 11 weeks are available beginning December 27, 2020.	To qualify for a PEUC extension, the employee's regular UI claim must have started on or after July 8, 2018. Depending on when the employee has filed their unemployment claim and if it has expired, the employee may need to reapply for unemployment. If the employee has a PUA claim, the employee cannot collect PEUC at the same time.
Federal-State Extended Duration (FED-ED)	If an employee's employment status has been affected by COVID-19 and the employee is fully or partially unemployed as a result.	Extended UI benefits. Provides partial wage replacement benefit payments to workers who lose their job or have their hours reduced through no fault of their own.	Provides up to 20 additional weeks of payments if an employee has used all available benefits under the PEUC extension. Same payments as for regular UI claim. Maximum benefit amount is **lesser** of either: • 50% of the maximum benefit amount of UI claim. • 13 times the weekly benefit amount.	Employees may be eligible for FED-ED benefits if they are unemployed and: • Have a regular UI claim that started on or after May 19, 2019. • Used all benefits on their UI claim and the PEUC extension, or their claim has expired. • Do not qualify for a new UI claim in California or any other state. • Meet UI eligibility requirements and are not disqualified. • Made enough earnings in the base period of their regular UI claim.

California Employee Leave and Benefit Information Relating to COVID-19

Program	Why	What	Benefits	Worker Eligibility Requirements
Pandemic Unemployment Assistance (PUA)	If an employee has lost their job or business or has had their hours or services reduced for reasons related to COVID-19.	Partial wage replacement benefit payments for business owners, self-employed, independent contractors, those who have limited work history, those who have used all their regular UI benefits and any extended benefits, and those who are serving false statement penalty weeks on their regular UI claim.	Ranges from $167-$450 for each week an individual is unemployed due to COVID-19 *The federal government has approved an additional 11 weeks of PUA benefits. This extension began December 27, 2020, under the Continued Assistance for Unemployed Workers Act of 2020. With the new extension, PUA includes up to 57 weeks of benefits beginning February 2, 2020.	Available to those who do not qualify for regular UI benefits, including business owners, self-employed workers, independent contractors, people with a limited work history, people who have used all their regular UI benefits as well as any extended benefits, and people who are serving false statement penalty weeks on their regular UI claim. These individuals must meet one of the following conditions: ❖ They have been diagnosed with COVID-19 or have symptoms of COVID-19 and are seeking a medical diagnosis. ❖ They cannot work because their healthcare provider told them to self-quarantine. ❖ A member of their household has been diagnosed with COVID-19. ❖ They are caring for a family member or a member of their household who has been diagnosed with COVID-19. ❖ They cannot work because they are caring for a dependent whose school or care facility has closed due to COVID-19. ❖ They became the main income provider due to a COVID-19 death in their household. ❖ They quit their job as a direct result of COVID-19. ❖ Their workplace is closed as a direct result of COVID-19. ❖ They had a definite date to begin work, but the job is no longer available, or they could not reach the job as a direct result of COVID-19. ❖ They are unable to travel to their job as a direct result of COVID-19. ❖ They are unemployed, partially employed, or unable to work because COVID-19 has forced them to stop working.

California Employee Leave and Benefit Information Relating to COVID-19

Program	Why	What	Benefits	Worker Eligibility Requirements
California Paid Sick Leave	If an employee or a family member is sick or for preventive care, including when civil authorities recommend quarantine, isolation, or stay-at-home.	Leave benefit an employee has accumulated or the employer has provided to the employee under the Paid Sick Leave law. This may be 1 hour accrued for every 30 hours worked, or 3 days/24 hours provided per year in a lump sum. Company policy will determine whether paid sick leave is given in a lump sum upfront or whether it accrues. Employer may cap accrual at 48 hours and use at 3 days or 24 hours, whichever is greater, within a 12 month period.	Paid at an employee's regular rate of pay or an average based on the past 90 days.	All employees.

California Employee Leave and Benefit Information Relating to COVID-19

Program	Why	What	Benefits	Worker Eligibility Requirements
Workers' Compensation	If an employee was infected with COVID-19 at work, the employee might be eligible for workers' compensation benefits.	Provides temporary disability (TD) payments after exhausting specific federal or state COVID-19 paid sick leave benefits.	Generally paid at 2/3 of the gross wages an employee loses while recovering from a work-related illness or injury for up to 104 weeks. In addition, eligible employees are entitled to medical treatment and additional payments if a doctor determines they suffered a permanent disability because of the illness. TD payments stop when either the employee returns to work, their doctor releases them for work, or their doctor says their illness has improved as much as it is going to.	Employees who reported to their employer's worksite and subsequently tested positive or were diagnosed with a COVID-19-related illness may be eligible for workers' compensation benefits. Under California law, a COVID-19 related illness is presumed to have arisen out of and in the course of employment for purposes of awarding workers' compensation benefits if the following three requirements are met: 1) The employee tests positive for COVID-19 within 14 days after the employee performed work at their place of employment and at the employer's direction; 2) The day the employee performed work was on or after July 6, 2020; and 3) The place of employment where the employee performed work was not the employee's home or residence.

California Employee Leave and Benefit Information Relating to COVID-19

Program	Why	What	Benefits	Worker Eligibility Requirements
California Family Rights Act (CFRA) Leave	If employees are incapacitated by a serious health condition, as may be the case with COVID-19, where complications arise or are needed to care for covered family members who are incapacitated by a serious health condition.	Provides job-protected leave.	Authorizes eligible employees to take up a total of 12 weeks of unpaid, job-protected leave during a 12-month period. While on leave, employees keep the same employer-paid health benefits they had while working.	To be eligible for CFRA leave, an employee must be either a full- or part-time employee working for a covered employer in California, have more than 12 months of service with the employer, and have worked at least 1,250 hours in the 12-month period before the date the leave begins. Leave is 12 weeks in a 12-month period and can be taken intermittently. Eligible employees can take the leave for one or more of the following reasons: ❖ Birth of a child for purposes of bonding (including the child of a domestic partner). ❖ Placement of a child in the employee's family for adoption or foster care. ❖ To care for the employee's child (including adult children and children of a domestic partner), parent, spouse, registered domestic partner, sibling, grandparent, or grandchild with a serious health condition. ❖ The serious health condition of the employee (excluding pregnancy). ❖ A qualifying military exigency related to the covered active duty or call to covered active duty of an employee's spouse, domestic partner, child, or parent in the United States Armed Forces. **Note**: Effective January 1, 2021, employers with five or more employees will be subject to the CFRA. Also, effective January 1, the CFRA includes more bases for leave, including for a broader range of family members and for a military exigency. Further, there is no exception for reinstatement of key employees.

California Employee Leave and Benefit Information Relating to COVID-19

Program	Why	What	Benefits	Worker Eligibility Requirements
Family Medical Leave Act (FMLA) Leave	If employees are incapacitated by a serious health condition, as may be the case with COVID-19, where complications arise or are needed to care for covered family members who are incapacitated by a serious health condition.	Provides job-protected leave.	Authorizes eligible employees to take up a total of 12 weeks of unpaid, job-protected leave during a 12-month period. While on leave, employees keep the same employer-paid health benefits they had while working.	To be eligible for FMLA leave, an employee must be either a full- or part-time employee working for a covered employer, have more than 12 months (52 weeks) of service with the employer, and have worked at least 1,250 hours in the 12-month period before the date the leave begins, and work at a location where the employer has a least 50 employees within 75 miles. Eligible employees can take the leave for one or more of the following reasons: ❖ Birth of a child or placement of a child with the employee for adoption or foster care; ❖ To care for a spouse, child, or parent who has a serious health condition; ❖ For a serious health condition that makes the employee unable to perform the essential functions of their job; or ❖ For any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status.

California Employee Leave and Benefit Information Relating to COVID-19

Program	Why	What	Benefits	Worker Eligibility Requirements
Local Government Supplemental Paid Sick Leave for COVID-19 (Varies by locality)	If an employee is unable to work due to concerns related to COVID-19.	Provides up to 80 hours of supplemental paid sick leave for covered employees while the local law is in effect.	Varies by locality.	Varies by locality. Some localities that still provide COVID-19 related supplemental paid sick leave are as follows: ❖ **City of Long Beach**: The COVID-19 Paid Supplemental Sick Leave Ordinance, which applies to employers with 500 or more employees, has no expiration date. ❖ **City of Los Angeles**: The Mayor's Order re: Supplemental Paid Sick Leave Due to COVID-19 requires employers with either 500 or more employees in the city of Los Angeles or 2,000 or more employees in the U.S. to provide paid leave. It remains in effect until two calendar weeks after the COVID-19 local emergency expires. ❖ **San Mateo County**: December 8, 2020 urgency ordinance extended the Emergency COVID-19 Paid Sick Leave Ordinance that applies to the unincorporated areas of the county and that requires employers with 500 or more employees nationally to provide paid sick leave until June 30, 2021. ❖ **City and County of Sacramento**: On December 15, 2020, extended the Worker Protection, Health and Safety Act of 2020, which requires employers with 500 or more employees to provide additional paid sick leave, through March 31, 2021. ❖ **City and County of San Francisco**: On December 15, 2020, urgency ordinance reenacted the Public Health Emergency Leave Ordinance, which requires employers with 500 or more employees worldwide to provide paid leave, for an additional 60 days. ❖ **City of San Jose**: Revised COVID-19 Paid Sick Leave Ordinance that will apply to all employers, regardless of size, that will last through June 30, 2021. ❖ **City of Oakland**: Extended Program extends some of the FFCRA leave benefits, which provides for Emergency Paid Sick Leave and Extended Family and Medical Leave benefits, through March 31, 2021. None of the extension bills require an employer to provide a new bank of leave; rather, they continue the obligation to provide COVID-19 related leave when needed. COVID-19 related supplemental paid sick leave has expired for some localities (e.g., Los Angeles County (unincorporated areas); Sonoma County; City of Santa Rosa).

California Employee Leave and Benefit Information Relating to COVID-19

Program	Why	What	Benefits	Worker Eligibility Requirements
California COVID-19 Supplemental Paid Sick Leave (SPSL) **(Expired 12/31/20)**	If an employee is unable to work due to concerns related to COVID-19.	For leave that was taken or began prior to December 31, 2020, up to 80 hours of supplemental paid sick leave for workers who work for hiring entities with 500 or more employees in the United States and healthcare employees and emergency responders who were not extended paid sick leave by their employers under the federal Families First Coronavirus Response Act, without regard to the size of their employer.	Paid at the employee's regular rate of pay, the state minimum wage, or the local minimum wage, whichever is higher, and not to exceed $511 per day and $5,110 in total.	Employees who, prior to December 31, 2020, were: 1) subject to federal, state, or local quarantine or isolation order related to COVID-19, 2) advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19, or 3) prohibited from working by the worker's hiring entity due to health concerns related to the potential transmission of COVID-19. **Note**: Workers taking SPSL as of December 31, 2020, could continue to take leave they were currently on even if the entitlement extended past December 31, 2020. For example, an employee who exhibited symptoms and was recommended to isolate on December 28, 2020, may have continued to utilize the SPSL they would have been entitled to even if that isolation was required to extend into 2021 and be paid for the time according to the requirements of the SPSL law.

California Employee Leave and Benefit Information Relating to COVID-19

Program	Why	What	Benefits	Worker Eligibility Requirements
Federal Families First Coronavirus Response Act (FFCRA) Emergency Paid Sick Leave (Expired 12/31/20)	If an employee is unable to work due to concerns related to COVID-19.	For leave that was taken prior to December 31, 2020, up to 80 hours of paid sick leave for employees who work for public employers, or for private employers with fewer than 500 employees. (Some exceptions may apply, including small business exemption from providing paid leave for child care.)	For employee: Higher of regular rate or minimum wage rate, not to exceed $511 per day and $5,110 in total For family care: 2/3 of regular rate, not to exceed $200 per day and $2,000 in total	Employees who, prior to December 31, 2020, were unable to work (or telework) because: 1) They were subject to a Federal, State, or local quarantine or isolation order related to COVID-19. 2) They were advised by a health care provider to self-quarantine due to concerns related to COVID-19. 3) They were experiencing symptoms of COVID-19 and seeking a medical diagnosis. 4) They were caring for an individual who was subject to an order as described in subparagraph (1) or was advised as described in paragraph (2). 5) They were caring for a child whose school or place of care was closed, or whose child care provider was unavailable for reasons related to COVID-19. 6) They were experiencing any other substantially similar condition specified by the Secretary of Health and Human Services. **Note**: Employers are not required to provide FFCRA leave after December 31, 2020, but may voluntarily decide to provide such leave. The Consolidated Appropriations Act, 2021, extended employer tax credits for paid sick leave and expanded family and medical leave voluntarily provided to employees until March 31, 2021.

California Employee Leave and Benefit Information Relating to COVID-19

Program	Why	What	Benefits	Worker Eligibility Requirements
Federal Families First Coronavirus Response Act (FFCRA) Emergency Paid Family & Medical Leave (Expired 12/31/20)	If an employee is unable to work due to concerns related to COVID-19.	For leave taken prior to December 31, 2020, up to an additional 10 weeks of paid leave for employees who work for public employers or private employers with fewer than 500 employees. (Small business exemption may apply)	2/3 of regular rate, not to exceed $200 per day and $10,000 total	Employees who, prior to December 31, 2020, were unable to work (or telework) because they were caring for a child whose school or place of care was closed, or whose child care provider was unavailable for reasons related to COVID-19. **Note**: Employers are not required to provide FFCRA leave after December 31, 2020, but may voluntarily decide to provide such leave. The Consolidated Appropriations Act, 2021, extended employer tax credits for paid sick leave and expanded family and medical leave voluntarily provided to employees until March 31, 2021.

WORKPLACE ISSUES IN THE COVID ERA

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On-Site Work Numbers Have Risen Since April

- April 2020 Lockdown:
  - 51% were always working remotely
  - 31% were sometimes working remotely
  - 18% were never working remotely
- In October 2020:
  - 33% were always working remotely
  - 25% were sometimes working remotely
  - 42% were never working remotely

Source: Gallup: COVID-19 and Remote Work

What Will Happen to Remote Work Post-Pandemic?

- Between 40 – 56% of U.S. jobs could be done remotely
- 80% of employees want to work from home at least some of the time
- Over a third would take a pay cut in exchange for the option to work from home
- Cost savings for employees *and* employers

Sources:
Whitepaper: How Many Jobs Can Be Done at Home?
Stanford News: Snapshot New Working Home Economy
Global Workplace Analytics: Work-at-Home After COVID-19

Session Topics

1. Wage and Hour Issues
2. Monitoring Remote Employee Performance
3. Reimbursement of Business Expenses
4. Workplace Safety
5. Discrimination
6. Protecting Confidential Information
7. Issues with Out-of-State and International Employees
8. Return to Work Plans

Effective Timekeeping Policies and Practices for Remote Workers

- Requirement to record all working time accurately – and verify accuracy
- Prohibit “off-the-clock” work – but pay for the work
- Clear meal and rest period policies
- Define compensable and non-compensable time
- Require managers to review time records
- Falsification of time records as grounds for termination

“Off-the-Clock” Work

A. Under the Industrial Commission’s Wage Orders, to employ an individual includes “to suffer or permit to work”

B. Under the “suffer or permit” standard, “the basis of liability is the defendant’s knowledge of and failure to prevent the work from occurring.”

Questions to Consider for Off-the-Clock Work

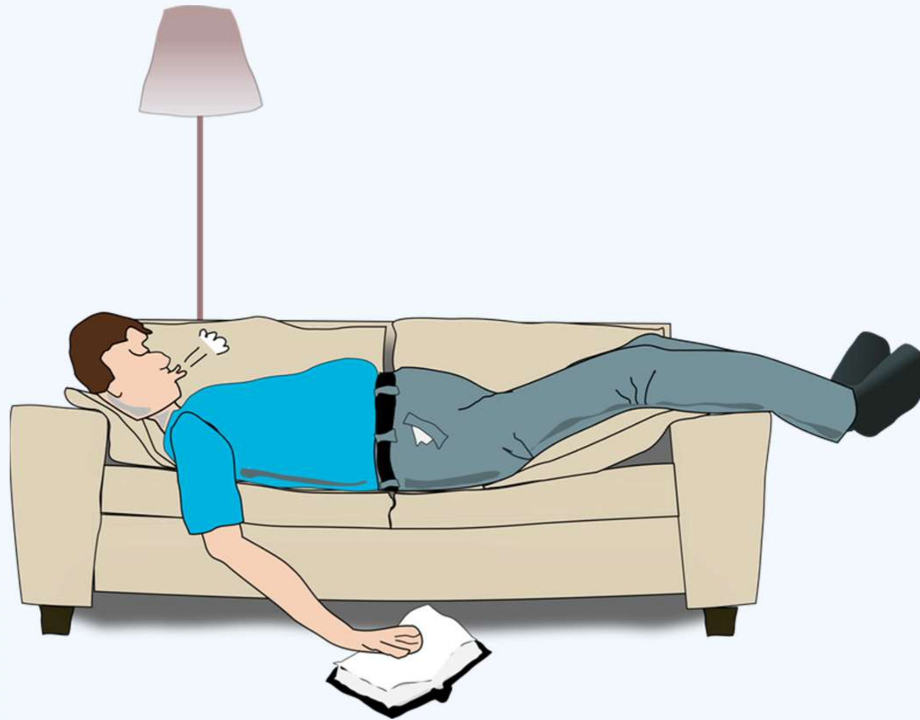
- How does this standard apply to employees working from home?
- When are employees expected to be available – or accessible – for work?
- When are they expected to log off completely?
- How much flexibility do remote workers have to create their own work schedules?
- How does this standard apply to work during quarantine/sick/leave periods?
- How to address employees who regularly work off-the-clock?

Monitoring Remote Employee Performance

Benefits of remote work:

- Reduces business costs
- Wider talent pool
- Increases employee retention
- Increases productivity!

But how do we know what our employees are doing all day?



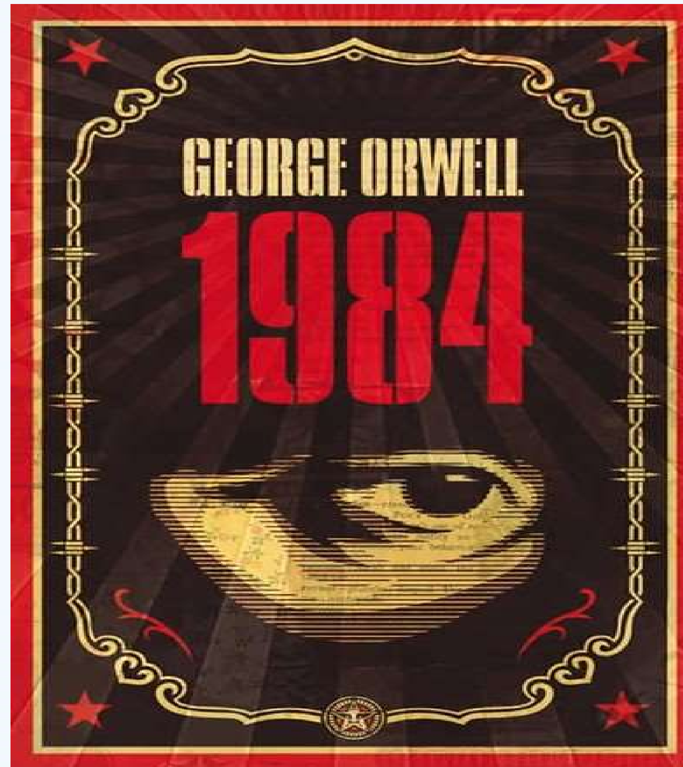
Performance Tracking Technology AKA "Tattleware"

- Track keystrokes
- Measure active v. idle time
- Track time on particular tasks
- Track website use
- Take photos to see if employee is working from his/her computer
- Taken screenshots at random intervals
- Give reminders when on non-work websites
- Generate reports of websites visited and for how long

Performance Monitoring Technologies

- Zoom/Slack
- Trello
- Time Doctor
- Toggl
- RescueTime
- Timely
- Harvest
- Everhour
- Timeneye
- ClickTime
- TopTracker
- Sneek
- Intergaurd

Legitimate Performance Review or Micromanaging?



Tattleware: Pros

- Employees will be held accountable for their output, and they will be motivated to produce results regularly
- Temps, contractors and hourly billers (lawyers) have concrete evidence of how they used their time for billing purposes
- Clients/cost centers know exactly which remote work they're being billed for
- Reduces time spent on manual time tracking and task management
- Automatic location tracking can ease tax filings for traveling workers
- Weeds out bad actors

Tattleware: Cons

Employee Morale and Loyalty

- Anti-surveillance technology is also booming

Privacy

- Reasonable expectation of privacy
- Balance their legitimate business interests with their employees' legitimate privacy expectations
- Use of company equipment v. personal equipment

Security

- How is the data stored? How long is it retained? Who has access? What about incidental personal/medical information? Encryption?

Tips for Using Employee Surveillance Technology

- Transparency: set and define new systems clearly– draft new policies!
- Get employee/user feedback in developing and evaluating new systems
- Disclose how data is stored and how it is used
- Be fair and consistent. What behaviors will result in greater monitoring?
- Use as an interim or secondary performance evaluation system if possible

Traditional Evaluation Methods Are Still Effective!

- Check-in regularly
- Personalize conversations and build rapport
- Video > phone > email for connection
- Establish clear and realistic goals, including timelines, priorities, and milestones
- Give regular feedback and assessments
- Assess and address performance issues – don't jump to conclusions; right now people have extreme stresses in their lives; very unusual time to say the least
- Rewards and compensation for good performance and/or productivity

Reimbursing Remote Employees for Work-Related Expenses

- California Labor Code Section 2802 requires employers to reimburse employees for the “reasonable and necessary" expenses incurred in direct consequence of discharging their job duties.
- California Supreme Court: this statute “prevents[s] employers from passing their operating expenses on to their employees." *Gattuso v. Harte- Shoppers, Inc.*, 42 Cal. 4th 554, 562 (2007)

Remote Work Expenses Pre-Pandemic

- "Optional" Work From Home
- *Novak v. Boeing Co.*, Central District of California (July 20, 2011)
  - The employer had "physical workspaces with computers, phones, and other necessary equipment available at its offices to employees"
  - No reimbursement of home expenses required.
- *Lawson v. PPG Architectural Finishes, Inc.*, Central District of California (June 21, 2019)
  - Employer had provided a company iPhone and company tablet with a mobile hotspot
  - Employee sought reimbursement of home internet because it had a faster connection and was more convenient than the mobile hotspot.
  - Convenience ≠ "reasonable or necessary"

Mandatory Remote Work Expenses

- Phone and Data Plan
- Internet
- Computer
- Teleconferencing Equipment or Software
- What is “reasonable and necessary”?

Cochran v. Schwan's Home Service, Inc., 228 Cal. App. 4th 1137 (2014)

- If the equipment or technology is required, the employer must pay “some reasonable percentage” of the bill – regardless of whether employee incurred any extra expense.

What about…

- Desks? Chairs? Lighting? Other furniture?
- Office supplies?
- Increased cost of utilities?
- Travel to the physical office?

Workplace Safety For Remote Workers

California Occupational Safety and Health Act (Cal/OSHA)

- Requires employers to provide “safe and healthy workplace,” even if the workplace is in the employee's home
- Remote workers must take reasonable care for their own health and safety and the health and safety of others, as well as to comply with reasonable safety instructions given by their employers
- Home inspections highly unlikely

Workers’ Compensation

- Remote and telecommuting workers are typically covered under workers' compensation laws if the injury arises out of and in the course of employment.
- **Personal comfort doctrine:** acts performed during work that are necessary for the personal comfort, convenience, or welfare of the employee, are within the course and scope of employment, even if not part of the employee’s specified work duties.

  Examples: going to the restroom, getting water or coffee, lunch breaks
- Work-related because they are necessary and customary such that they become part of “normal working conditions”

  Fireman’s Fund Indem. Co. v. Industrial Acc. Com. (Elliott) (1952) 39 Cal. 2d 529.

Workers' Compensation

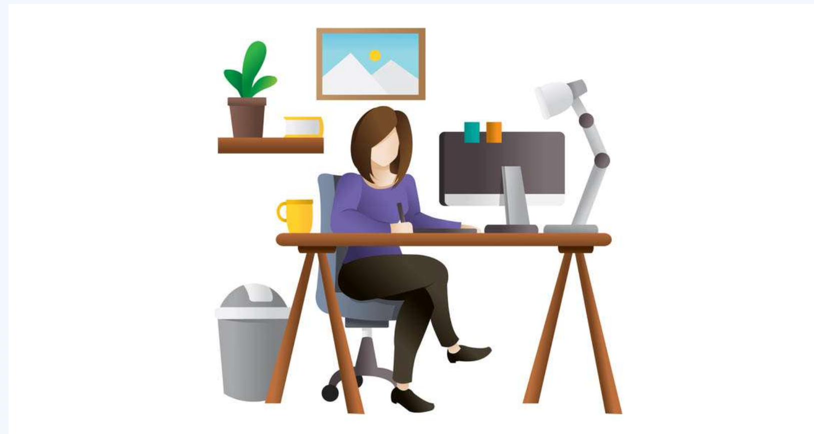
- *Personal activities*: if the activity is strictly for personal purposes, they are not within the course of employment.
- The activity is **not incidental** to the employment.
- There is **no employment-related benefit** to the employer.
- *Elliott* at 531-532; *Liberty Mut. Ins. Co. v. I.A.C. (Dahler)* (1952) 39 Cal. 2d 512, 516; *Hinkle v. W.C.A.B.* (1985) 175 Cal. App. 3d 587, 591; *Osbun v. W.C.A.B.* (1979) 93 Cal. App. 3d 163, 168; *Dalgleish v. Holt* (1952) 108 Cal. App. 2d 561, 565–566.

Workers' Compensation

- *Munson v. Wilmar/Interline Brands* (2008) MN Wrk. Comp. LEXIS 124: Employee fell down the stairs while on a coffee break. Covered?
- *Verizon Pennsylvania v. W.C.A.B (Alston)*, 900 A.2d 440 (Pa. Cmwlth. 2006): Employee fell down the stairs when rushing to answer a phone. Covered?
- *Sedgwick CMS v. Valcourt-Williams*, 271 So.3d 1133 (Fla. App.): Employee tripped over her dog. Covered?

Biggest Safety Issue: Ergonomics

- Repetitive stress injuries: back pain, neck pain from looking down at a computer, carpal tunnel due to use of a keyboard or mouse, etc.
- Relying on employee to set up their own work station

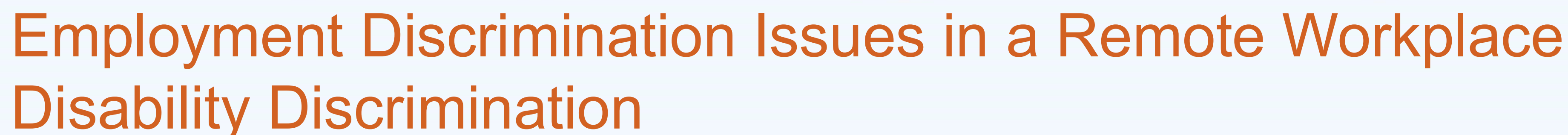


Steps to Ensure Workplace Safety:

- Policies and Training: make sure employees know they need to keep their workspaces free of hazards. Make sure they know they have to report any injuries.
- Send someone to the home office to evaluate safety, including ergonomics
- Ask employee to send pictures of their home office space and/or take a safety survey
- Provide appropriate office equipment, including accommodations for those with disabilities
- Periodic home office safety check-ins

Important Note: COVID-19 and Remote Workers

- Cal/OSHA Emergency Standards generally do not apply to employees working solely from home.
- Governor Newsom's Executive Order N 62-20 which created a rebuttable presumption of occupational exposure for workers diagnosed with COVID-19, does not apply to employees working solely from home.



Employment Discrimination Issues in a Remote Workplace
Disability Discrimination

The Americans with Disabilities Act (ADA) requires employers to provide reasonable accommodations to employees with disabilities who require them unless the accommodation would cause an undue hardship.

- "Remote working" can be a form of reasonable accommodation
- Duty to accommodate could include providing specialized equipment to allow employees with disability to work from home (chair, desk, keyboard, monitor)
- Remote working as an undue hardship or on-site work as an essential function of the job (pre and post-pandemic)

Other Discrimination Issues in a Remote Workplace

- Ensure that employees have an equal opportunity to participate in remote working
- Ensure that remote workers and on-site employees are treated equally
- Remote workers, child care needs, and gender disparities
- Online harassment

Protecting Confidential Information

CHALLENGES

1. More of the responsibility for information security is shifted to the employee.
2. People and remote systems are more susceptible to scams.
3. More mixing of business and personal devices.
4. Less secure home networks (and overloading of VPN)
5. You can’t control who is coming in and out of the home.
6. Distractions.

Steps to Protect Confidential Information

1. **Policies and Training!**
2. Labeling of information as confidential and storage in a secure area or place
3. Limiting employee access to certain key employees
4. Confidentiality provisions in employment agreements
5. Confidentiality or non-disclosure agreements (NDAs) with contractors
6. Education on phishing threats
7. Access to shredders
8. Update copying/printing policies

Technology Tips to Protect Confidential Information

- Use VPN (Virtual Private Networks) - helps maintain end-to-end data encryption.
- Security codes and password protection of company information
- Update anti-virus software
- Multi-factor authentication (MFA)
- Encryption software (for chatting, email, etc.)
- “Least privilege” access rights (i.e., only giving the most limited permissions)
- For video conferencing - check meeting links, virtual waiting rooms, blurred backgrounds, lock rooms once meetings have started.
- Multiple back-up options
- Secure document exchange instead of email
- Prohibit local storage of data

An Employee Wants To Move to Another State – Now What?

Employees are typically subject to state and local employment laws *where they physically work.*

These could include:

- Minimum wage and overtime laws
- Sick leave
- Workers compensation
- Unemployment insurance
- Workplace poster requirements
- Payroll deductions and other wage statement issues

Other Practical Guidance for Out-of-State Remote Workers

- Hire a payroll company
- Consult an accountant
- Employer ***and employee*** taxes are based on where the company does business
- Some states have issued COVID-19 related guidance for temporary employee relocations due to COVID-19 reasons.
- "Counting" Employees – FMLA, WARN Act, state laws depend on the number *and/or location* of employees

Returning to the Workplace

- What is the new normal for your organization? Some employees will want to continue working remotely.
  - what has worked with remote work and what hasn't?
  - hybrid remote work?
- Develop a plan now to mitigate the risk of workplace illness.
- Develop a phase-in return to work plan, by site and job. Prioritize critical employees. Look at zip-code specific heath information.
- Anticipate and plan for reoccurrence of stay at home orders.
- Build empathetic policies and culture
- Consider redesigning office space – less individual offices and more collaborative space?

COVID-19 Prevention Strategies

- Increase physical space between employees in work areas and between employees and customers - partitions, floor markings, directional signs
- At least once a day, clean and disinfect surfaces that are frequently touched by multiple people (door handles, desks, tables, phones, light switches, faucets)
- Consider assigning a person to rotate throughout the workplace to clean and disinfect surfaces
- Consider scheduling handwashing breaks
- Hand sanitizer and PPE stations

- Evaluate building ventilation systems and consider upgrades or improvements.
- Consider implementing flexible sick leave and supportive policies and practices.
- Additional information on how to keep employees safe can be found in the CDC Guidance for Businesses and Employers.

Closing Thoughts and Recap

Have a clear telecommuting/remote worker policy that covers:

- Eligibility
- Timekeeping
- Performance expectations
- Reimbursement procedures
- Safety issues
- Reasonable accommodations
- Communication and accessibility expectations
- Confidential Information
- Return to work protocol

Other Practical Considerations

- New hire documentation, onboarding, and orientation process
- Electronic signature software
- Intranet vs. physical postings
- Maintain personal connections
- Provide regular feedback
- Scheduling team meetings – consider time zones, child care responsibilities

HANSON BRIDGETT LABOR & EMPLOYMENT SEMINAR

Reference Materials

1. Department of Fair Employment and Housing (DFEH) - Pay Reporting Data

2. Law360 - “LA Courts Criticized For COVID-19 Policies, Interpreter’s Death”

Pay Data Reporting

Under California legislation enacted on September 30, 2020 (Senate Bill 973) private employers of 100 or more employees (with at least one employee in California) must report certain pay and other data to the Department of Fair Employment and Housing (DFEH) by March 31, 2021 and annually thereafter. For the online submission portal, user guide to the portal, and the template that employers can use to create their reports, visit the California Pay Data Reporting page. Below, please find answers to frequently asked questions. Please write to paydata.reporting@dfeh.ca.gov to pose additional questions not answered below.

I. INTRODUCTION

Why does California require large employers to report pay data to DFEH?
(11/02/2020) In SB 973, the California Legislature required employers of 100 or more employees to report to DFEH pay and hours-worked data by establishment, job category, sex, race, and ethnicity (hereinafter "pay data"). In enacting this legislation, the Legislature found that "[d]espite significant progress made in California in recent years to strengthen California's equal pay laws, the gender pay gap persists, resulting in billions of dollars in lost wages for women each year in California. Pay discrimination is not just a women's issue, but also harms families and the state's economy. In California, in 2016, women working full time, year round made a median 88 cents to every dollar earned by men, and for women of color, that gap is far worse. Although there are legitimate and lawful reasons for paying some employees more than others, pay discrimination continues to exist, is often 'hidden from sight,' and can be the result of unconscious biases or historic inequities."

By creating a system by which large employers report pay data annually to DFEH, the Legislature sought to encourage these employers to self-assess pay disparities along gendered, racial, and ethnic lines in their workforce and promote voluntary compliance with equal pay and anti-discrimination laws. In addition, SB 973 authorized DFEH to enforce the Equal Pay Act (Labor Code section 1197.5), which prohibits unjustified pay disparities. The Fair Employment and Housing Act (Gov. Code § 12940 et seq.), already enforced by DFEH, prohibits pay discrimination. Employers' pay data reports will allow DFEH to more efficiently identify wage patterns and allow for effective enforcement of equal pay or anti-discrimination laws, when appropriate. DFEH's strategic vision is a California free of discrimination.

Where is California's pay data reporting requirement codified in law?
(11/02/2020) The pay data reporting requirement is contained in Government Code section 12999. In addition, DFEH intends to issue regulations implementing this statute consistent with DFEH's existing regulations (California Code of Regulations, Title 2, Division 4.1).

Will an employer's pay data be publicly available?
(11/02/2020) Government Code 12999(i) prohibits DFEH, the Division of Labor Standards Enforcement (DLSE), and their staff from making "public in any manner whatever any individually identifiable information obtained pursuant to their authority under this section prior to the institution of an investigation or enforcement proceeding by [DFEH and/or DLSE] under Section 1197.5 of the Labor Code or Section 12940 involving that information, and only to the extent necessary for purposes of the enforcement proceeding. For the purposes of this section, 'individually identifiable information' means data submitted pursuant to this section that is associated with a specific person or business."

In addition, Government Code section 12999(j) provides that "any individually identifiable information" (defined above) submitted to DFEH shall be considered confidential information and not subject to disclosure pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1)."

May DFEH publish reports based on data aggregated from multiple employers?
(11/02/2020) Pursuant to Government Code section 12999(k), "[DFEH] may develop, publish on an annual basis, and publicize aggregate reports based on the data obtained pursuant to their authority under this section, provided that the aggregate reports are reasonably calculated to prevent the association of any data with any individual business or person."

How long will DFEH keep employers' pay data?
(11/02/2020) DFEH "shall maintain pay data reports for not less than 10 years." Gov. Code § 12999(l).

How will DFEH keep the data submitted by employers secure?
(11/02/2020; updated 01/15/2021) DFEH takes data security and privacy very seriously. DFEH's pay data reporting system uses end-to-end encryption for transmission and storage of all employer-submitted data. The system is housed in a secure government cloud environment that meets FedRAMP and NIST Federal and State requirements for data protection. For more information, see FAQ "Will an employer's pay data be publicly available?"

Does the federal government already collect pay data from large employers?
(11/02/2020) In SB 973, the California Legislature explained: "Recognizing that pay discrimination is difficult to detect and address, the Obama Administration announced a proposed revision to the Employer Information Report (EEO-1) to include the reporting of pay data by gender, race, and ethnicity beginning in 2018. However, in August 2017, the Trump Administration put a halt to the implementation of this new rule." Following a federal court ruling, the U.S. Equal Employment Opportunity Commission (EEOC) was ordered to and did collect these data for 2017 and 2018. Since then, the EEOC has stopped collecting these data.

II. FILING REQUIREMENTS

Will DFEH's pay data reporting system be similar to the one used by the EEOC to collect EEO-1 Component 2 data?
(11/02/2020) To ease reporting by employers, DFEH is endeavoring to create a system that closely resembles the EEOC's system to the extent permitted by state statute.

What is the deadline for employers to submit their pay data report(s) to DFEH?
(11/02/2020) Under Government Code section 12999(a), employers must submit their pay data reports to DFEH on or before March 31, 2021, and then on or before March 31 each year thereafter.

How do employers submit their pay data reports to DFEH?
(11/02/2020; updated 01/15/2021) SB 973 was enacted on September 30, 2020. In December 2020, DFEH awarded an offer to OnCore Consulting LLC to provide the necessary IT infrastructure for California's pay data reporting system, including a secure online submission portal. In January 2021, DFEH awarded an offer to National Opinion Research Center (NORC) to consult on this project. NORC constructed and ran the EEO-1 Component 2 collection for the EEOC.

DFEH's pay data submission portal will be available by February 15, 2021. The user guide for the portal and DFEH's report template (including detailed instructions and examples) will be available by February 1, 2021. Once the portal is live, an employer will submit their pay data report either by uploading an Excel or .CSV file using DFEH's template (suggested method) or by using the portal's fillable form. The portal, user guide, and template can be accessed at www.dfeh.ca.gov/paydatareporting. Employers must use the online portal to submit their reports. DFEH will not accept reports by email or hard copy.

Multiple-establishment employers must report all of their establishment-level data in a single report. Multiple-establishment employers do not report consolidated data. That is because a multiple-establishment employer must report on all of its establishments, including those with fewer than 50 employees, in the same manner, because Government Code section 12999 does not differentiate between establishment size. In other words, DFEH does not permit employers to submit what is known in the federal EEO-1 survey as a "Type 6" list of establishments of fewer than 50 employees. So as to reduce the potential for confusion, DFEH has slightly updated some answers in these FAQs to reflect the fact that multiple-establishment employers will be submitting a single report containing all establishment-level data and will not submit consolidated data.

Are there standard forms that employers should use to submit their pay reports to DFEH?
(11/02/2020; updated 01/15/2021) This question is answered in the FAQ "How do employers submit their pay data reports to DFEH?"

Must employers submit their pay data reports in a particular electronic file format?
(11/02/2020; updated 01/15/2021) This question is answered in the FAQ "How do employers submit their pay data reports to DFEH?"

What are the penalties for employers who fail to file?
(11/02/2020) "If [DFEH] does not receive the required report from an employer, the department may seek an order requiring the employer to comply with these requirements and shall be entitled to recover the costs associated with seeking the order for compliance." Gov. Code § 12999(h).

III. REQUIRED CONTENT

What is the "Reporting Year"?

(11/23/2020) A pay data report shall "cover[] the prior calendar year, which, for purposes of this section, shall be referred to as the 'Reporting Year.'" Gov. Code § 12999(a). For example, a pay data report submitted to DFEH in 2021 will contain pay and hours-worked data from calendar year 2020 for employees employed during the Snapshot Period; 2020 is the Reporting Year.

What is the "Snapshot Period"?
(11/23/2020) The "Snapshot Period" is a single pay period between October 1 and December 31 of the Reporting Year. Gov. Code § 12999(b)(3). Employers are free to choose the single pay period between October 1 and December 31 of the Reporting Year that will serve as their Snapshot Period. As explained more below, the Snapshot Period is used by employers to identify the employees to be reported on in the pay data report submitted to DFEH. See Gov. Code §§ 12999(b)(3) & 12999(b)(4).

Which employers are required to submit pay data reports to DFEH?
(11/23/2020) Under Government Code section 12999(a), "a private employer that has 100 or more employees and who is required to file an annual Employer Information Report (EEO-1) pursuant to federal law shall submit a pay data report to" DFEH. An employee is "an individual on an employer's payroll, including a part-time individual, whom the employer is required to include in an EEO-1 Report and for whom the employer is required to withhold federal social security taxes from that individual's wages." Gov. Code § 12999(m)(1).

An employer has the requisite number of employees if the employer either employed 100 or more employees in the Snapshot Period chosen by the employer or regularly employed 100 or more employees during the Reporting Year. "Regularly employed 100 or more employees during the Reporting Year" means employed 100 or more individuals on a regular basis during the Reporting Year. "Regular basis" refers to the nature of a business that is recurring, rather than constant. See Cal. Code Regs., tit. 2, §§ 11008(d)(1) & 11008(d)(1)(A). For example, in an industry that typically has a three-month season during a calendar year, an employer that employed 100 or more employees during that season regularly employed the requisite number of employees and would be required to file a pay data report to DFEH, if the employer is also required to file an EEO-1 Report.

Employees located inside and outside of California are counted when determining whether an employer has 100 or more employees. See Cal. Code Regs., tit. 2, § 11008(d)(1)(C). For example, an employer that had 50 employees inside California and 50 employees outside of California during the Reporting Year would be required to submit a pay data report to DFEH. An employer with no employees in California during the Reporting Year would not be required to file a pay data report with DFEH.

Part-time employees, including those who work partial days and fewer than each day of the work week, are counted the same as full-time employees. For example, for counting purposes, an employer has 100 employees when 60 individuals work every day and 40 individuals work alternate days to fill 20 positions, and there are no more than 80 individuals working on any working day. Employees on paid or unpaid leave, including California Family Rights Act (CFRA) leave, pregnancy leave, disciplinary suspension, or any other employer-approved leave of absence, are counted. See Cal. Code Regs., tit. 2, § 11008(d)(1)(B).

Consistent with federal EEO-1 filing requirements, an employer with fewer than 100 employees is required to file with DFEH "if the company is owned or affiliated with another company, or there is centralized ownership, control or management (such as central control of personnel policies and labor relations) so that the group legally constitutes a single enterprise, and the entire enterprise employs a total of 100 or more employees." View EE0-1 Instruction Booklet.

When determining whether an employer has 100 or more employees, does the employer count temporary workers provided by a staffing agency or independent contractors?
(11/23/2020). For purposes of pay data reporting to DFEH, Government Code section 12999(m)(1) defines "employee" to mean "an individual on an employer's payroll, including a part-time individual, whom the employer is required to include in an EEO-1 Report and for whom the employer is required to withhold federal social security taxes from that individual's wages." If any temporary worker provided by a staffing agency or any independent contractor meets this definition of "employee," then that individual is counted.

Is an organization that files a federal EEO-3 Report (formerly known as the Local Union Report), EEO-4 Report (formerly known as the State and Local Government Report), or EEO-5 Report (formerly known as Elementary-Secondary Staff Information Report), and does not file an EEO-1 Report, subject to California's pay data reporting requirement?
(01/07/2021) No. California's pay data reporting requirement only applies to employers that file EEO-1 Reports. Gov. Code § 12999(a).

Are there different types of pay data reports?
(11/23/2020; updated 01/15/2021) Whether a single-establishment employer or multiple-establishment employer, each employer will submit a single pay data report to DFEH.

Multiple-establishment employers must report all of their establishment-level data in a single report. Multiple-establishment employers do not report consolidated data. That is because a multiple-establishment employer must report on all of its establishments, including those with fewer than 50 employees, in the same manner, because Government Code section 12999 does not differentiate between establishment size. In other words, DFEH does not permit employers to submit what is known in the federal EEO-1 survey as a "Type 6" list of establishments of fewer than 50 employees.

Further, for California pay data reporting, a multiple-establishment employer's headquarters is a distinct establishment reported in the same manner as other establishments.

For more information about how an employer creates and submits their report, see FAQ "How do employers submit their pay data reports to DFEH?"

What information must be contained in a pay data report?
(11/23/2020; updated 01/15/2021) DFEH's portal, user guide, and template specify the required information, which includes but may not be limited to:

1. For each establishment, during the Snapshot Period, the number of employees by race, ethnicity, and sex in each of the following ten job categories: Executive or senior level officials and managers; First or mid-level officials and managers; Professionals; Technicians; Sales workers; Administrative support workers; Craft workers; Operatives; Laborers and helpers; and Service workers.
2. For each establishment, during the Snapshot Period, the number of employees by race, ethnicity, and sex, whose annual earnings fall within each of the pay bands used by the United States Bureau of Labor Statistics in the Occupational Employment Statistics survey. For purposes of establishing the numbers to be reported under this paragraph (2), the employer shall identify the total earnings during the Reporting Year, as shown on the Internal Revenue Service Form W-2 Box 5, for each employee in the Snapshot, regardless of whether the employee worked for the full calendar year.
3. For the entire Reporting Year, the total number of hours worked by each employee plus the hours the employee was on any form of paid time off for which the employee was paid by the employer (such as vacation time, sick time, or holiday time).
4. The Reporting Year and the dates of the Snapshot Period selected by the employer.
5. The employer's name, address, headquarters' address (if different), California and federal Employer Identification Number, North American Industry Classification System (NAICS) code, Duns and Bradstreet number, number of employees inside and outside of California, number of establishments inside and outside of California, and whether the employer is a California state contractor. If applicable, the name and address of the employer's parent company or parent companies.
6. For a multiple-establishment employer's establishments, each establishment's name, address, number of employees, and major activity.
7. Any clarifying remarks.
8. A certification that the information contained in the pay data report is accurate and prepared in accordance with Government Code section 12999 and DFEH's instructions, and the name, title, signature, and date of signature of the certifying official.
9. The name, title, address, phone number, and email address of someone who can be contacted about the report.

Should an employer's pay data report only include their California employees or all employees?
(11/23/2020; updated 01/15/2021) As explained above, an employer is required to file a pay data report with DFEH if the employer has 100 or more employees (inside and outside of California), is required to file an EEO-1 report, and has at least one employee in California. See previous FAQ "Which employers are required to submit pay data reports to DFEH?"

When reporting to DFEH, employers must include their employees assigned to California establishments and/or working within California, and employers may include their other employers. Thus, DFEH expects that a single-establishment employer in California will include on its pay data report all employees (including any employees outside of California) whether or not teleworking.

Similarly, DFEH expects that a multiple-establishment employer with establishments only in California will include across its establishment-level data in its report all employees (including any employees outside of California) whether or not teleworking.

For multiple-establishment employers with establishments inside and outside of California, the employer: (A) must report to DFEH on its California establishments, all of its employees assigned to those establishments (including any employees outside of California) whether or not teleworking, and any other California employee (including those teleworking from California but assigned to an establishment outside of California); and (B) may report to DFEH on its establishments and employees not covered by (A). DFEH is providing employers with these options because one option may be less burdensome for employers than the other in light of federal EEO-1 reporting.

For example, if an employer has one establishment in California with 50 employees (with three workers telecommuting from Nevada during the Snapshot Period) and one establishment in Nevada with 50 employees (with three workers telecommuting from California during the Snapshot Period), the employer would submit a report with: (1) establishment-level data for their California establishment that covers all 50 employees, including those teleworking from Nevada; and (2) establishment-level data for their Nevada establishment that covers either only the employees teleworking from California or all 50 employees assigned to the Nevada establishment.

If employees telework from a residence outside of California, but are assigned to an establishment in California, should they be included on the pay data report?
(11/23/2020) Yes. See previous FAQ "Should an employer's pay data report only include their California employees or all employees?"

If employees telework from a residence in California, but are assigned to an establishment outside of California, should they be included on the pay data report?
(11/23/2020; updated 01/15/2021) Yes. An employer's report must include establishments outside of California if any employee at that establishment is working from California during the Snapshot Period. For an establishment outside of California, the employer's reporting would cover either only those employees teleworking from California and who are assigned to a single establishment outside of California or all employees assigned to that establishment outside of California. DFEH is providing employers with these options because one option may be less burdensome for employers than the other in light of EEO-1 reporting.

For example, if an employer has 100 employees assigned to an establishment in Oregon (five of whom are teleworking from California during the Snapshot Period) and 100 employees assigned to an establishment in Arizona (five of whom are teleworking from California during the Snapshot Period), the employer would submit a report with: (1) establishment-level data for the Oregon establishment that covers either the five employees teleworking from California or all 100 employees at the establishment; and (2) establishment-level data for the Arizona establishment that covers either the five employees teleworking from California or all 100 employees at the establishment.

Should employees assigned to an establishment in California but who work at client sites outside of California be included in the employer's pay data report?
(11/23/2020) Yes. Please see previous FAQ "Should an employer's pay data report only include their California employees or all employees?"

Must employers report on employees who were employed during the Snapshot Period even if they were no longer active employees by December 31st of the Reporting Year?
(11/23/2020) Yes. Even if an employee resigned or was terminated before December 31 of the Reporting Year, the employee should be reported on if the employee was employed during the Snapshot Period.

Does a temporary services employer report on the temporary staff that they place on assignment at other companies?
(01/07/2021) In addition to reporting on its permanent employees, a temporary services employer must report on the workers that it places on assignment at other companies if those workers are the "employees" of the temporary services employers. Government Code 12999(m)(1) defines "employee" to mean "an individual on an employer's payroll, including a part-time individual, whom the employer is required to include in an EEO-1 Report and for whom the employer is required to withhold federal social security taxes from that individual's wages." Thus, a temporary services employer must report to DFEH on those workers assigned to client employers but who are on the payroll of the temporary services employer.

How should employers assign employees to a job category?
(11/23/2020) Employers should assign each employee to one of the ten job categories listed in previous FAQ "What information must be contained in a pay data report?" and in Government Code section 12999(b)(1). All jobs are considered as belonging in one of these ten categories. For consistency with federal EEO-1 reporting, employers should follow the EEO-1 Instruction Booklet.

Which pay bands should an employer use?
(11/23/2020) Even though California has a higher minimum wage than is established under federal law, employers' pay data reports must utilize the pay bands established by the U.S. Bureau of Labor Statistics (BLS) in the Occupational Employment Statistics survey, which currently are:

1. $19,239 and under
2. $19,240 – $24,439
3. $24,440 – $30,679
4. $30,680 – $38,999
5. $39,000 – $49,919

6. $49,920 – $62,919
7. $62,920 – $80,079
8. $80,080 – $101,919
9. $101,920 – $128,959
10. $128,960 – $163,799
11. $163,800 – $207,999
12. $208,000 and over

How should employers report employees' race and ethnicity?
(11/23/2020) For consistency with federal EEO-1 reporting, employers should follow the EEOC's instructions for race and ethnicity identification available in the EEO-1 Instruction Booklet.

How should employers reports employees' sex?
(11/23/2020; updated 01/15/2021) Under the Gender Recognition Act of 2017 (Senate Bill 179), California officially recognizes three genders: female, male, and non-binary. Therefore, employers should report employees' sex according to these three categories. Employee self-identification is the preferred method of identifying sex information. Unlike the EEO-1 Component 2 data collection from 2017 and 2018, DFEH requires employers to report non-binary employees in the same manner as male and female employees.

May an employer submit a federal EEO-1 Report to DFEH to satisfy its obligation under Government Code section 12999?
(11/23/2020; updated 01/15/2021) Yes, but only if the EEO-1 Report "contain[s] the same or substantially similar pay data information required" by Government Code section 12999. Gov. Code § 12999(g). Because the EEO-1 survey is not collecting pay data at this time, no EEO-1 Report filed with the EEOC for Reporting Year 2020 will satisfy this standard.

Some employers have inquired whether they are permitted to submit reports to DFEH using the scripts/programs they developed for the EEO-1 Component 2 collection from 2017 and 2018. DFEH has endeavored to build a reporting system that closely resembles the EEO-1 Component 2 collection in order to ease burden on employers. However, as explained in these FAQs, the California requirements differ in certain ways from the EEO-1 Component 2 collection from 2017 and 2018. Therefore, employers must use DFEH's template or the fillable form on DFEH's portal to create and submit their reports.

IV. PAY

What measure of pay should employers use to assign employees to the appropriate pay band?
(01/07/2021) In addition to identifying the job category, race, ethnicity, and sex of each of its employees in the Snapshot Period, the employer assigns those employees to the appropriate pay bands within each job category. For more information about the pay bands employers should use, see FAQ "Which pay bands should an employer use?"

To identify the particular pay band in which to count an employee, the employer "shall calculate the total earnings, as shown on the Internal Revenue Service Form W-2," for each employee in the Snapshot, for the entire Reporting Year. Gov. Code § 12999(b)(4). For the purposes of the pay data reports due to DFEH by March 31, 2021, employers must use "W-2 Box 5 – Medicare wages and tips" for the entire Reporting Year.

Unlike the federal EEO-1 Component 2 collection from 2017 and 2018, in which the EEOC required employers to use W-2 Box 1, DFEH is requiring W-2 Box 5.

Should employers calculate and report annualized earnings for employees who did not work the entire Reporting Year?
(01/07/2021) No. The employer must use the W-2 Box 5 income of an employee, regardless of whether the employee worked the full calendar year. Employers should not annualize an employee's earnings if they did not work the entire Reporting Year. For example, if an employee started work on July 1, 2020 with an annual salary of $100,000 and her 2020 W-2 Box 5 income is $50,000, the employee should be counted in the pay band encompassing $50,000, not $100,000.

If an employee's W-2 is corrected, what should an employer do?
(01/07/2021) If an employee's W-2 is corrected before the employer submits its pay data report to DFEH, the employer should report the corrected W-2 information. If an employee's W-2 is corrected after the employer submits its pay data report to DFEH, and the correction would put the employee in a different pay band than originally reported or would otherwise require a correction on the employer's pay data report, the employer should promptly submit a corrected pay data report to DFEH, identifying the corrected cells and explaining the correction in the remarks field(s).

V. HOURS WORKED

How are employees' total hours worked calculated?
(01/07/2021) In addition to identifying the job category, pay band, race, ethnicity, and sex of each of its employees in the Snapshot Period, the employer calculates the total hours worked by each of those employees.

When calculating the total hours worked of a non-exempt employee for the purposes of the pay data reports due to DFEH by March 31, 2021, employers should utilize timesheets (or other records) to calculate the actual hours worked by the employee plus the hours the employee was on any form of paid time off for which the employee was paid by the employer (such as vacation time, sick time, or holiday time). "Non-exempt" employees are covered by orders of the California Industrial Welfare Commission and/or the federal Fair Labor Standards Act (FLSA).

When calculating the total hours worked of an exempt employee for the purposes of the pay data reports due to DFEH by March 31, 2021, employers should utilize either timesheets (or other records) to calculate the actual hours worked by the employee plus the hours the employee was on any form of paid time off for which the employee was paid by the employer (such as vacation time, sick time, or holiday time), if such records are maintained. Otherwise, employers should calculate each exempt employee's total hours worked by multiplying the total number of days actually worked during the Reporting Year plus the total number of days on any form of paid leave for which the employee was paid by the employer (such as vacation time, sick time, or holiday time), by the average number of hours worked per day by the employee. If the employer records some exempt employees' hours worked but does not record other exempt employees' hours worked, the employer may report the actual hours worked for the tracked employees and may use a proxy for those whose hours are not tracked.

Unlike the federal EEO-1 Component 2 collection from 2017 and 2018, in which the EEOC required employers to exclude time on paid leave when calculating hours worked, DFEH is requiring employers to include time during which the employee was on any form of paid time off for which the employee was paid by the employer, because such pay will be included on the employee's W-2.

Should employers calculate and report annualized hours for employees who did not work the entire Reporting Year?
(01/07/2021) No. Employers should not annualize the hours worked for employees who did not work the full Reporting Year. For example, if a full-time exempt employee (who does not maintain records of her hours) worked on average 8 hours per day, worked for 98 days, and took 2 days of paid sick leave during the Reporting Year, the employer would calculate and report the employee's hours by multiplying 8 by 100 (800 hours).

What does an employer do after calculating the total hours worked and collecting other required information of each employee in the Snapshot?
(01/07/2021) Once an employer has identified the job category, pay band, hours worked, race, ethnicity, and sex of each of its employees in the Snapshot Period, the employer counts the number of employees within each establishment (or, the establishment for single-establishment employers) with the same job category, pay band, race, ethnicity, and sex, and aggregates the hours worked by this group of like employees. If an employee does not share the same job category, pay band, race, ethnicity, or sex of any other employee in the establishment, the employer would report a count of 1 and that employee's total hours worked alone.

For more information about how employers should report these data to DFEH, see FAQs "How do employers submit their pay data reports to DFEH?" and "Are there standard forms that employers should use to submit their pay reports to DFEH?"

VI. MULTIPLE-ESTABLISHMENT EMPLOYERS

What does "establishment" mean? What does it mean for an employee to be "assigned to" an establishment?
(01/07/2021; updated 01/15/2021) Government Code section 12999(m)(2) defines "establishment" to mean "an economic unit producing goods or services." For the purposes of the pay data reports due to DFEH by March 31, 2021, employers should utilize the same establishments that they use for their EEO-1 reports. DFEH recognizes that the federal EEO-1 approach to establishments may not reflect all modern work arrangements, but DFEH is initially adopting the federal EEO-1 approach for consistency with federal reporting and to ease the reporting burden on employers. For California pay data reporting, a multiple-establishment employer's headquarters is a distinct establishment reported in the same manner as other establishments.

For the purposes of the reports due to DFEH by March 31, 2021, employers should assign employees to the establishment where the employer reports the employee for federal EEO-1 purposes, for consistency with federal reporting and to ease the reporting burden on employers. To the extent employers need additional guidance, DFEH advises employers to assign employees to the establishment that the employee formally reports to during the Snapshot Period. If an employee reports to more than one establishment during the Snapshot Period, employers should assign the employee to the establishment that the employee reports to for the majority of their work.

Because employers are required to report to DFEH on all employees assigned to California establishments and/or working within California (see FAQ "Should an employer's pay data report only include their California employees or all employees?), an employer may not avoid reporting on employees working in California by assigning them to an establishment outside of California.

How should employers with more than one establishment report their pay data?
(01/07/2021) This question is answered in the FAQs "Are there different types of pay data reports?", "What information must be contained in a pay data report?", "Should an employer's pay data report only include their California employees or all employees?", and "If employees telework from a residence in California, but are assigned to an establishment outside of California, should they be included on the pay data report?", among others.

If an employer has two establishments in California and two establishments outside of California, does the employer need to submit a pay data report for all four establishments?
(01/07/2021) This question is answered in the FAQs "Should an employer's pay data report only include their California employees or all employees?" and "If employees telework from a residence in California, but are assigned to an establishment outside of California, should they be included on the pay data report?"

If a California employer has multiple establishments – some with 50 or more employees and some with fewer than 50 employees – does the employer only report for establishments with 50 or more employees?
(01/07/2021) No. Such an employer must report on all of its establishments, including those with fewer than 50 employees, in the same manner, because Government Code section 12999 does not differentiate between establishment size.

How should an employer report on an employee who, during the Reporting Year, started out in one California establishment and ended the year in a different California establishment?
(01/07/2021) The employer should report the employee according to their establishment in the Snapshot Period. The employer should not split up this employee's pay or hours by establishment.

How should an employer report on an employee who, during the Reporting Year, started out in a California establishment but, during the Snapshot Period, was assigned to an establishment outside of California?
(01/07/2021) If this employee was working within California during the Snapshot Period, the employer is required to report to DFEH on this employee even though the employee is assigned to an establishment outside of California. If this employee was not working from California during the Snapshot Period, the employer may, but is not required to, report to DFEH on this employee.

VII. ACQUISITIONS AND MERGERS

Guidance coming soon

VIII. SPINOFFS

Guidance coming soon

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LA Courts Criticized For COVID-19 Policies, Interpreter's Death

By **Craig Clough**

Law360 (January 15, 2021, 9:16 PM EST) -- The nonprofit Court Watch Los Angeles on Friday said Los Angeles Superior Court's lax COVID-19 safety protocols led to an interpreter dying from the virus, alleging his death is the result of "incoherent" COVID-19 policies that punish employees for attempting to quarantine after a possible exposure.

Interpreter Sergio Cafaro died Tuesday after the virus spread among a group of interpreters and other staff at the Clara Shortridge Foltz Criminal Justice Center, the group said in a statement posted to its Twitter account.

The outbreak was avoidable and the result of Cafaro and other interpreters not being given permission to quarantine with paid sick leave for 14 days after two other LASC staff tested positive, the group said.

"Mr. Cafaro's death was preventable, and the circumstances of his infection are just one example of Los Angeles Superior Court's dangerous COVID-19 policies," Court Watch Los Angeles said. "At 10 months into this pandemic, it is clear that Los Angeles Superior Court's COVID-19 policies have prioritized keeping courthouses staffed and running over keeping people safe."

In a statement issued Saturday, LASC said that a traffic clerk also died recently from COVID-19, but defended its virus protocols and said it has "proactively protected its employees" throughout the pandemic. The court also said it has a policy that employees who have tested positive, exhibited symptoms, or been exposed someone with symptoms, must quarantine.

"With these losses, we are reminded of the devastating nature of this pandemic and its impact on our county," Presiding Judge Eric C. Taylor said. "We are the largest court in the nation, and are reminded that every one of us who is dedicated to justice is precious. And while we continue to implement extensive safety measures in all of our 38 courthouses, none of us is immune to this plague on our nation."

Court Watch L.A. says it is a volunteer organization formed by several social justice groups intent on holding "prosecutors and judges in the criminal courts accountable for their actions," according to its website. The group says it has over 200 volunteers who attend court hearings to document possible injustices, racial disparities or other problems.

According to the group's statement, LASC does not screen members of the public for COVID-19 before they enter the building, does not properly inform court staff and other employees about possible exposure, and routinely denies requests from employees to quarantine with pay after a possible exposure.

The exposure that led to Cafaro's death began in late November after a COVID-19 positive member of the public appeared in a courtroom with symptoms, and two employees who were present later tested positive, according to Court Watch L.A.

The interpreter who was in the courtroom that day was not informed of the exposure but learned about it "through word of mouth" on Dec. 7, and the interpreter's request to quarantine at home with

pay was denied by the Interpreter Services Division, Court Watch L.A. said.

That interpreter continued to come to work for three more days before testing positive on Dec. 10, Court Watch L.A. said.

After the exposure, 18 interpreters asked to quarantine with pay for 14 days, but the Interpreter Services Division only granted the request to some, while others received partial time off and others received no time off despite doctor's notes outlining their need to quarantine, Court Watch L.A. said.

"We ask LASC: Was the denial of these interpreters' requests to quarantine rooted in a public health determination, or the fact that the courthouse would not be able to operate without interpreters present," Court Watch L.A. said.

One of three who took no time off was Cafaro, who tested positive for the virus on Dec. 21, three days after he began feeling sick, Court Watch L.A. said.

"His death was very likely caused by a confluence of Los Angeles Superior Court practices, from their failure to screen members of the public entering the courthouse, to their refusal to inform all staff who are actually exposed to COVID-19 of their exposure, to their refusal to allow staff who have been exposed to quarantine," Court Watch L.A. said.

The group also said the LASC interpreters through their union asked LASC to properly inform employees when there had been a possible exposure and allow for paid quarantines when there has been exposure.

In its statement, LASC also said that Judge Taylor "urged the public to be aware that inaccurate, insensitive and exploitative information often circulates on social media and emphasized the court has endeavored to be transparent" about public health and safety protections in its courthouses.

Court Watch L.A. said it is calling on the Los Angeles City Attorney's Office and the Los Angeles District Attorney's Office to stop charging low-level offenses and stop pursuing pretrial detention and incarceration during the pandemic.

Family of Cafaro could not be reached for comment. The Los Angeles City Attorney's Office and the Los Angeles District Attorney's Office did not immediately respond to requests for comment.

--Editing by Bruce Goldman.

Update: This story has been updated with comments from Los Angeles Superior Court and LASC Presiding Judge Eric C. Taylor.

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