

Coronavirus and California Employers: What You Need To Know Now

Presented by Jonathan Werner and Theodore Bacon



Questions?

Please direct them to the following email address:

webinarquestions@alvaradosmith.com

Please include your name, company, and phone number

Governor's Executive Order of March 19, 2020

Executive Order N-33-20

- Reaffirms the state of emergency declared on March 4, 2020
- All individuals living in the State of California are ordered to stay home or at their place of residence—"stay in place"
- "Essential Services" will remain open. What are those?
 - Gas stations
 - Pharmacies
 - Food: Grocery stores, farmers markets, food banks, convenience stores, take-out and delivery restaurants
 - Banks
 - Laundromats/laundry services
- The order was clearly written very quickly and there will likely be further clarifications and/or amendments to it.

Governor's Executive Order of March 19, 2020

- What is closed?
 - Dine-in restaurants
 - Bars and nightclubs
 - Entertainment venues
 - Gyms and fitness studios
 - Public events and gatherings
 - Convention centers
- When will these restrictions end?
 - Executive order is in place until further notice
- What about more restrictive local orders?

Governor's Executive Order of March 19, 2020

Exceptions? "Federal critical infrastructure sectors":

Any "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."

President's guidance:

"If you work in a critical infrastructure industry, as defined by the Department of Homeland Security, such as healthcare services and pharmaceutical and food supply, you have a special responsibility to maintain your normal work schedule"

Governor's Executive Order of March 19, 2020

Those sectors are:

Chemical Sector	Commercial Facilities Sector
Communications Sector	Critical Manufacturing Sector
Dams Sector	Defense Industrial Base Sector
Emergency Services Sector	Emergency Services Sector
Energy Sector	Financial Services Sector
Food and Agriculture Sector	Government Facilities Sector
Healthcare and Public Health Sector	Information Technology Sector
Nuclear Reactors, Materials, and Waste Sector	Transportation Systems Sector

Governor's Executive Order of March 19, 2020

- For more information or to determine whether your business is a critical infrastructure sector, please consult the "Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response" [included in the handouts](#)

- Also review the following website:

<https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19>

Remote Working Arrangements

- To the maximum extent possible, have employees work remotely
- Non-exempt hourly employees
 - Make sure they record all hours worked and meal periods
 - Make sure they acknowledge they have taken all of their required rest periods
 - Use paper time sheets if needed
 - Make sure they know they are not to work off the clock
- Provide necessary equipment (computers, laptops, printers, phones)
- California Labor Code section 2802
 - If employees are using their own equipment, provide a reimbursement for the reasonable expense for such use
 - Internet access?

Reduced Hours/Reductions in Force/Furloughs

- Let's define our terms:
 - Reduced hours:** A reduction in work hours and pay for some or all of an employer's workforce
 - Reductions in force:** "Permanent" layoffs of some or all of an employer's workforce
 - Furlough:** Temporary layoffs of some or all of an employer's workforce, generally without pay
- Reduced Hours
 - Employers are permitted to reduce hours and pay as necessary
 - For hourly employees, this is simple
 - For exempt employees, a little more difficult
 - Employers may temporarily reduce an exempt employee's salary and hours due to economic difficulties
 - Must still pay a salary that meets California's minimum salary threshold
 - 25 or fewer employees: \$49,920
 - 26 or more employees: \$54,080

Reduced Hours/Reductions in Force/Furloughs

- Reductions in force and furloughs potentially implicate federal and California WARN Acts
 - WARN Acts generally require 60 days advance notice prior to any covered plant closing or mass layoff
- Federal WARN Act
 - "Covered Employers" are generally those with 100 or more full-time employees
 - Covers mass layoffs and plant closings that meet certain numerical thresholds
 - Furloughs of less than six months generally do not require notice under federal WARN Act
 - Under federal WARN, a covered employer may order a mass layoff or plant closure before the conclusion of the 60-day period if caused by:
 - Business circumstances that were not reasonably foreseeable as of the time notice would have been required
 - A natural disaster
 - COVID-19 very likely qualifies as an unforeseen business circumstance**

Reduced Hours/Reductions in Force/Furloughs

- California WARN Act
 - Applies to employers who operate a “covered establishment” (any industrial or commercial facility that employs, or has employed within the preceding 12 months, 75 or more persons)
 - Covers mass layoffs, relocations, or terminations of 50 or more employees
 - California’s WARN Act does not contain an exception for furloughs and recent case law suggests that a furlough would qualify as a mass layoff
 - Under California’s WARN Act, an employer may order a mass layoff before the conclusion of the 60-day period if caused by:
 - A “physical calamity” or “act of war”
 - It is unclear whether COVID-19 would qualify as a physical calamity. Those usually refer to floods, fires, earthquakes, or the like
 - The employer is actively seeking capital or business and would be unable to secure it if forced to provide WARN notice
 - Technical requirements of this exemption are specific and significant

Reduced Hours/Reductions in Force/Furloughs

- California WARN Act
 - On the night of March 17, 2020, Governor Gavin Newsom issued Executive Order N-31-20
 - For the period beginning March 4, 2020 through the end of the declared state of emergency, significant portions of California’s WARN Act are **suspended** for employers who order a mass layoff, relocation, or termination at a covered establishment
 - Employers must still:
 - Verify** that the mass layoff or terminations were due to COVID-19 circumstances which were not reasonably foreseeable as of the time that the normal, 60-day notice would have been required
 - Give as much advance notice as is practicable** and, at the time notice is given, provide a brief statement of the basis for reducing the notification period along with the information required by the federal WARN Act
 - Include the following statement in its notice to employees: **“If you have lost your job or been laid off temporarily, you may be eligible for Unemployment Insurance (UI). More information on UI and other resources available for workers is available at labor.ca.gov/coronavirus2019”**

Unemployment/Disability Insurance/Paid Family Leave

- Unemployment, Disability Insurance, and Paid Family Leave are available to employees impacted by COVID-19
- Unemployment and Disability Insurance**
 - Employees unable to work due to having or being exposed to COVID-19 may file a disability insurance claim. Benefits generally range from \$50-\$1,300 per week
 - Employees who have had their hours reduced or lost their jobs, or who miss work due to a child's school closure, may file an unemployment insurance claim. Benefits generally range from \$40-\$450 per week
 - Governor's recent executive order waives the one-week unpaid waiting period
- Paid Family Leave**
 - Employees unable to work because they are caring for an ill or quarantined family member with COVID-19 can file a Paid Family Leave claim. PFL provides up to 6 weeks of benefit payments to eligible employees. Benefits generally range from \$50-\$1,300 per week

Unemployment Insurance Work Sharing Program

- Employers experiencing a slowdown in business due to COVID-19 may apply for EDD's Work Sharing Program
- Allows employers to seek an alternative to layoffs by retaining employees by reducing their hours and wages that can then be partially offset with unemployment insurance benefits
- Workers approved to participate in the Work Sharing Program receive the percentage of their weekly unemployment insurance benefit amount based on the percentage of hours and wages reduced, not to exceed 60%
- Employers wishing to utilize this program must contact EDD
- See the following link for more details:

https://www.edd.ca.gov/Unemployment/Work_Sharing_Program.htm

Families First Coronavirus Response Act

- Enacted on March 18, 2020
- Goes into effect April 2, 2020
- Key provisions for employers:
 - Emergency Family and Medical Leave Expansion Act
 - Emergency Paid Sick Leave Act
 - Tax credits for employers

Families First Coronavirus Response Act

Emergency Family and Medical Leave Expansion Act

- Special leave provisions with respect to COVID-19 that only applies to employers with **fewer than 500 employees**, and only to employees who have been employed for at least 30 days
- Amends the FMLA to provide up to 12 weeks of leave “because of a qualifying need related to a public health emergency”
- “Qualifying need”
 - Employee unable to work due to a need for leave to care for the son or daughter under 18 of such employee if the school or care facility has been closed, or the child care provider is unavailable due to an emergency with respect to COVID-19 declared by a federal, state, or local authority
 - Employees must provide notice as soon as practicable when the need for leave is foreseeable
- The first ten days of leave are unpaid, but an employee may elect to substitute any accrued vacation, personal leave, or sick leave, and employers are prohibited from requiring the substitution of paid leave

Families First Coronavirus Response Act

Emergency Family and Medical Leave Expansion Act, cont'd...

- If leave exceeds 10 days, it must be paid
- Paid at the rate of at least two-thirds of employee's regular rate of pay based on the number of hours an employee normally would have been scheduled to work
- For employees with irregular hours, a formula is used
- In all cases, an employer need not pay an employee more than \$200 per day and \$10,000 in total
- Employers with 25 or more employees must restore employees to their positions following their return from leave in the same manner as under the FMLA
- Employers with less than 25 employees must reinstate employees unless certain conditions are met
- The Department of Labor may issue regulations:
 - To exclude certain healthcare providers and emergency responders from being eligible for public health emergency leave
 - To exempt businesses with fewer than 50 employees from having to provide paid emergency leave

Families First Coronavirus Response Act

Emergency Paid Sick Leave Act

- Provides for paid emergency sick leave in the case of certain absences related to COVID-19
- Again, only applies to employers with **fewer than 500 employees**
- An employee employed for at least 30 days is entitled to paid sick leave if the employee is:
 - Subject to a federal, state, or local quarantine or isolation order
 - Has been advised by a doctor to self-quarantine because of COVID-19
 - Is experiencing symptoms of COVID-19 and seeking a medical diagnosis
 - Is caring for an individual who is subject to a quarantine order or who has been advised to self-quarantine
 - Is caring for a son or daughter if the school or child care provider has been closed, or if the provider is unavailable due to COVID-19
 - Is experiencing any other substantially similar condition specified by the Secretary of HHS

Families First Coronavirus Response Act

Emergency Paid Sick Leave Act, cont'd...

- If eligible for paid sick leave, employees are entitled to:
 - Up to 80 hours of paid sick leave; part-time employees are entitled to a number of hours equal to the average number of hours that such employee works over a two-week period
 - Paid sick leave is paid at the employee's regular rate of pay; if they are caring for a family member, employees are entitled to two-thirds of their regular rate of pay.
 - Paid sick leave may be capped at \$511 per day per employee (\$5,110 aggregate) or \$200 per day per employee (\$2,000 aggregate), depending on the reason for the leave
- The paid sick leave provided by this new law must be offered in addition to any existing leave benefits and employers are not allowed to change their policies after enactment so as to avoid these new requirements
- Employers may exclude employees who are healthcare providers or first responders

For More Information

- California's Coronavirus Website:

<https://covid19.ca.gov>

- Federal Government's Coronavirus Website:

<https://www.coronavirus.gov>

- Centers for Disease Control and Prevention COVID-19 website:

<https://www.cdc.gov/coronavirus/2019-nCoV/index.html>

Extra Credit...

- Many of the following slides were rendered obsolete by the Governor's order for a large percentage of employers
- However, if you operate in an essential industry or are a critical infrastructure component and intend to continue operations during this time, the following slides may apply

Preparing Your Workplace

- Hygiene
 - Post CDC-approved posters regarding proper hygiene
 - Require hand washing upon arriving at work and throughout the day
 - Provide hand sanitizers, tissues, and no-touch disposal cans
 - Routinely clean all surfaces which are frequently touched
 - Shared offices and hot-seating arrangements
 - All such employees must wipe down their phone, keyboard, mouse, and other work surfaces anytime they are surrendering the work station to another employee
 - Prohibit sharing of personal items between employees (brushes, dishes, cups, etc.)
 - No food sharing

Preparing Your Workplace

- Business Operations**
 - No business travel unless absolutely necessary
 - No business meals or in-person meetings unless absolutely necessary
 - No meetings in the office unless absolutely necessary
 - Cross-train essential personnel
- Use technology to your advantage
 - Remote work*
 - Online meetings (Zoom, GoToMeeting, Slack, etc.)

Inquiries Regarding Employees

- How much information may an employer request from an employee who calls in sick?**
 - During a pandemic, employers may ask such employees if they are experience symptoms of the virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain this information as a confidential medical record.*
- When may an employer take body temperatures?**
 - While such measurements are generally considered medical examinations, because the CDC and state/local health authorities have recognized community spread, employers may take such measurements. However, remember that some people with COVID-19 are asymptomatic.*
- Can employers require employees to stay home if they have symptoms?**
 - Yes. The CDC has stated that employees who are ill with symptoms should leave the workplace.*
- Can an employer require a doctor's note/fitness for duty certification?**
 - Yes. However, recognize that doctors and hospitals may be too busy to provide in-depth certifications. In such cases, consider relying on a form from a local clinic, stamp, email, or other document to certify that an individual does not have the pandemic virus.*

Inquiries Regarding Employees

- What if an employee has a family member who have traveled to affected areas?**
 - Employers may request that employees inform them if they have had close contact with any family members who have traveled to high-risk areas, in order for the employer to determine if the exposure poses a direct threat to the health and safety of others.*
- Can I prevent employees from traveling, even if for personal reasons?**
 - Generally, no. However, employers should advise such employees that they may be subject to quarantine upon their return.*
- Can employees refuse business travel?**
 - Maybe. If the employee is part of a group of employees who object or if they are objecting on behalf of a group, they may be protected by the NLRA's protections for concerted, protected activity. Try to work out a solution, and consult legal counsel before taking any adverse action.*
- What if an employee appears ill but refuses to leave the workplace?**
 - Explain to the employees the public health nature of the request to leave and instruct them to leave. Offer to allow the employee to use paid sick leave or other leave benefits.*

Inquiries Regarding Applicants

- If an employer is hiring, may it screen applicants for symptoms of COVID-19?**
 - Yes, but only after making a conditional offer of employment. Job offers should be in writing and include as a condition that the employee test negative for COVID-19.*
- May an employer take an applicant's temperature as part of a post-offer, pre-employment medical examination?**
 - Yes.*
- May an employer delay an applicant's start date who has COVID-19 or related symptoms?**
 - Yes. According to the CDC, such individuals should not be in the workplace.*
- May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or related symptoms?**
 - Yes. Based on current CDC guidance, such individuals cannot safely enter the workplace, and therefore the employer may withdraw the job offer.*

What if an Employee Shows Up to Work Sick?

- Send the employee home
- Before the employee leaves, find out who the employee worked in close proximity with over the past 14 days
- Do not identify the infected employee by name
- Send home all employees who worked closely with that employee for a 14-day period to ensure the infection does not spread
- Contact the local health department (usually the county) and provide the above information
- Clean and sanitize the office
- Direct threat under ADA? *COVID-19 qualifies*

Remember, some employees will be asymptomatic—hygiene is therefore key

What if an Employee Refuses to Come to Work?

- Generally, employees may only refuse to come to work if they believe they are in “imminent danger”
- Threat must be immediate or imminent, and employee’s objection must be objectively reasonable
- Most workplaces in the United States do not meet the elements required for an employee to refuse to work in these circumstances
- Nevertheless, if employees are jointly refusing to work, may raise NLRA protected concerted activity issue
- In such circumstances, employees generally are protected against discipline or termination for engaging in such conduct
- Stay tuned: Many jurisdictions have or are about to issue stay-at-home orders, which would justify an employee’s refusal to come to work**

Use of Paid Sick Leave/Paid Vacation/PTO Benefits

- Can my employee use paid sick leave due to COVID-19 illness?**
 - Yes. The employee can request or the employer can require its use when the employee is out due to their own health condition or that of a family member.*
- If my employee has exhausted their paid sick leave, can other paid leave be used?**
 - Yes, provided the terms of the vacation or other paid time off policy permit it (Note: FMLA/CFRA's separate requirements on substitution of paid vacation or PTO benefits).*
- Can an employer require an employee who is not sick but under quarantine to use their paid sick leave?**
 - No. Use under these circumstances is at the employee's discretion.*
- What if my employee's child's school or day care closes for reasons related to the pandemic?**
 - They may use paid sick leave or other paid leave that is available. Employees at worksites with more than 25 employees may take up to 40 hours per year for school-related emergencies, such as closure of a school or day care center. Employers may require employees to use their paid vacation or paid time off benefits, but may not require use of the employee's paid sick leave.*

Use of Paid Sick Leave/Paid Vacation/PTO Benefits

- If an employee reports to work but is sent home due to illness, is he or she entitled to pay?**
 - Generally, if an employee reports to work but is furnished less than half their usual hours, the employee must be compensated for at least two hours, but no more than four hours, of reporting time pay.*
- If a state of emergency is declared, does reporting time pay apply?**
 - Depends. If the state of emergency does not recommend discontinuing business operations, reporting time pay applies. If the state of emergency recommends discontinuing business operations, no reporting time pay is required.*
- If an employee is exempt, are they entitled to a full week's salary for work interruptions during a workweek due to a shutdown of operations?**
 - Yes. However, if an exempt employee performs no work at all during a workweek, they may have their salary reduced. If an exempt employee is absent for less than a full day for reasons of sickness, their salary may not be reduced but deductions from their paid sick leave bank may be made. If none remains, no deduction to the salary may be made.*

Questions?

Please direct them to the following email address:

webinarquestions@alvaradosmith.com

Please include your name, company, and phone number