DAIJOGO & PEDERSEN, LLP

COVID-19 FAQS FOR EMPLOYERS
(UPDATED MARCH 25, 2021)

Employers have many questions about responding to COVID-19 in the workplace. We have therefore compiled this list of frequently asked questions to address key issues. We are periodically updating these FAQs as guidance from public health authorities and stay-at-home orders evolve. We recommend contacting legal counsel when specific questions arise.

Return to Work: Notice and Employee Response

1. **How much notice do we need to give employees before returning them to the workplace?**

For most employers, there is not a legally required notice period an employer must provide employees before returning them to the workplace. State and local orders or retail scheduling laws may include notice requirements or recommendations. From a practical perspective, we recommend providing employees with reasonable advance notice (in writing) regarding their actual return-to-work date in order to allow them to prepare. When possible, at least one to two weeks' notice is recommended.

2. **Which employees do we bring back*? (Updated October 22, 2020)***

For many employers, returning employees to work will occur in stages, and for some there will be a permanent reduction in personnel. We recommend formulating a plan and documenting the legitimate business reason(s) and objective criteria for selecting which employees to return and when. Ensure that your plan for bringing employees back is compliant with applicable anti-discrimination laws and collective bargaining agreements. Be sure to communicate the plan to your employees in advance.

Note that some jurisdictions have enacted laws regarding reemployment rights. Los Angeles requires certain categories of employers (including event centers, hotels and employers of commercial janitorial, maintenance and security workers) to offer laid-off or furloughed workers the first chance to return to work as operations are resumed. And, San Francisco adopted a "Back to Work" emergency ordinance that creates a right to reemployment for certain laid-off workers who work for employers with 100 or more

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employees. Other cities that have adopted reemployments rights laws include Oakland and San Diego .

3. **Should employees who are vulnerable to COVID-19 be required to return to the workplace**? ***(Updated January 5, 2021)***

Not if they do not wish to return upon reopening. As employers bring employees back to the workplace, they may find some workers reluctant to return. This may include employees who have been identified by the CDC and/or state and local authorities as being at a higher risk for developing more severe effects from COVID-19. According to the CDC, people at increased risk for severe illness from COVID-19 are older adults[1] and people of any age with cancer, chronic kidney disease, COPD (chronic obstructive pulmonary disease), immunocompromised state from solid organ transplant, obesity (BMI of 30 or higher), heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies, pregnancy, sickle cell disease, smoking, and type 2 diabetes mellitus. Individuals with other underlying medical conditions might also be at an increased risk for severe illness from COVID-19, including: moderate-to-severe asthma; cerebrovascular disease; hypertension or high blood pressure; cystic fibrosis; immunocompromised state from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines; neurologic conditions such as dementia; liver disease; overweight (BMI greater than 25, but less than 30); pulmonary fibrosis; thalassemia blood disorder, type 1 diabetes mellitus.

If a vulnerable employee who has requested to remain home is required to return to the workplace, you may be inviting a failure to accommodate/disability discrimination claim under the Americans with Disabilities Act and applicable state law. In addition, requiring such employees to return to work may conflict with a state or local order recommending that such individuals remain at home. Instead, you should engage in a good faith interactive process to determine if the employee is entitled to a reasonable accommodation, which could include continued telework or a leave of absence. Businesses that transitioned to telework during the pandemic will likely be required to offer continued telework as a reasonable accommodation because of an employee's particular vulnerability to COVID-19. Be aware that the California DFEH has advised

[1] The CDC has removed the specific age threshold from the older adult classification. The CDC now warns that among adults, risk increases steadily as you age, and it's not just those over the age of 65 who are at increased risk for severe illness. The CDC still considers age an independent risk factor for severe illness, but risk in older adults is also in part related to the increased likelihood that older adults have underlying medical conditions.

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employers that they may need to waive any requirement for medical documentation of a COVID-19-related disability to support an employee's request for reasonable accommodation during the pandemic.

You should also pay attention to your state and local return-to-work orders to see if vulnerable individuals are advised to continue isolating.

4. **Can we ask employees if they will need a reasonable accommodation to return to the workplace?** ***(Added June 22, 2020)***

Yes, according to the EEOC, you may send a general notice to *all* employees who are designated for returning to the workplace, noting that you will consider requests for reasonable accommodation. Be sure to include information about how an employee can make a request, including who to contact. You may also want to include a list of conditions recognized by the CDC and/or applicable state and local authorities that put an individual at a higher risk for developing more severe effects from COVID-19. Upon receiving any request, engage in a good faith interactive process to determine if the employee is entitled to a reasonable accommodation.

5. **Can we prevent an employee who is vulnerable to COVID-19 from returning to the workplace?** ***(Updated June 22, 2020)***

Not necessarily. According to published guidance from the EEOC, the Age Discrimination in Employment Act prohibits an employer from involuntarily excluding an employee from the workplace based on the fact the employee is 65 or older. Likewise, if an employer is concerned about an employee's health being jeopardized upon returning to the workplace, the ADA does not allow the employer to exclude the employee – or take any other adverse action – *solely* because the employee has a disability that the CDC identifies as potentially placing him at "higher risk for severe illness" if he gets COVID-19. Under the ADA, such action is not allowed unless the employee's disability poses a "direct threat" to his health that cannot be eliminated or reduced by reasonable accommodation. A direct threat assessment requires an individualized assessment based on a reasonable medical judgment about this employee's disability – not the disability in general – using the most current medical knowledge and/or on the best available objective evidence, taking into consideration the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area and the employee's own health (for example, whether the disability is well-controlled), and the

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employee's particular job duties. A determination of direct threat also would include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, also would be relevant.

The EEOC guidance further provides that even if an employer determines that an employee's disability poses a direct threat to the employee's own health, the employer still cannot exclude the employee from the workplace – or take any other adverse action – unless there is no way to provide a reasonable accommodation (absent undue hardship). The ADA regulations require an employer to consider whether there are reasonable accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions. This will involve engaging in an interactive process with the employee.

Reasonable accommodations may include (without limitation) providing additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to employees returning to its workplace; erecting barriers that provide separation between an employee with a disability and coworkers/the public; increasing the space between an employee with a disability and others; eliminating or substituting particular "marginal" functions (less critical or incidental job duties as distinguished from the "essential" functions of a particular position); and temporarily modifying work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting); or moving the location where the employee works (for example, moving the employee's workspace to an area that provides more social distancing).

If there are no accommodations that would sufficiently eliminate or reduce the risk to the employee, then an employer must consider accommodations such as telework, leave, or reassignment (perhaps to a different job in a place where it may be safer for the employee to work or that permits telework). An employer may only bar an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation.

6. What if an employee is pregnant? *(Added June 22, 2020)*

You may not exclude an employee from the workplace because they are pregnant. The EEOC has stated that this would constitute sex discrimination, even if the decision is motivated by concern for the employee. On the other hand, you may be required to allow

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a pregnant employee to take leave or telework if requested by the employee. You should respond to such a request as you would to any other request for reasonable accommodation under the ADA and/or as otherwise required by applicable state law. In California, for example, an employee may be eligible for up to 4 months of leave due to a pregnancy-related disability, and may request a reasonable accommodation or transfer due to a pregnancy-related condition.

7. **What if our employee is not vulnerable, but is living with a household member who is vulnerable to COVID-19?** ***(Updated June 22, 2020)***

Some jurisdictions may require that employers provide flexibility or remote scheduling for employees who live with a person who is vulnerable to COVID-19. Absent such an order, an employer can require an employee who is not vulnerable, but who is living with a household member who is vulnerable to COVID-19, to return to the workplace. Employers are not required under the ADA to provide a reasonable accommodation to an employee who is not disabled. According to the EEOC, although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom the employee is associated. Notwithstanding, to the extent feasible, we recommend you consider offering employees the option to continue teleworking as businesses begin to reopen. Indeed, CDC guidance recommends physically separating employees from each other when possible, including through utilizing telework strategies.

8. **What if our employee is anxious about returning to work, but is not in a vulnerable population?**

Some employees may be reluctant to return because they are anxious about the spread of COVID-19. In those cases, you should engage in the interactive process with the employee to determine if they have a disability that prevents them from returning to work, and whether a reasonable accommodation is available. Keep in mind that some mental health conditions may be exacerbated by returning to work, and could constitute a disability under federal or state law. Be aware that the California Department of Fair Employment and Housing has advised employers that they may need to waive any requirement for medical documentation of a COVID-19-related disability to support an employee's request for reasonable accommodation during the pandemic. Even if you determine that the employee is not disabled, you may want to offer employees the option to continue teleworking (if possible) or take time off as businesses begin to reopen.

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9. What if our employees can't return to work because they do not have childcare available due to COVID-19? *(Updated March 25, 2021)*

If an employee cannot work because childcare is not available due to COVID-19 and no other suitable person is available to provide such care, the employee may be eligible for emergency paid sick leave ("PSL") and/or emergency family and medical leave ("FMLA") under the Families First Coronavirus Response Act ("FFCRA"), but only if you are a covered employer under the FFCRA (i.e., fewer than 500 employees) and you have chosen to continue providing such leave. The FFCRA expired on December 31, 2020, and employers are no longer ***required*** to provide FFCRA leave in 2021. Under the Consolidated Appropriations Act, enacted on December 27, 2020, and the American Rescue Plan Act ("ARPA"), enacted March 11, 2021, however, employers may continue to voluntarily provide FFCRA leave and claim the FFCRA tax credit through September 30, 2021. The ARPA also expands the qualified reasons for taking leave to include an employee who is: obtaining a COVID-19 immunization; recovering from an injury, disability, illness or condition related to COVID-19 immunization; or seeking or awaiting the results of a COVID-19 test or diagnosis because either the employee has been exposed to COVID or the employer requested the test or diagnosis.[2]

Covered employers should decide whether they plan to voluntarily continue to provide FFCRA leave from January 1, 2021 through March 31 under the Consolidated Appropriations Act, and/or from April 1, 2021 to September 30, 2021 under the ARPA. We recommend that employers who have been voluntarily providing FFCRA leave in 2021 under the Consolidated Appropriations Act and/or plan to voluntarily provide emergency PSL and emergency FMLA under the ARPA communicate their decision to all employees.

Please note that if you are a covered employer (fewer than 500 employees) and have chosen to continue providing FFCRA leave beyond 2020, tax credits for each employee are limited to up to 10 weeks of emergency FMLA and up to 2 weeks of emergency PSL leave for the period April 1, 2020 through March 31, 2021. For example, if an employee exhausted their emergency FMLA and emergency PSL leave in 2020, you are not be entitled to any additional tax credit if you allow the employee to take additional paid emergency FMLA or PSL leave up through March 31, 2021.

[2] Under the APRA, as of April 1, 2021, emergency FMLA can be taken (and a tax credit can be claimed) for the same reasons that emergency PSL can be taken, including the expanded reasons provided in the ARPA.

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However, the ARPA "refreshes" the emergency PSL tax credit, and appears to refresh the emergency FMLA tax credit available, as of April 1, 2021, through September 30, 2021.[3] Moreover, the ARPA increases the cap on the emergency FMLA tax credit to $12,000 (up from $10,000), meaning employers can claim a tax credit on up to 12 weeks of emergency FMLA pay (up from 10 weeks of pay prior to April 1, 2021) for each employee.

As mentioned in footnote 2 above, another change is the expansion of qualifying reasons to use emergency FMLA. Currently, employees can only use emergency FMLA if they need time off to care for a child whose school or daycare is closed due to COVID-19 related reasons. Under the ARPA, however, as of April 1, 2021, emergency FMLA can be used for any of the qualifying reasons found under emergency PSL.[4] This means that if an employee qualifies for emergency PSL and needs leave beyond the 10-day entitlement for emergency PSL, the employee could take up to an additional 12 weeks of emergency FMLA (assuming they have not previously used any emergency FMLA, or time off under the FMLA). In practical terms, after April 1, 2021, an employee could potentially take up to a total of 14 weeks of paid emergency PSL/FMLA leave.

Even if you choose not to continue providing FFCRA leave, employees may still be entitled to leave under state paid sick leave laws, many of which provide paid leave if an employee cannot work or telework because they need to care for a child whose school or child care provider is unavailable. For example, California recently enacted a new COVID-19 supplemental paid sick leave law (COVID-19 SPSL), Senate Bill 95. This is in addition to any paid sick leave already required by the California Healthy Workplace Healthy Family Act. However, COVID-19 SPSL counts towards maintaining the earnings of employees excluded under Cal/OSHA's emergency temporary standards.

[3] The statutory language is not clear, but it appears that Congress intended to refresh the emergency FMLA tax credit as of April 1, 2021. The DOL will hopefully clarify this in upcoming rules or FAQs.

[4] Other qualifying emergency PSL purposes include when an employee cannot work or telework because: (1) the employee is subject to, or caring for a person who is subject to, a Federal, State, or local quarantine or isolation order related to COVID-19, (2) the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, or is caring for an individual who has been advised by a health care provider to self-quarantine, (3) the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis, (4) the employee is seeking or awaiting the results of a diagnostic test for, or medical diagnosis of, COVID-19 and the employee has been exposed to COVID-19 or the employee's employer has requested such test or diagnosis, or (5) the employee is obtaining a COVID-19 vaccine or is recovering from any injury, disability, illness, or condition related to receiving a COVID-19 vaccine.

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SB 95 goes into effect on March 29, 2021, and is retroactive to January 1, 2021. The law is in effect through September 30, 2021. SB 95 requires employers with at least 25 employees to pay employees up to two weeks of COVID-19 SPSL (at their regular pay, up to a maximum of $511 per day) for any of the following reasons: (1) the employee is subject to, or is caring for a family member who is subject to, a quarantine or isolation period related to COVID-19; (2) the employee has been advised by, or is caring for a family member who has been advised by, a health care provider to self-quarantine due to concerns related to COVID-19 ; (3) the employee is attending an appointment to receive a vaccine for protection against contracting COVID-19; (4) the employee is experiencing symptoms related to a COVID-19 vaccine that prevent the employee from being able to work or telework; (5) the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis; or (6) the employee is caring for a child whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19 on the premises.

The fact that SB 95 is retroactive to January 1, 2021 means an employee can receive COVID-19 SPSL for any absence since January 1, 2021, taken for a covered reason. For example, if an employee took unpaid leave in January 2021 to care for a quarantined family member, the employee can ask for, and the employer must pay, COVID-19 SPSL for those unpaid absences. Similarly, if an employee used accrued vacation in February 2021 to care for a child because school was closed, then the employee could ask the Company to apply COVID-19 SPSL for those days and the Company would have to replenish the employee's vacation bank.

California employers with fewer than 500 employees may be entitled to take a FFCRA tax credit for COVID-19 SPSL; however, employers with 500 or more employees are not covered by the FFCRA, and therefore are not entitled to claim the FFCRA tax credit.

You should also be mindful that many local jurisdictions have also enacted COVID-19 paid sick leave laws. For example, Los Angeles, San Francisco and San Jose have enacted paid sick leave laws requiring certain employers to provide paid leave for COVID-19 reasons (including for school and child care closures), and New York City issued guidance regarding employee use of existing paid sick leave for COVID-19 reasons, including school and child care closures.

Employees may also be able to use available vacation time or paid time off for COVID-19 related absences in accordance with the terms of an employer's vacation or paid time off policy.

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Leave may also be available under existing "school activities" leave laws. For example, California employers who employ at least 25 employees are required to allow employees to take up to 40 hours of leave for school closures. Although this leave is unpaid, employees are eligible to substitute any available sick, vacation or other paid time off.

10. **What if our employee would prefer not to return to work because the supplemental benefits under the CARES Act or the American Rescue Plan Act have increased their weekly unemployment benefits to an amount that is higher than their weekly wages?**

Some employees may resist returning to work because they are receiving more in unemployment benefits than they would if they return. However, workers who decline to return to work without a legitimate COVID-19 reason (e.g., the employee is vulnerable to COVID-19) could potentially forfeit unemployment benefits. Unemployment officials in Vermont, for example, announced that unemployment claimants who have been placed on temporary layoff or furlough related to COVID-19 must return to work if called back by their employer, stating: "Refusal to return to work, when being offered the normal rate of pay and number of hours per week, may result in the termination of unemployment benefits and the need to repay certain benefits." Other states (including Iowa, Ohio and Texas) are encouraging employers to report employees who refuse to return to work when work is available. The U.S. Labor Department has published guidance regarding CARES Act stating: "Barring unusual circumstances, a request that a furloughed employee return to his or her job very likely constitutes an offer of suitable employment that the employee must accept." The California Unemployment Insurance Code, Section 1257(b), provides an individual is disqualified for unemployment benefits if they, without good cause, refuse to accept suitable employment when offered; however, the Employment Development Division has not stated what constitutes "good cause" during the on-going pandemic. According to recent news reports, the EDD is planning to publish guidance on this issue.

If an employee refuses to return to work, you should first determine if the employee has a legitimate reason for refusing to return. If there is no legitimate reason, we recommend explaining to the employee that refusing to return to work without a legitimate reason could cause the employee to become ineligible for continued unemployment benefits, and that you may be required to report this refusal to your state unemployment agency.

11. **What if our employee has a sick family member at home? *(Updated March 25, 2021)***

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If an employee cannot work because they have to care for an individual who has been diagnosed with COVID-19 or is seeking a medical diagnosis due to COVID-19 symptoms, the employee may be eligible for emergency paid sick leave under the FFCRA, but only if you are a covered employer under the FFCRA and you have chosen to continue providing such leave. The FFCRA expired on December 31, 2020, and employers are no longer ***required*** to provide FFCRA leave in 2021. Under the Consolidated Appropriations Act, enacted on December 27, 2020, and the American Rescue Plan Act ("ARPA"), enacted on March 11, 2021, however, employers may continue to voluntarily provide FFCRA leave and claim the FFCRA tax credit through September 30, 2021. The ARPA also expands the qualified reasons for taking leave to include an employee who is: obtaining a COVID-19 immunization; recovering from an injury, disability, illness or condition related to COVID-19 immunization; or seeking or awaiting the results of a COVID-19 test or diagnosis because either the employee has been exposed to COVID or the employer requested the test or diagnosis.[5]

Covered employers should decide whether they plan to voluntarily continue to provide FFCRA leave from January 1, 2021 through March 31 under the Consolidated Appropriations Act, and/or from April 1, 2021 to September 30, 2021 under the ARPA. We recommend that employers who have been voluntarily providing FFCRA leave in 2021 under the Consolidated Appropriations Act and/or plan to voluntarily provide emergency PSL and emergency FMLA under the ARPA communicate their decision to all employees.

Please note that if you are a covered employer (fewer than 500 employees) and have chosen to continue providing FFCRA leave beyond 2020, tax credits for each employee are limited to up to 10 weeks of emergency FMLA and up to 2 weeks of emergency PSL leave for the period April 1, 2020 through March 31, 2021. For example, if an employee exhausted their emergency FMLA and emergency PSL leave in 2020, you are not be entitled to any additional tax credit if you allow the employee to take additional paid emergency FMLA or PSL leave up through March 31, 2021.

However, the ARPA "refreshes" the emergency PSL tax credit, and appears to refresh the emergency FMLA tax credit available, as of April 1, 2021, through September 30, 2021.[6] Moreover, the ARPA increases the cap on the emergency FMLA tax credit to $12,000

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(up from $10,000), meaning employers can claim a tax credit on up to 12 weeks of emergency FMLA pay (up from 10 weeks of pay prior to April 1, 2021) for each employee.

As mentioned in footnote 5 above, another change is the expansion of qualifying reasons to use emergency FMLA. Currently, employees can only use emergency FMLA if they need time off to care for a child whose school or daycare is closed due to COVID-19 related reasons. Under the ARPA, however, as of April 1, 2021, emergency FMLA can be used for any of the qualifying reasons found under emergency PSL, including when an employee needs to care for a family member who has been diagnosed with COVID-19 or is seeking a medical diagnosis due to COVID-19 symptoms.[7] This means that if an employee qualifies for emergency PSL and needs leave beyond the 10-day entitlement for emergency PSL, the employee could take up to an additional 12 weeks of emergency FMLA (assuming they have not previously used any emergency FMLA, or time off under the FMLA). In practical terms, after April 1, 2021, an employee could potentially take up to a total of 14 weeks of paid emergency PSL/FMLA leave.

Even if you choose not to continue providing FFCRA leave, employees may still be entitled to leave under state paid sick leave laws, many of which provide paid leave if an employee cannot work or telework because they need to care for a sick family member with COVID-19. For example, California recently enacted a new COVID-19 supplemental paid sick leave law (COVID-19 SPSL), Senate Bill 95. This is in addition to any paid sick leave already required by the California Healthy Workplace Healthy Family Act. However, COVID-19 SPSL counts towards maintaining the earnings of employees excluded under Cal/OSHA's emergency temporary standards.

SB 95 goes into effect on March 29, 2021, and is retroactive to January 1, 2021. The law is in effect through September 30, 2021. SB 95 requires employers with at least 25 employees to pay employees up to two weeks of COVID-19 SPSL (at their regular pay,

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up to a maximum of $511 per day) for any of the following reasons: (1) the employee is subject to, or is caring for a family member who is subject to, a quarantine or isolation period related to COVID-19; (2) the employee has been advised by, or is caring for a family member who has been advised by, a health care provider to self-quarantine due to concerns related to COVID-19 ; (3) the employee is attending an appointment to receive a vaccine for protection against contracting COVID-19; (4) the employee is experiencing symptoms related to a COVID-19 vaccine that prevent the employee from being able to work or telework; (5) the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis; or (6) the employee is caring for a child whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19 on the premises.

The fact that SB 95 is retroactive to January 1, 2021 means an employee can receive COVID-19 SPSL for any absence since January 1, 2021, taken for a covered reason. For example, if an employee took unpaid leave in January 2021 to care for a quarantined family member, the employee can ask for, and the employer must pay, COVID-19 SPSL for those unpaid absences. Similarly, if an employee used accrued vacation in February 2021 to care for a child because school was closed, then the employee could ask the Company to apply COVID-19 SPSL for those days and the Company would have to replenish the employee's vacation bank.

California employers with fewer than 500 employees may be entitled to take a FFCRA tax credit for COVID-19 SPSL; however, employers with 500 or more employees are not covered by the FFCRA, and therefore are not entitled to claim the FFCRA tax credit.

You should also be mindful that many local jurisdictions have also enacted COVID-19 paid sick leave laws. For example, Los Angeles, San Francisco and San Jose have enacted paid sick leaves requiring certain employers to provide paid sick leave for COVID-19 reasons, including to care for a family member who is experiencing COVID-19 symptoms, and New York City issued guidance regarding employee use of existing paid sick leave for COVID-19 such reasons. In addition, many state and local sick leave laws that were enacted before the pandemic provide that sick leave may be used to care for certain family members who are sick or seeking medical care.

Employees may also be able to use vacation time/paid time off (depending on the terms of the employer's time off policy) for COVID-19 related absences. And, employees who work at a site with 50 or more company employee within 75 miles may be able to use available FMLA leave.

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12. What if our employee can only get to work using public transportation, but public transportation is not available or the employee is worried about taking public transportation?

The CDC recommends that businesses consider offering their employees incentives to use forms of transportation that minimize close contact with others, such as reimbursement for parking for commuting to work alone or single-occupancy rides, or allowing them to work during off peak times to minimize potential exposure to COVID-19 during their commute. If neither of these options is feasible, consider offering employees the option to continue teleworking or taking time off.

For employees who continue to commute on public transportation, remind them to comply with all applicable safety requirements. Many transit agencies require face coverings for all riders, including while waiting for and riding transit, and have instituted other safety measures such as mandatory social distancing and backdoor boarding for all passengers except those in wheelchairs. Employees should wash their hands immediately upon arriving at work.

Testing, Screening and Vaccination

13. Are all employers required to test their employees and visitors for COVID-19 each day before they enter the workplace? ***(Updated January 5, 2021)***

No. All employers are not currently required to test employees and visitors for COVID-19, and, indeed, testing capacity may not allow for wider testing of individuals without symptoms in some areas. The California Department of Public Health currently gives equal testing priority to the following groups: hospitalized patients with COVID-19 symptoms and those identified through an outbreak or contact tracing investigation; all other individuals with COVID-19 symptoms; close contacts of confirmed COVID-19 cases; people without symptoms, but who are residents in congregate care facilities, healthcare workers who have frequent interactions with the public or with people who may have COVID-19 or been exposed to the virus, workers in congregate care facilities, individuals who provide care to elderly persons or persons with a disability in the home, workers in the emergency service sector who have frequent interactions with the public or people who may have COVID-19 or been exposed to the virus, workers in correctional facilities, patients requiring pre-operative/pre-hospital admission screening, and patients being discharged from hospitals to lower care; certain essential workers and education workers without symptoms; and other individuals not specified above, including those

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who are asymptomatic but believe they have a risk for being actively infected, as well as routine testing by employers.

14. Are we permitted to test our employees to determine if they have COVID-19 before they enter the workplace? ***(Updated January 5, 2021)***

Yes. According to EEOC guidance, employers may take steps choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others. The ADA does not interfere with employers who are following recommendations by the CDC or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate. Testing administered by employers consistent with current CDC guidance will meet the ADA's "business necessity" standard.

Employers who are considering testing their employees for COVID-19 should be mindful of whether sufficient testing is available, whether those who are providing the test are certified to perform the test, whether the tests are accurate and reliable (following guidance from the FDA, the CDC and other public health authorities), and how employees may react to being tested since many of the tests involve a deep nasal cavity swab.

15. What steps do we need to take if we decide to test our employees to determine if they have COVID-19? ***(Updated January 5, 2021)***

If you intend to implement testing to determine if your employees have COVID-19, you should implement testing protocols. As an initial matter, according to the CDC, employees undergoing testing should receive clear information on:

- the manufacturer and name of the test, the type of test, the purpose of the test, the reliability of the test, any limitations associated with the test, who will pay for the test, and how the test will be performed; and
- how to understand what the results mean, actions associated with negative or positive results, who will receive the results, how the results may be used, and any consequences for declining to be tested (See FAQ 17).

Additionally, employers will need to consider who will conduct the tests, how these personnel will be trained, whether the test will be performed in a clinical lab or by a licensed healthcare professional, whether a physician order is required for testing, who will be tested, how often tests will be done, how test results will be maintained (meeting

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required confidentiality standards), and the process for identifying contacts and sharing such information as appropriate. Employees will also need to sign a release authorizing you to receive their test results.

16. **Are we permitted to test our employees for COVID-19 antibodies?** ***(Added June 22, 2020)***

No. According to EEOC guidance, the ADA does not permit employers to conduct antibody testing of their employees. An antibody test constitutes a medical examination under the ADA, and may only be required for a current employee if it is job related and consistent with business necessity. Because the CDC has stated that antibody test results should not be used to make decisions about returning persons to the workplace, the EEOC has concluded that antibody testing does not meet the ADA's "job related and consistent with business necessity" standard.

17. **We are instituting mandatory viral testing of all on-site employees. What actions can we take if an employee refuses to be tested?** ***(Added October 22, 2020)***

Although it is permissible under the ADA to test employees during the pandemic to see if they are currently positive for COVID-19, employers must tread carefully. If an employee refuses to be tested, you should ask their reason for refusing. This will factor into how you respond. If the employee's reason is based on a medical disability or religious belief, you should engage in your regular interactive process with the employee to see if there are any reasonable accommodations, such as altering the procedures for administering the test, or if necessary, dispensing with the testing requirement if the employee can work from home or can safely work onsite in an area that does not require close proximity with other personnel or the public. If the employee is refusing for unprotected personal reasons, you may be able to address their concerns. For example, if they are concerned about the confidentiality of their medical information, review with the employee your policy regarding the confidentiality of medical information. The ADA requires that all medical information about an employee must be kept confidential and stored separately from the employee's personnel file. If the employee continues to refuse to be tested for unprotected personal reasons, you can require that they work from home, or place them on unpaid leave if there is no work they can do from home.

We do not recommend that you terminate an employee for refusing testing. In California (and potentially other states), this could be a potential violation of public policy given an

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employee's right to privacy under the California constitution, especially if the testing is being required of all employees, irrespective of whether they have symptoms.

Prior to implementing any mandatory testing, you should provide your employees with a testing policy that, among other things, explains how the testing will be conducted, how the information will be kept confidential, the potential consequences for refusing to be tested, and how to request an accommodation. You should also have your employees sign a consent authorizing the test provider to disclose the test results to you in compliance with HIPAA and the California Confidentiality of Medical Information Act.

18. Are we required to (or should we) screen our employees and visitors for COVID-19 symptoms before they enter the workplace? (*Updated January 5, 2021*)

The CDC recommends that employers consider regular health checks (e.g. temperature and respiratory symptom screening) of employees and visitors entering workplace. The EEOC and the California Department of Fair Employment and Housing have both published guidance stating that such health checks are permissible. Moreover, emergency temporary standards issued by Cal/OSHA and many states and local jurisdictions require that employers conduct temperature checks and/or screen for other COVID symptoms. For example, return-to-work orders in Los Angeles and San Diego specify that any business that doesn't implement symptom checks must be prepared to explain why such checks are inapplicable to their business. In San Francisco, businesses must ensure that personnel review a handout containing health screening criteria before each shift. Personnel can be required to provide answers to the screening criteria before the start of each shift.

If you conduct employee screenings, you should decide whether to conduct the screenings in-person or whether to have employees conduct their own screenings at home and report the results. In-person screenings must be conducted safely using social distancing, barrier or partition controls, or by providing PPE or other face coverings to protect the screener and the individual, and the screener must be properly trained. Employees will need to be trained if they will be self-screening at home. Depending on your location, you may need to pay your employees for the time it takes them to complete the required screening, whether at home or in-person. (See FAQ 22.) You should make sure health screenings are as private as possible and maintain confidentiality of each individual's medical status and history by collecting the information on separate forms that are kept in separate confidential medical files.

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Be prepared to respond to any request for reasonable accommodation. If an employee requests an alternative method of screening due to a medical condition, you should proceed as you would for any other request for reasonable accommodation under the ADA. If the request is easy to provide and inexpensive, you might voluntarily choose to make it available to anyone who asks. Otherwise, you should engage in the interactive process with the employee, which may include requesting medical documentation in support of the request (to the extent feasible given current constraints on health care providers). Similarly, if an employee requests an alternative method of screening due to their religious beliefs or practices, you should engage in the interactive process to determine if an accommodation is available.

Lastly, health screening information likely meets the definition of personal information under the California Consumer Privacy Act. Employers who are covered by the CCPA should contact a Privacy attorney to make sure that proper notice has been provided to employees.

19. Can we ask employees if any family members have COVID-19 or symptoms associated with COVID-19? ***(Added October 22, 2020)***

No. Asking employees if any family members have COVID-19 or COVID-19 symptoms would violate the Genetic Information Nondiscrimination Act. You may, however, ask employees whether they have had any contact with anyone who has been diagnosed with COVID-19 or has COVID-19 symptoms.

20. What if an employee or visitor refuses to be screened for COVID-19 symptoms? ***(Updated October 22, 2020)***

Given the public health emergency, employers are allowed to refuse entry to an employee or visitor who refuses to comply with reasonable health screenings for COVID-19 symptoms. Consequences for refusing to participate should be communicated to employees in writing in advance of implementing a screening program. Signs should be posted at all entrances denying entry to anyone refusing to be screened. To gain the cooperation of employees, the EEOC recommends that employers ask the employee why they refuse to be screened. A non-cooperating employee may be willing to participate in the screening if you explain that the process is intended to help ensure the safety of everyone in the workplace, and that the screenings are consistent with recommendations from the CDC. Sometimes, employees are reluctant to provide medical information because they fear an employer may widely spread such personal medical information throughout the workplace. The ADA prohibits such broad disclosures. Alternatively, if an

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employee requests reasonable accommodation with respect to screening, the usual accommodation process should be followed

21. What should we do with our testing and screening records?

Information obtained from an employee's health screening (whether self-reported or administered by the employer) must be maintained as a confidential medical record, separate from the personnel files, and in compliance with all applicable federal and state privacy laws. State and local orders may also contain record retention requirements. For example, Colorado requires that employers keep the screening forms in a secure location for three months, and provide the forms upon request from public health agencies.

22. Do we have to pay non-exempt employees for the time spent completing the testing or screening?

Whether a non-exempt employee must be compensated for time spent waiting for and undergoing testing or screening will vary depending on your jurisdiction. In California, it is likely that such time is compensable based on the California Supreme Court's recent decision in *Frlekin v. Apple.* In that case, the Court determined that time spent on an employer's premises waiting for and undergoing required security exit searches constitutes compensable hours worked under the California wage orders. The Court explained that "hours worked" is defined by Wage Order 7 (the wage order applicable to Apple) as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." The Court recognized that an employee who is subject to the control of the employer need not be working in order for that time to be compensable. The Court ruled that while employees were waiting for and undergoing security checks, they were clearly under Apple's control, in that the searches were required under threat of discipline, the employees had to wait in the premises before they underwent the searches, and employees were required to follow certain procedures and tasks while undergoing the searches. Following this logic, time spent undergoing testing or screening would be similarly compensable if employees are not permitted to enter the workplace without complying. The purpose of the testing or checks is to protect the workforce (which in turn protects the employer's ability to continue to effectively operate), and employees who refuse to participate would be disciplined in that they would not be permitted to work.

It is an open question under federal law as to whether time spent undergoing testing or screening is compensable. In *Integrity Staffing Solutions, Inc. v. Busk*, the U.S. Supreme

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Court determined that time spent on post-shift security screenings was not compensable under federal law because it was not "integral and indispensable" to the principal activities that employees were employed to perform. The Court noted that "integral" means "belonging to or making up an integral whole; constituent, component; specifically necessary to the completeness or integrity of the whole; forming an intrinsic portion or element, as distinguished from an adjunct or appendage." And, when used to describe a duty, "indispensable" means "a duty that cannot be dispensed with, remitted, set aside, disregarded, or neglected." Based on these definitions, the Court reasoned that "[a]n activity is therefore integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities."

On the one hand, it could be argued that testing and symptom screenings are similar to pre-shift security searches conducted for the employee's own safety, and that they are not integral and indispensable to the productive work employees are usually employed to perform. On the other hand, testing and screening for COVID-19 is not just to protect individual employees—they also serve the purpose of protecting the entire workforce and the employer's ability to continue operating. In addition, to the extent that employees will be interacting with customers, it's reasonable to argue that the checks are integral and indispensable to the safe performance of their job duties.

While it is not clear whether time spent being tested or screened is required to be compensated under federal law, to be conservative, the best approach would be to pay employees for their time, given the possible exposure to a wage and hour claim.

23. What steps should we take if an employee fails our testing or screening protocol?

If an employee reports or is assessed as having any COVID-19 symptoms (fever or chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, or diarrhea), you should send the employee home immediately and follow public health authority guidance about isolation and returning to work. See FAQ 43 for additional guidance.

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24. Can we offer our employees a COVID-19 vaccination once one becomes available? ***(Added January 5, 2021)***

Yes. Based on guidance recently provided by the EEOC, employers may lawfully offer COVID-19 vaccinations to employees on a voluntary basis. You may not retaliate in any way against an employee who declines to voluntarily be vaccinated.

25. Can we require our employees to be vaccinated before returning to work? ***(Updated March 25, 2021)***

Not necessarily. Although the California Department of Fair Employment and Housing has issued FAQs stating that employers may require employees to receive an FDA-approved COVID-19 vaccine (subject to exceptions based on an employee's medical/disability condition or sincerely-held religious belief, as discussed below), currently, the only COVID-19 vaccines available to the public have been granted "Emergency Use Authorization" (EUA) by the FDA. As the EEOC points out in recently published guidance, individuals who receive a vaccine under EUA must be notified of, among other things, the fact that they have the option to refuse the vaccine. This suggests that employees have the right to opt out of an employer's mandatory vaccination program that relies on an EUA-approved vaccine.

Further, according to the EEOC, the medical/disability condition and sincerely-held religious belief exemptions that the EEOC recognizes for other vaccines also apply to COVID-19 vaccines. Under the ADA, an employee may be entitled to an exemption from a mandatory vaccination requirement if they have a disability that prevents them from taking the vaccine unless the employer can show that an unvaccinated employee would pose a direct threat due to a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." The EEOC states that employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. Moreover, even if an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat. For example, the employee may be able to perform (or continue performing) their current position remotely.

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Likewise, under Title VII, an employer must provide a reasonable accommodation (absent undue hardship) for the religious belief, practice, or observance. Previous EEOC guidance explains that because the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. If, however, an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.

If an employer chooses to implement a mandatory vaccination program in compliance with applicable law, we recommend that employees receive the vaccine from a third party that does not have a contract with the employer, such as a pharmacy or other health care provider. That way, the pre-screening questions (which are required before receiving the vaccine) won't implicate the ADA's provision on disability-related inquiries.

Lastly, requiring proof of vaccinations from employees could implicate privacy concerns under the state constitution and common law principles, and for certain companies under the California Consumer Privacy Act. We recommend contacting a Privacy attorney for additional guidance.

26. Do we need to pay employees for the time spent being vaccinated? ***(Added March 25, 2021)***

California employers who *require* that their California employees be vaccinated in order to return to work must pay employees for the time spent obtaining the vaccine (including travel time), even if they obtain the vaccine outside their normal work hours. The DIR issued COVID-19 FAQs specifically addressing this issue. The same is likely true in other states. For example, the Illinois Department of Labor recently issued guidance stating that if an employer requires employees to get vaccinated, time spent getting vaccinated likely must be paid, even if outside the employee's regular working hours.

In New York, *all* employees must receive up to 4 hours of paid leave per COVID-19 vaccine, whether or not the employer mandates the vaccine. This time off is in addition to any paid leave already provided by an employer. Likewise, in California, employers with 25 or more employees must allow employees to use Emergency Supplemental Paid Sick Leave if they are unable to work or telework due to attending an appointment to receive a COVID-19 vaccine, or they are experiencing symptoms related to a COVID-19 vaccine that prevent the employee from being able to work or telework.

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As discussed in response to FAQ 9 above, under the American Rescue Plan Act, beginning April 1, 2021, time spent by an employee to obtain a COVID-19 vaccine or recover from any injury, disability, illness, or condition related to receiving a COVID-19 vaccine is considered a qualifying reason for FFCRA emergency FMLA and emergency PSL. That means that covered employers (fewer than 500 employees) who voluntarily continue to provide FFCRA paid leave can claim a tax credit in accordance with the FFCRA for paid leave provided to employees to obtain, or recover from receiving, a COVID-19 vaccine.

Protecting Employees in the Workplace

27. Do we need to develop a written plan for addressing COVID-19 in the workplace? ***(Updated January5, 2021)***

Yes, in California, emergency temporary standards issued by Cal/OSHA require that employers establish, implement and maintain an "effective" COVID-19 Prevention Program ("CPP") covering most California employees.[8] The CPP can be integrated with an employer's existing Illness and Injury Prevention Program, or it can be maintained as a separate document. A list of specific information that must be included in the CCP is listed in CCR Title 8 Section 3205(c), which can be found here. Cal/OSHA has published a model CPP, which can be found here.

For employers not covered by Cal/OSHA's emergency temporary standard, most public health authorities and other governmental agencies (including the CDC and OSHA) recommend that businesses establish written preparedness and response plans to prevent and reduce transmission of COVID-19 among workers, maintain healthy business operations, and maintain a healthy work environment. The plan should be specific to your workplace, identifying areas and job tasks with potential exposures to COVID-19 and control measures to eliminate or reduce such exposures. Topics to include in a plan include:

- Infection prevention measures, including, for example, engineering and administrative controls for physical distancing in the workplace.

[8] A CCP is not required for those employees who work exclusively from home or by themselves in a place where they will not have contact with other people, and those who are protected by Cal/OSHA's Aerosol Transmissible Disease Standard.

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- Procedures for identifying and isolating sick persons in the workplace (e.g. temperature checks and health screenings), and determining if any work-related factors could have contributed to the infection.
- Procedures for identifying and isolating (if necessary) workers who had close contact (within 6 feet) for a prolonged period of time (15 minutes or more*) with a COVID-19 positive individual in the workplace. *In healthcare settings, a prolonged period of time is any exposure greater than a few minutes.
- Procedures for cleaning and disinfecting the workplace.
- Protocols for training and communicating with employees about COVID-19 prevention measures in the workplace.
- Ongoing oversight of the plan, including regularly evaluating compliance and correcting deficiencies.

Businesses should appoint a plan coordinator who is responsible for implementing the plan at each worksite.

28. Do we need to revise any other policies in light of COVID-19? ***(Updated January 5, 2021)***

Yes, you should review your existing policies to make sure that they are consistent with public health recommendations and new and existing state and federal workplace laws. Typical policies that may need revision include attendance, leaves of absence, vacation/sick/flexible time off, work schedule, meal and rest break, and telecommuting policies.

29. Should we provide any special training to our employees in connection with their return to work? ***(Updated January 5, 2021)***

Yes, training your employees about COVID-19 and how to prevent its spread in the workplace is highly recommended, and may be required in some jurisdictions. For example, in California, employers who are subject to Cal/OSHA's emergency temporary standards are required to provide effective training to employees that includes:

- The employer's COVID-19 policies and procedures to protect employees from COVID-19 hazards.
- Information regarding COVID-19-related benefits to which the employee may be entitled under applicable federal, state, or local laws.
- The fact that COVID-19 is an infectious disease that can be spread through the air when an infectious person talks or vocalizes, sneezes, coughs, or exhales; that

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COVID-19 may be transmitted when a person touches a contaminated object and then touches their eyes, nose, or mouth, although that is less common; and that an infectious person may have no symptoms.

- Methods of physical distancing of at least six feet and the importance of combining physical distancing with the wearing of face coverings.
- The fact that particles containing the virus can travel more than six feet, especially indoors, so physical distancing must be combined with other controls, including face coverings and hand hygiene, to be effective.
- The importance of frequent hand washing with soap and water for at least 20 seconds and using hand sanitizer when employees do not have immediate access to a sink or hand washing facility, and that hand sanitizer does not work if the hands are soiled.
- Proper use of face coverings and the fact that face coverings are not respiratory protective equipment.
- COVID-19 symptoms and the importance of not coming to work and obtaining a COVID-19 test if the employee has COVID-19 symptoms.

30. Should we provide any special training to our supervisors and managers*?*

Yes, in addition to providing the training given to all employees, your supervisors and managers should also be trained on procedures they need to take to implement any new policies and protocols in response to the pandemic and how to respond to employee concerns. Remind supervisors and managers that employees must not being retaliated against or treated unfairly for raising concerns and complaints.

31. Should employees be required to wear PPE in the workplace?

According to OSHA, unless your employees work in jobs that are classified as having a very high, high, or, in some cases, medium risk of exposure to COVID-19, the use of PPE (e.g. gloves, gown, face shield or goggles, and either a face mask or respirator) is not necessary, and indeed generally not recommended given the continuing shortage of PPE. Very high-risk jobs are those with a high potential for exposure to known or suspected sources of COVID-19 during medical, postmortem or laboratory procedures, such as healthcare workers collecting or handling specimens from known or suspected COVID-19 patients. High risk exposure jobs are those with high potential for exposure to known or suspected sources of COVID-19, such as healthcare delivery and support staff exposed to known or suspected COVID-19 patients. Medium exposure risk jobs include those that require frequent and/or close contact with (i.e. within 6 feet of) people may be

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infected with COVID-19, such as high-population-density work environments and some high-volume retail settings.

32. Should employees be required to wear cloth face coverings in the workplace? ***(Updated January 5, 2021)***

This will depend on the location and configuration of your workplace. Some states and local jurisdictions require or recommend cloth face coverings, especially when employees are in close proximity of others. For example, under Cal/OSHA's emergency temporary standards, employers must provide face coverings and ensure they are worn by employees over the nose and mouth when indoors, when outdoors and less than six feet away from another person, and where required by orders from the CDPH or local health department, except in the following circumstances:

- When an employee is alone in a room.
- When an employee is eating and drinking at the workplace, provided employees are at least six feet apart and outside air supply to the area, if indoors, has been maximized to the extent possible.
- If an employee is wearing respiratory protection in accordance with applicable regulations.
- If an employee cannot wear a face covering due to a medical or mental health condition or disability, or if an employee is hearing-impaired or communicating with a hearing-impaired person.
- When specific tasks which cannot feasibly be performed with a face covering. This exception is limited to the time period in which such tasks are actually being performed, and the unmasked employee shall be at least six feet away from all other persons unless unmasked employees are tested at least twice weekly for COVID-19.

Employees exempted from wearing face coverings due to a medical condition, mental health condition, or disability must wear an effective non-restrictive alternative, such as a face shield with a drape on the bottom, if their condition or disability permits it. If their condition or disability does not permit an effective non-restrictive alternative, the employee must be at least six feet apart from all other persons unless they are tested at least twice weekly for COVID-19.

Many local jurisdictions, including Los Angeles, San Francisco, San Diego, and other states, including New York, and New Jersey, also currently require cloth face coverings for some or all employees in the workplace.

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Note that the EEOC and the California DFEH have published guidance stating that employers may require employees to wear protective gear, such as cloth face coverings. However, an employee with a disability may require a reasonable accommodation under the ADA (e.g., modified face coverings for interpreters or others who communicate with an employee who uses lip reading), or a religious accommodation under Title VII (such as modified equipment due to religious dress). If employees will be required to wear face coverings in the workplace, you should discuss any request for a reasonable accommodation with your employee, and provide the modification or an alternative, unless it would result in an undue hardship on your business.

33. Do we need to pay for cloth face coverings for our employees? ***(Updated June 22, 2020)***

This will depend on the location of your workplace. Some jurisdictions that require employees to wear face coverings in the workplace also specifically require that employers provide/pay for those coverings, including Los Angeles, San Francisco, New York, and New Jersey.

Even without a specific order requiring employers to pay for face coverings, some employers may be required to pay for cloth face coverings under existing state law. Employers should review applicable wage and hour and workplace safety regulations in their location to determine if they are obligated to pay for face coverings and other items recommended for COVID-19 protection. For example, California employers will need to provide required face coverings to employees at no cost under California law. California law requires that employers provide and pay for safety devices and safeguards that are reasonably adequate to render the employment and place of employment safe. Additionally, California employers are required to reimburse employees for all "necessary expenditures or losses" incurred in discharging their duties.

Depending on local requirements and any applicable safety rules, employers may be able to permit employees to use their own personal face coverings as an alternative to wearing the coverings provided by the employer. If a California employer makes face coverings available at no cost to the employee, it likely would not be required to cover the cost of a personal face covering voluntarily used by the employee.

At the federal level, OSHA and the DOL have not provided guidance whether employers must provide and/or pay for face coverings. However, employers have a general duty under the Occupational Safety and Health Act to keep employees safe from "recognized hazards that are causing or likely to cause death or serious physical harm."

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34. Do we need to train our employees on how to use a cloth face covering? ***(Updated January 5, 2021)***

California employers who are covered by Cal/OSHA's emergency temporary standards are required to provide training to employees on the proper use of face coverings. Other employers that will be requiring or recommending the use of face coverings in the workplace, should provide training to their employees on the use, benefits, and limitations of face coverings, including:

- How to properly fit and wear a face covering.
- That face coverings do not protect the wearer and are not personal protective equipment (PPE).
- That face coverings can help protect people near the wearer, but do not replace the need for physical distancing and frequent handwashing.
- Information about washing or sanitizing hands before and after using or adjusting face coverings, and the importance of avoiding touching your eyes, nose, and mouth.
- That face coverings should be washed after each shift.
- That face coverings should not be shared.

The CDC has published several posters that businesses can post in their workplaces with important information about cloth face coverings, including how to safely wear and take them off.

35. What hygiene supplies do we need to make available to employees to reduce the risk of COVID-19 transmission in the workplace?

You should make sure employees have access to soap, water and tissues, as well as no-touch disposal receptacles. If soap and water are not readily available, alcohol-based hand sanitizer that is at least 60% ethanol or 70% isopropanol should be provided. You should also consider whether disposable gloves may be helpful to supplement frequent handwashing or use of hand sanitizer in certain areas of the workplace, such as for workers who are screening others for symptoms or handling commonly touched items. Also, the CDC recommends that employers place posters in appropriate locations throughout the workplace to encourage hand hygiene to help stop the spread of the virus.

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36. Do we need to reconfigure our workspace or otherwise modify our workplace? ***(Updated January 5, 2021)***

Yes, if reconfiguration or modification is necessary to maintain physical distancing in the workplace. Public health authorities agree that physical distancing (i.e., limiting close contact with people outside one's household) is the best way to reduce the spread of COVID-19. This will likely require physical modifications to most workplaces, such as:

- The use of physical partitions or visual cues (e.g., floor markings, colored tape or signs to indicate to where employees should stand or walk).
- Redesigned workspaces, cubicles, etc. and decreased capacity for conferences and meetings to ensure workspaces allow for six feet between employees.
- Closed or restricted common areas, using barriers, or increasing physical distance between tables/chairs where personnel are likely to congregate and interact, such as kitchenettes and break rooms, and discouraging employees from congregating in high traffic areas such as bathrooms, hallways, and stairwells.
- Establishing directional hallways and passageways for foot traffic, if possible, to eliminate employees from passing by one another.
- Designating separate routes for entry and exit into office spaces to help maintain physical distancing and lessen the instances of people closely passing each other.
- Installing production transfer-aiding materials, such as shelving and bulletin boards, to reduce person-to-person production hand-off.
- Moving storage to areas with multiple access points to avoid employees passing each other and/or setting up multiple individual storage areas.
- Improving ventilation in the building.

Businesses should determine how to best accomplish physical distancing in their specific workspaces, taking into account any federal, state or local requirements and recommendations. California employers should consult Cal/OSHA's emergency temporary standards for additional guidance.

37. In addition to physical modifications to our workplace, are there other steps we can take to comply with physical distancing requirements and recommendations?

Yes, whenever feasible, employers should consider any or all of the following measures to improve physical distancing in the workplace:

- Limiting the number of employees at the office at one time through modified work schedules (e.g. staggering start/end times), establishing alternating days for

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onsite reporting, returning to the office workspace in phases, and/or continuing telework whenever possible.

- Placing limitations on the number of workers in enclosed areas to ensure at least six feet of separation.
- Staggering employee breaks, within compliance with wage and hour regulations
- Limiting the number of individuals riding in an elevator.
- Discontinuing nonessential travel and encouraging distance meetings via phone and internet.
- Requiring employees to avoid handshakes and similar greetings that break physical distance.
- Placing limits on the number of customers allowed on-site at a time, with additional customers queuing outside while maintaining physical distancing.
- For employees who commute to work using public transportation or ride sharing, offer employees incentives to use forms of transportation that minimize close contact with others, such as reimbursement for parking for commuting to work alone or single-occupancy rides; or allow employees to shift their work hours so they can commute during less busy times. Ask employees to wash their hands as soon as possible after their commute.

38. We serve lunch to our employees through a buffet-style catering service. Do we need to make any changes to that practice?

Yes, you will likely need to adjust in-office catering and meal service, and you may want to consider suspending catering entirely during the pandemic. According to the CDC, it may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their mouth, nose, or possibly eyes, although this is not thought to be the main way the virus spreads. (The virus mainly spreads from person to person.) The American Industrial Hygiene Association recommends that employers stop providing communal meals to employees and making food available in common areas where employees may congregate. And the FDA recommends discontinuing self-service buffets and salad bars in communities with sustained transmission of COVID-19.

If you do continue to provide food service, you should switch to individual sealed containers for each employee. In addition, you should ensure frequent washing and sanitizing of all food contact surfaces and utensils and proper hand hygiene by all food-service workers. You should also make any necessary modifications to your lunchrooms and other break areas to comply with physical distancing requirements, including using barriers, or increasing physical distance between tables/chairs where employees are likely to congregate.

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39. Can we hold in-person meetings?

Most public health authorities recommend that businesses discontinue or limit in-person meetings. The CDC recommends using videoconferencing or teleconferencing when possible, or postponing non-essential meetings and events. If videoconferencing or teleconferencing is not possible, you should hold meetings in open, well-ventilated spaces, maintain physical distancing, and have employees wear cloth face coverings.

40. What types of delivery/visitor protocols should we develop?

You should establish protocols that keep delivery personnel and visitors distanced from your employees, to the extent possible. Consider establishing a separate defined space for messengers, food delivery and other visitors, with visual cues to ensure physical distancing (e.g. floor markings or signs to indicate where visitors should stand). If possible, designate separate routes for entry and exit to help maintain physical distancing and lessen the instances of people closely passing each other. Other recommended protocols including providing hand sanitizer at entrances, encouraging or requiring the use of gloves and face coverings, and conducting health checks (e.g. temperature and respiratory symptom screening) before delivery personnel and visitors enter the premises.

41. What steps do we need to take to clean and disinfect the workplace?

The CDC has issued the following guidelines for cleaning and disinfecting workplaces:

- Develop a plan. Address the type of cleaning and/or disinfection needed in each area of the workplace and the resources and equipment that will be needed.
  - For outdoor spaces, maintain existing cleaning practices.
  - For indoor spaces:
    - Maintain routine cleaning of areas that have not been occupied within the last 7 days.
    - Thoroughly clean all areas that have been occupied within the last 7 days and disinfect frequently touched surfaces and objects (e.g. tables, doorknobs, light switches, countertops, handles, desks, phones, keyboards, toilets, faucets, sinks and touch screens), and set a schedule for routine cleaning and disinfection, as appropriate.
- Implement the plan.
    - Clean visibly dirty surfaces with soap and water prior to disinfection.
    - Properly disinfect areas using products that meet the EPA's criteria for use against COVID-19 and are appropriate for the surface. Gloves and

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gowns appropriate for the chemicals being used must be worn when cleaning and disinfecting. Consult and follow the manufacturer's instructions for use.

- Maintain and revise the plan.
  - Continue routine cleaning and disinfection and revise plan based on appropriate disinfectant and PPE availability.
  - Maintain safe practices, such as frequent handwashing, using cloth face coverings, and encouraging workers to stay home if sick.
  - Continue practices that reduce the potential for exposure, including physical distancing and reducing the sharing of common spaces and frequently touched objects.
  - Routinely clean and disinfect all frequently touched surfaces in the workplace, such as workstations, keyboards, telephones, handrails, and doorknobs.
- Discourage workers from using other workers' phones, desks, offices, or other work tools and equipment, when possible. If necessary, clean and disinfect them before and after use.
- Provide disposable wipes so that commonly used surfaces (e.g., doorknobs, keyboards, remote controls, desks, other work tools and equipment) can be wiped down by employees before each use.

Consider any additional cleaning and disinfecting protocols recommended by your state or local public health authorities. California has issued industry-specific guidance documents, each of which include specific cleaning and disinfecting protocols. Although the protocols are only guidelines, we recommend that businesses follow all applicable protocols, to the extent possible.

Responding to COVID-19 in the Workplace

42. What steps should we take if an employee is suspected or confirmed to have COVID-19? ***(Updated March 25, 2021)***

If an employee or other worker notifies you (or you otherwise learn) that they have tested positive for, or been diagnosed with, COVID-19, you should take the following steps:

- Determine, to the extent possible, when the affected individual tested positive or was diagnosed with COVID-19 and when they first started having COVID-19 symptoms (if any).
- Determine when the affected individual was last present in the workplace.

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- Determine which employees (including subcontracted employees) were at the same worksite as the affected individual during the infectious period (i.e. 48-hour period before the affected individual developed COVID-19 symptoms or tested positive). This will require evaluating the activities performed and the locations visited by the affected individual during the infectious period.
- Notify those employees of their potential exposure to COVID-19. Be sure to maintain the affected individual's confidentiality. Do not identify them by name, gender or other descriptor**.**
- Determine which employees should quarantine at home as a result of the COVID-19 exposure. The CDC generally recommends (and Cal/OSHA's emergency temporary standards require) that workers quarantine if they were within 6 feet of the affected individual for a cumulative total of at least 15 minutes over a 24-hour period starting from 2 days before the onset of the illness (or, for asymptomatic individuals, 2 days before testing positive) until the time the affected individual began self-isolation.[9]
- Conduct additional cleaning and disinfecting in accordance with CDC and state/local public health guidance. See FAQ 48.

In accordance with AB 685, all California employers (except certain health facilities) must notify employees of their potential exposure to COVID-19 within one business day of learning of the exposure. The notice must be provided in both English and the language understood by the majority of the employees and must be given in the manner the employer normally uses to communicate employment-related information (e.g. personal service, email, or text message if it can reasonably be anticipated to be received by the employee within one business day of sending). The notice must also be given to the employees' authorized representative (if applicable) and the employers of any subcontracted employees. The notice does not have to be given to employees located in separate buildings, floors, or other work locations that the affected individual did not enter during the infectious period. The notice must include information regarding COVID-19-related benefits to which the employee may be entitled under applicable federal, state, or local laws, including, but not limited to, workers' compensation, COVID-19-related leave, employer-provided sick leave, state-mandated leave,

[9] California employers that are subject to Cal/OSHA's emergency temporary standards must maintain an employee's earnings, seniority, and all other employee rights and benefits, including the right to reinstatement, unless the employer can demonstrate that the COVID-19 exposure necessitating the employee's exclusion from the workplace was not work related or if the employee is unable to work for reasons other than protecting the workplace from possible COVID-19 transmission. In maintaining the employee's pay, the employer may use employer-provided employee sick leave benefits and consider benefit payment from public sources.

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supplemental sick leave, or negotiated leave provisions, as well as anti-retaliation and anti-discrimination protections of the employee. Please see FAQs 9 and 11 above, which discuss the new California supplemental paid sick leave requirements and the American Rescue Plan Act's voluntary continuation of emergency PSL and FMLA (and accompanying tax credits).

The notice must also include information regarding the disinfection and safety plan that the employer plans to implement and complete in response to the workplace exposure in accordance with CDC guidelines. If applicable, California employers must also provide the exclusive representative of the employees the same information as would be required in an incident report in a Cal/OSHA Form 300 injury and illness log, unless the information is inapplicable or unknown to the employer. This requirement applies regardless of whether the employer is required to maintain a Cal/OSHA Form 300 injury and illness log.

43. When can an employee return to work after isolating due to COVID-19? ***(Updated January 5, 2021)***

According to CDC guidance and Cal/OSHA's emergency temporary standards, if an employee has had COVID-19 symptoms, they may discontinue home isolation and return to work under the following conditions:

- At least 10 days have passed since the individual's symptoms began (although the CDC has stated that some individuals with severe illness may warrant home isolation for up to 20 days after their symptoms developed);
- The individual has been fever-free (without the use of medicine that reduces fevers) for at least 24 hours; and
- Other symptoms have improved.

If an employee tested positive for COVID-19, but never developed COVID-19 symptoms, the employee may discontinue home isolation 10 days after their positive test.

The CDC has stated that a longer timeframe for returning to work may be desired for healthcare personnel and persons who have conditions that might weaken their immune system which could prolong viral shedding after recovery. In addition, for persons who are severely immunocompromised, discontinuation of home isolation may be conditioned by the employee's doctor on two negative COVID-19 test results taken at least 24 hours apart.

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The guidelines for returning to work are different for employees who had close contact with a person with COVID-19. See FAQ 44.

44. When can an employee return to work after quarantining due to a COVID-19 exposure? ***(Added January 4, 2021)***

CDC and California guidelines specify that individuals may discontinue quarantine after 10 days from the last date of exposure, as long as they remain asymptomatic and as long as they continue to wear a surgical face mask at all times during work through 14 days from the last date of exposure. Note, however, that local health orders may require longer quarantine periods.

The CDC guidelines permit critical infrastructure worker (e.g. janitorial staff and other custodial staff and workers in food and agriculture, critical manufacturing, informational technology, transportation and energy facilities) to continue working, provided they remain asymptomatic and the following additional CDC-recommended precautions are practiced prior to and during their work shift; however, California employers that are subject to Cal/OSHA's emergency temporary standards must exclude all employees with a COVID-19 exposure from the workplace, regardless of whether they are a critical infrastructure worker.

45. Do we need to take any additional steps if there is more than one COVID-19 case in the workplace? ***(Added January 5, 2021)***

If a California employer (or the employer's representative) (except certain health care facilities) is notified of a COVID-19 "outbreak" in the workplace (as defined by the California Department of Public Health), the employer must, within 48 hours, notify the local public health agency in the jurisdiction of the worksite of the names, number, occupation, and worksite of employees who have tested positive for or been diagnosed with COVID-19, have been ordered by a public health official to isolate due to COVID-19, or have died due to COVID-19. The employer must also report the business address and NAICS code of the worksite where the particular employees work. Any further laboratory-confirmed cases during the outbreak must also be reported to the local health department. In guidance issued to local health departments in October, the CDPH defined an outbreak in the workplace as at least 3 probable or confirmed COVID-19 cases within a 14-day period, although a higher number (or proportional number, such as 5% or 10%) could be used for workplaces with 100 or more people.

California employers that are subject to Cal/OSHA's emergency temporary standards must take the following additional actions if there is an outbreak (defined as 3 or more

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COVID-19 cases in an exposed workplace within a 14-day period) or a major outbreak (defined as 20 or more COVID-19 cases in an exposed workplace within a 30-day period) in the workplace.

- Provide the local health department with the contact information, workplace business address and hospitalization and/or fatality status for each COVID-19 case, and any other information requested by the local health department.
- Investigate, review and correct any policies, procedures or controls to prevent the further spread of COVID-19. If there is a major outbreak, the employer must also meet certain air filtration standards, consider the need for a (or change an existing) respiratory protection program, and evaluate whether to halt some or all operations.
- Provide COVID-19 testing. If there is an outbreak, the employer must immediately provide COVID-19 testing to all employees at the exposed workplace (unless they were not present in the workplace during the relevant 14-day period), and employees must be retested weekly thereafter until there are no new COVID-19 cases detected in the workplace for a 14-day period. If there is a major outbreak, the employer must provide COVID-19 testing twice a week (or more frequently if recommended by the local health department) to all employees present at the exposed workplace during the relevant 30-day period and who remain in the workplace.

46. Can we require an employee who has notified us that they have been exposed to COVID-19 outside the workplace to stay home? ***(Updated March 25, 2021)***

Yes, according to DOL guidance, "A company may require any employee who knows he has interacted with a COVID-infected person to telework or take leave until he has personally tested negative for COVID-19 infection." Moreover, California employers are required to exclude from the workplace all employees who were within 6 feet of a COVID-19 case for a cumulative total of at least 15 minutes over a 24-hour period starting from 2 days before the onset of the COVID-19 case's illness (or, for asymptomatic individuals, 2 days before testing positive).

Note: According to CDC guidance, fully vaccinated employees do not have to quarantine or test following a known COVID-19 exposure, as long as they remain asymptomatic. However, for California employers covered by the Cal/OSHA emergency temporary standards, all prevention measures, including excluding employees from the workplace

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following a COVID-19 exposure, must be continued at this time, even if an employee has been fully vaccinated. Relevant DIR FAQs can be found here.

California employees who are required to quarantine due to a COVID-19 exposure *outside* the workplace are not entitled to paid leave under the Cal/OSHA emergency temporary standards. However, they may be eligible for California supplemental paid sick leave and/or emergency PSL and/or FMLA under the American Rescue Plan Act (if you are a covered employer and have chosen to continue providing such leave). Please see FAQs 9 and 11 above, which discuss the new California supplemental paid sick leave requirements and the American Rescue Plan Act's voluntary continuation of emergency PSL and FMLA (and accompanying tax credits).

47. Can I require my employee to provide a doctor's note or positive COVID-19 test result?

No. The CDC advises employers not to require sick employees to provide a doctor's note or positive COVID-19 test result to validate their illness, qualify for sick leave or return to work since healthcare provider officers and medical facilities may be extremely busy and not be able to provide such documentation in a timely manner. Employees who request emergency paid sick leave under the Families First Coronavirus Response Act because they have been advised by a health care provider to self-quarantine due to concerns related to COVID-19 can be asked to specify the name of their health care provider when requesting leave. For a proposed COVID-19 Leave Request form, please see our post on our website.

48. Do I need to perform any additional cleaning and disinfection if an employee is suspected or confirmed to have COVID-19? ***(Updated October 22, 2020)***

Yes, if it has been less than 7 days since the employee was last present in the workplace. The CDC recommends that employers take the following steps if an employee becomes sick and it has been less than 7 days since the employee was last present in the workplace:

- Close off areas used by the person who is sick. You do not need to close all operations if you can close off any affected areas.
- Open outside doors and windows to increase air circulation in the area.
- Wait 24 hours before cleaning and disinfecting. If 24 hours is not feasible, wait as long as possible.
- Clean and disinfect all areas used by the person who is sick, such as offices, bathrooms, common areas, shared electronic equipment like tablets, touch

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screens, keyboards, remote controls, and ATM machines. For California employers, Cal/OSHA recommends that this additional cleaning be performed by a professional cleaning service.

- Clean dirty surfaces with soap and water before disinfecting them. To properly disinfect areas, use products that meet the EPA's criteria for use against COVID-19 and are appropriate for the surface. Gloves and gowns appropriate for the chemicals being used must be worn when cleaning and disinfecting. Consult and follow the manufacturer's instructions for use.
- For soft surfaces such as carpeted floor, rugs, and drapes, clean the surface using soap and water or with cleaners appropriate for use on these surfaces. Launder items (if possible) according to the manufacturer's instructions. Use the warmest appropriate water setting and dry items completely, or disinfect with an EPA-registered household disinfectant. Vacuum as usual. Use a vacuum equipped with high-efficiency particular air (HEPA) filter, if available. Do not vacuum a room or space that has people in it. Temporarily turn off in-room, window-mounted, or on-wall recirculation HVAC to avoid contamination of HVAC units. Consider temporarily turning off room fans and the central HVAC system that services the room or space, so that particles that escape from vacuuming will not circulate throughout the facility. Once the area has been appropriately disinfected, it can be opened for use.

If it has been 7 days or more since the sick employee used the facility, additional cleaning and disinfection is not necessary. Continue routine cleaning and disinfecting.

49. Is my workers' compensation insurance affected if an employee becomes sick with COVID-19? *(Updated October 22, 2020)*

Several states have taken action to amend their workers' compensation laws so that certain COVID-19 infections are presumed to be work-related and covered under workers' compensation. For the most part, these actions have been limited to health care workers and first responders, although some states have also included grocery store employees.

However, under a new California law (SB 1159), a rebuttable presumption will exist that an illness or death resulting from COVID-19 arose out of and in the course of employment if:

- The employee tests positive for COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment (not including the employee's residence) at the employer's direction.

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- The day on which the employee performed labor or services at the employee's place of employment at the employer's direction was on or after July 6, 2020.[10] This must be the last date the employee performed labor or services at the employee's place of employment at the employer's direction before the positive test.
- The employee's positive test occurred during a period of an "outbreak" at the employee's specific place of employment.

An "outbreak" exists for purposes of SB 1159 if within 14 calendar days one of the following occurs at a specific place of employment:

- If the employer has 100 employees or fewer at a specific place of employment, four employees test positive for COVID-19; or
- If the employer has more than 100 employees at a specific place of employment, four percent of the employees who reported to the specific place of employment test positive for COVID-19.

The presumption may be controverted by other evidence, which may include (without limitation) evidence of measures in place to reduce potential transmission of COVID-19 in the workplace and evidence of an employee's non-occupational risks of COVID-19 infection.

Further, California employers are required to report the following information to their workers' compensation claims administrator in writing (by email or fax) within 3 business days of when they know or reasonably should know that an employee has tested positive for COVID-19:

- The fact that an employee has tested positive. (Do not provide any personally identifiable information regarding the employee unless the employee asserts the infection is work related or has filed a claim.)
- The date the employee tested positive (i.e., the date the specimen was collected for testing).
- The specific address(es) of the employee's place of employment during the 14-day period preceding the date of the positive test.
- The highest number of employees who reported to work at the employee's specific place(s) of employment in the 45-day period preceding the last day the employee worked at each specific place of employment.

[10]There was a similar rebuttable presumption existed for illnesses or death resulting from COVID-19 between March 19, 2020 and July 5, 2020 under Executive Order N-62-20, which was issued by Governor Newsom in May, but has since expired.

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California employers have until October 17, 2020 to report the above information to their claims administrator if they had any positive tests between July 6, 2020 and September 17, 2020.

The presumption in favor of workers' compensation coverage in California could increase the possibility that an employer could face a claim (and potential liability) for "serious and willful" misconduct under California Labor Code section 4553. To prevail on such a claim, an infected employee would have to prove that the employer knew of the dangerous condition, knew that the probable consequences of continuing to allow the dangerous condition would involve serious injury to an employee, and deliberately failed to take corrective action. Section 4553 allows a workers' compensation claim to be increased as a penalty by one-half of every benefit or payment provided to the applicant under workers' compensation, including medical treatment payments, medical-legal fees, vocational rehabilitation costs, and all indemnity benefit payments, plus up to $250 in costs and expenses. The serious and willful penalty must be paid directly by the employer to the employee; it is not covered by the insurance company, and employers may not purchase insurance to cover serious and willful misconduct. Thus, if an employee believes the employer intentionally failed to observe and enforce CDC, OSHA, or Cal/OSHA guidelines or is showing a reckless disregard of safety guidelines, they could seek workers' compensation penalties under Section 4553.

50. If an employee becomes infected with COVID-19, do I have to record the case on my OSHA Form 300? ***(Updated October 22, 2020)***

Perhaps, depending on the circumstances. According to OSHA guidance, a COVID-19 case must be recorded on the employer's Form 300 (Log of Work-Related Injuries and Illnesses) if:

- The case is a confirmed case of COVID-19;
- The case is "work-related," which means an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness; and
- The case involves death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness, or the case involves a significant injury or illness diagnosed by a physician or other licensed health care professional, even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness.

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Given the spread of the pandemic, employers may find it difficult to determine whether a positive COVID-19 case in the workplace is "work related." OSHA has stated that employers must make "reasonable efforts," based on the evidence available to them, to ascertain whether a particular case of COVID-19 is work-related for purposes of completing Form 300 listing injuries and illnesses. Employers, especially small employers, are not expected to undertake extensive medical inquiries. It is sufficient, according to OSHA, if an employer takes the following steps when it learns of an employee COVID-19 illness: (1) asking the employee how they believe they contracted COVID-19; (2) discussing with the employee his work and out-of-work activities that may have led to contracting COVID-19, while respecting the employee's privacy; and (3) reviewing the employee's work environment for potential COVID-19 exposure. Employers with 10 or fewer employees and employers in certain low-hazard industries remain partially exempt from OSHA's recording and reporting requirements. Those employers only have to report work-related illnesses (including COVID-19 cases) that result in a fatality, in-patient hospitalization, amputation or loss of an eye. A list of low-hazard industries can be found here.

California employers should be aware that Cal/OSHA has issued FAQs addressing recording requirements for COVID-19 cases that differ from the OSHA guidance in several respects. For example, according to Cal/OSHA, a positive COVID-19 test is not necessary to trigger recording requirements in California. Rather, if a test is not taken, or the employer does not have access to the test results, the employer must still record the case if it meets any one of the general recording criteria (e.g. death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness, or significant injury or illness diagnosed by a physician or other licensed health care professional).

51. If an employee becomes sick with COVID-19, do I need to report the information to any governmental authority? ***(Updated January 5, 2021)***

Federal and state OSHA laws require that employers report "work-related" incidents (including COVID-19 cases) that result in a death, in-patient hospitalization for other than medical observation or diagnostic testing, amputation, or loss of an eye. A work-related fatality must be reported within 8 hours, and any work-related amputation, loss of an eye, or hospitalization of a worker must be reported within 24 hours.

Cal/OSHA has published FAQs to help California employers determine when COVID-19 cases must be reported. As an initial matter, employers must report any death or in-patient hospitalization resulting from COVID-19 if the employee became sick at work; it

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does not matter if the illness is work-related. If, however, an employee becomes sick outside of work, the employer must report any death or in-patient hospitalization if there is cause to believe it may be work-related; if there is any uncertainty about whether an employee contracted COVID-19 at work, employers are instructed to report the case. Moreover, a COVID-19 case will be presumed work-related (and must be reported) if it resulted from events or exposures occurring in the work environment, including for example, interaction with someone known to be infected with COVID-19; working in the same area where someone known to have been carrying COVID-19 has been; sharing tools, materials or vehicles with someone known to have been carrying COVID-19. If there is not a known exposure that would trigger the presumption of work-relatedness, the employer must evaluate the employee's work duties and environment to determine the likelihood that the employee was exposed during the course of their employment. Factors to consider include:

- Multiple cases in the workplace.
- The type, extent and duration of contact the employee had at the work environment with other people, particularly the general public.
- Physical distancing and other controls that impact the likelihood of work-related exposure.
- Whether the employee had work-related contact with anyone who exhibited signs and symptoms of COVID-19.

FAQ 45 addresses additional reporting requirements when there is a COVID-19 outbreak in the workplace.

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