

Reopening 101: For California Employers

**A survey of employment and privacy
issues facing employers in the post-
COVID-19 shutdown**

June 10, 2020

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Overview

- Safety protocol
- Testing issues & privacy
- Discrimination and leaves
- Wage and hour, reimbursement concerns

Safety Protocol



OSHA Claims



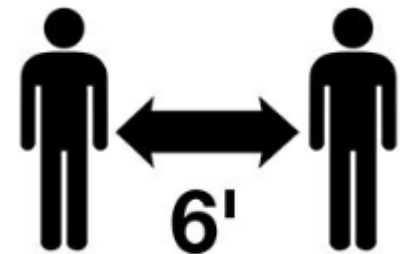
- Exposure must be work-related and a recordable injury or illness
- Encourage employees to raise safety concerns and continue addressing such concerns
- Penalty depends on the nature and severity of the violation
- OSHA's April 8, 2020 news release provided guidance on filing whistleblower complaints and emphasized retaliation is prohibited

Workers' Compensation Rebuttable Presumption

- In most situations, an employee is entitled to a rebuttable presumption that any COVID-19-related “arise[s] out of and in the course of employment for purposes of awarding workers’ compensation benefits”
- The rebuttable presumption only applies to dates of injury occurring 60 days following the date of the Order – i.e., through July 6, 2020

State and Local Safety Orders

- Social distancing protocols tend to require:
 - Posting the protocol at or near the entrance of the facility
 - Provided to each employee at the facility
 - Provide the requisite information set forth in the applicable county order (*e.g.*, limit the number of people who can enter the facility, marking 6-foot increments, and providing hand sanitizer)
- Some counties require masks or face coverings



COVID-19- Related Policies and Procedures



- Draft an addendum to your handbook or stand-alone policies related to COVID-19.
- Draft or revise your infections disease preparedness and response plan
 - Can include it in your addendum to your handbook
 - Address the levels of risk associated with various worksites and job tasks
 - Living document as federal, state, local, and tribal agencies update or provide new guidance

Testing Issues & Privacy



Testing for COVID-19 Symptoms

- If it is job-related and a business necessity, it is likely permitted.
- Currently, employers are permitted to conduct/use the following:
 - ✓ COVID-19 testing
 - ✓ Infrared thermometers and temperature checks
 - ✓ Health questionnaires
 - ✓ Third party digital tools, contact tracing apps
- Employers may send home employees with COVID-19 or symptoms associated with it (i.e., fever, chills, cough, shortness of breath, or sore throat).
- Employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they may have COVID-19.



** NOTE: Once CDC or other authorities determine the threat posed by COVID-19 has diminished the above may no longer be permitted under ADA.*

Creating a Compliant Testing Process

- What privacy laws apply to your organization?
 - CCPA, CMLA, HIPAA, GINA, GDPR, others
- Determine what information will be collected from employees by assessing:
 - Why are you collecting this information about your employees?
 - What you might need the information for in the future? (regulatory audits, litigation, etc.)
 - Do you need to collect information about family members from employees?
- Determine the notice required under the applicable law or that you plan to provide to employees in relation to the health monitoring procedures.
- Determine how long the information will be retained.
- Determine the security measures you and/or the third party provider will put in place to keep the information confidential.
- Develop procedures for responding to governmental requests for information.
- Create testing and notification procedures that protect privacy of employees.
- If you're using a service provider, limit their use of employee data.

Follow Data Minimization Principle

Reminder - *Less is more here. Consider recording only information necessary to support business decisions.*



Employee Privacy Notice – Testing

- Organizations that meet the California Consumer Privacy Act's (CCPA) “business” definition, must provide CCPA compliant notice to employees in relation to the testing.
 - Must describe types of personal information collected and purpose of the collection.
- To alleviate employee concerns, organizations may want to include information about:
 - whether information is or may be shared with other parties, and if so who;
 - the security measures in place to protect the confidentiality of the information collected; and
 - the retention period for the information collected.

Discrimination and Leave Issues



Claims Arising from Ongoing/Return to Work: Inoculate Yourselves From Liability

- **Disability Discrimination and Harassment**

- Charges accusing employers of failing to accommodate workers' disabilities are likely to outpace any other allegation tied to COVID-19
- Be sure to engage in an individualized interactive process with infected or otherwise disabled employee to identify potential reasonable accommodations.
- Just because your employee may be considered “vulnerable,” does not mean you can treat them differently.
 - EEOC Guidance on employees with “higher risk of severe illness”
- If employees are allowed to harass your ill or cured employees, you may need to find some urgent care from your lawyers.

Claims Arising from Ongoing/Return to Work: Inoculate Yourselves From Liability

- **What if your employee does not wish to return to work?**
- **Handling the Potential Whistleblower:**
 - An employee is fired for refusing to execute some task on the job that actually would be unlawful.
 - An employee is fired for complaining about what he or she reasonably perceives to be unlawful activity in the workplace (even if the activity turns out to be legal).
- Stay on top of local reopening orders and document any employee complaints.

Claims Arising from Ongoing/Return to Work: FFCRA Claims – Potential actions

- Fair Labor Standards Act minimum wage claim
- Failure to provide FMLA claims
- Rate of pay claims
- Discrimination and retaliation claims

Wage and Hour Issues



Wage and Hour 101 – The new business realities and the claims that come with them

- The new business reality:
 - Remote work
 - Safety measures (temperature checks, masks, other protective gear)
- The new potential claims:
 - Off-the-clock
 - Unreimbursed business expenses

Wage and Hour 101 – The new business realities and the claims that come with them

- The new business reality:
 - Intermittent demand
- The new potential claims
 - Reporting time pay
 - Predictive scheduling
 - Misclassification

Wage and Hour 101 – Claims Arising from Cost Saving Efforts

- Reduction in force claims:
 - Furloughs, final pay
 - Cal-WARN, Executive Order N-31-20
- Pay, hours, and job duty change claims:
 - Pay reductions
 - Hour reductions and job duty changes
- Potential COBRA Claims

GT Resources

- Easy to remember url: www.gtlaw.com/covid19
- Health Emergency Preparedness Task Force: Coronavirus Disease 2019 (COVID-19)
- GT Reopening the Economy Team
- GT COVID-19 Economic Stimulus Team
- Recent Coronavirus Alerts