



MEDINA MCKELVEY <sup>LLP</sup>

# TOP FIVE WAYS

TO PROTECT YOUR BUSINESS AND  
EMPLOYEES DURING AND AFTER COVID-19

Good companies are asking us how to keep their business and employees safe in the midst of COVID-19, but great companies are asking how to protect their business and employees, not just now, but in the future. With so many resources and legal updates floating around, we wanted to provide employers with the top five most impactful ways to safeguard your business and take care of employees during and after the pandemic.

Like our Cascade of Options for Businesses Navigating Downturns ([HTTPS://MEDINAMCKELVEY.COM/HANDLING-DOWNTURNS/](https://medinamckelvey.com/handling-downturns/)), we are providing a practical overview of the best practices that matter most at a time like this. In this overview, we outline the issues, provide some brief analysis, and point you to some helpful resources.<sup>1</sup> Some of these issues are fluid and changing rapidly, and this resource is not designed to capture every change in the law as it happens. Given this as well as the potential complexities involved for your business, you may need to consult with additional advisors, including experienced employment counsel, on some of these issues. Nevertheless, there are plenty of practical tools here for you to use to immediately help your business and team survive today and thrive tomorrow.

<sup>1</sup>All materials have been prepared for general information purposes to permit you to learn more about issues related to the impact of the COVID-19 pandemic. The information presented is not legal advice, is not to be acted on as such, may not be current and is subject to change without notice. We are providing this information to help keep you informed, and before you take action you should consult your financial, tax, legal, and businesses advisors, as well as your own judgment and common sense.

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## UNDERSTAND AND USE EXPANDED PAID SICK AND FAMILY LEAVE LAWS TO GET THROUGH THE NEXT FEW MONTHS

### A. BASICS

The federal Families First Coronavirus Response Act (FFCRA) went into effect on April 1, requiring all employers with 500 or fewer employees to provide additional paid sick leave and family leave for various COVID-related reasons. Until recently, larger employers could essentially ignore this law. But new state law as well as many local ordinances impose paid sick leave requirements on many businesses with **over 500 employees**.

### B. DETAILS

Governor Newsom signed an executive order on April 16, 2020 mandating that businesses with over 500 employees in the food sector (including food manufacturers and companies that deliver food) have new paid sick leave requirements for all food sector workers, as well as new hand washing requirements (allowing hand washing breaks every 30 minutes). These new requirements are presently in place, and affected business must notify employees of their rights with a forthcoming notice to be provided by the California Labor Commissioner. In addition, several California cities have enacted local ordinances that largely mirror the FFCRA and impose paid sick leave obligations on employers with **more than 500 employees** who perform work in these cities, such that many California employers, large or small, likely have some obligation to provide additional paid sick leave. Because these laws were enacted so quickly, many ambiguities exist. Legislators, regulators, and experts in the field are scrambling to clear these ambiguities and to anticipate and answer the myriad questions relating to mandatory leave related to COVID-19. The U.S. Department of Labor issued regulations that address many of the unanswered questions and also continues to update its FAQs to address more of those questions.

But questions remain and every day seems to bring with it new and unanticipated consequences and conundrums in contemplating how the new leave laws work in conjunction with other new COVID-related laws and pre-existing employment laws and regulations. The best practice is to consult with an experienced employment attorney who is current with federal, state, and local leave laws, both new and old, as well as to stay current on government and regulatory guidance.

#### **C. CAUTION**

As of April 17, 2020, five cities have enacted expanded paid sick leave ordinances for employers over 500 employees: Los Angeles, San Diego, San Francisco, San Jose, and Emeryville, and the new Executive Order applies to businesses with over 500 employees in the food sector only. Even if your business has over 500 employees and doesn't have to provide expanded leave under the FFCRA, and even if you don't have employees who perform work in these cities or are not in the food sector, you still must be careful, as other cities may soon enact similar ordinances. It can be very difficult to track the ordinances of the many cities in California and to try to comply with them piecemeal, because each ordinance has different requirements. Some large employers are therefore contemplating temporary expansion of their leave policies to match the requirements under the FFCRA for all employees in all locations in California to avoid this piecemeal approach. We believe this is a best practice and also a great example of businesses rising to the occasion to provide for employees in ways that may not technically be required in all jurisdictions, but that nonetheless provide support in challenging times.

#### **D. RESOURCES**

These are new laws and the best resources for information regarding sick leave, PTO, and leave usage are currently available from state and federal labor agency websites as listed below.

Federal:

- I. [HTTPS://WWW.DOL.GOV/AGENCIES/WHD/PANDEMIC/FFCRA-QUESTIONS](https://www.dol.gov/agencies/whd/pandemic/ffcr-questions)

California:

- II. [HTTPS://WWW.DIR.CA.GOV/DLSE/PAID\\_SICK\\_LEAVE.HTM/](https://www.dir.ca.gov/dlse/paid_sick_leave.htm/)
- III. [HTTPS://WWW.DIR.CA.GOV/DLSE/FAQ\\_VACATION.HTM](https://www.dir.ca.gov/dlse/faq_vacation.htm)
- IV. [HTTPS://WWW.GOV.CA.GOV/WP-CONTENT/UPLOADS/2020/04/4.16.20-EO-N-51-20.PDF](https://www.gov.ca.gov/wp-content/uploads/2020/04/4.16.20-EO-N-51-20.pdf)

Local:

- V. [HTTPS://ADVOCACY.CALCHAMBER.COM/CORONAVIRUS-COVID-19/](https://advocacy.calchamber.com/coronavirus-covid-19/)

Links to All California County Covid-19 Pages:

- VI. [HTTPS://ONWARDCA.ORG/RESOURCES/?STATE=CA&LANG=EN](https://onwardca.org/resources/?state=ca&lang=en)



## **PERFORM DAILY HEALTH SCREENINGS TO PROTECT YOUR EMPLOYEES, YOUR BUSINESS, AND THE COMMUNITY**

#### **A. BASICS**

At least one county, Fresno County, now requires all businesses to screen employees daily for COVID-related symptoms and to send employees home if they have such symptoms. Other counties may soon be enacting such requirements.

Even without county ordinances, however, many employers are asking whether they should nonetheless conduct daily screenings as a precautionary measure to protect their workforce and slow the spread of the virus. Where possible, this is a best practice (at present in the midst of shelter in place orders) to protect your employees, your business, and the community.

#### **B. DETAILS**

While Fresno County's daily screening ordinance has specific requirements, the extent to which employers should screen their employees depends on a variety of factors, including: (1) the county they are in and any relevant ordinances or guidelines; (2) the type of business; (3) the work environment; and (4) the number and location of employees and related testing logistics. Although Fresno County provides a sample written questionnaire (which can be found at [HTTPS://WWW.CO.FRESNO.CA.US/HOME/SHOWDOCUMENT?ID=44809](https://www.co.fresno.ca.us/home/showdocument?id=44809)), the Fresno County ordinance does not require a written screening form or for anyone to actually submit a form. Our interpretation of the ordinance is that employers in Fresno County have discretion as to how they obtain this information and in how they ask the questions provided in the resource guide below.

#### **C. CAUTION**

There are several reasons employers (particularly those with operations across the state) may want to consider doing wellness checks as a matter of course whether or not they are required by the county in which you operate.

- I. Some type of periodic screening or wellness check seems like a good standard of care at the moment and could prove to be a helpful protective mechanism in the event the virus were to spread inside the company and employees ended up with serious health complications.
- II. Some type of screening is better than no screening at all. Depending on the nature of your operations, it may not be all that difficult to ask employees a few questions each day about their health and potential contact with COVID-19. If sickness were to spread throughout your workforce (and potentially result in injury or death to coworkers or loved ones), you would want to be able to say that the business took reasonable and prudent steps to protect employees and their families. It will be hard to justify not screening at all, if the administrative burden was relatively low for your business and there were some simple options that could have prevented the spread of infection.
- III. Wellness checks might be easier than you think. They can be done in person for essential businesses with employees coming in (like a few questions from a supervisor), via email, or with an actual form that employers would give to employees to be returned, like the suggested form in Fresno County. You should obviously weigh cultural, logistical, and location-based issues in deciding how to do this. For more information on potential screening options, please see the resources below.
- IV. For employers with operations throughout the state, including Fresno, a best practice would be to screen in a similar manner as you would in Fresno. It could be bad for optics, culture, and consistency for a statewide employer to say that they tested in one location but not everywhere, especially in the event something goes wrong. In addition, it may be difficult for statewide employers to figure out every single place that has an ordinance that requires this and to implement wellness checks piecemeal if you have employees in more than one location. It is difficult to monitor what all 58 California counties are doing, let alone what individual cities might require.

#### D. RESOURCES

While there are not a lot of resources currently on employee screening, here are some of the best ones we have found, including a link to the Fresno County ordinance described above:

Fresno Questions:

- I. [HTTPS://WWW.CO.FRESNO.CA.US/HOME/SHOWDOCUMENT?ID=42696](https://www.co.fresno.ca.us/home/showdocument?id=42696)

California:

- II. [HTTPS://WWW.DIR.CA.GOV/DOSH/CORONAVIRUS/GENERAL-INDUSTRY.HTML](https://www.dir.ca.gov/dosh/coronavirus/general-industry.html)

Federal:

- III. [HTTPS://WWW.EEOC.GOV/EEOC/NEWSROOM/WYSK/WYSK\\_ADA\\_REHABILITAION\\_ACT\\_CORONAVIRUS.CFM](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm)

SHRM Sample Form:

- IV. [HTTPS://WWW.SHRM.ORG/RESOURCESANDTOOLS/TOOLS-AND-SAMPLES/HR-FORMS/PAGES/COVID-19-EMPLOYEE-HEALTH-SCREENING-FORM.ASPX](https://www.shrm.org/resourcesandtools/tools-and-samples/hr-forms/pages/covid-19-employee-health-screening-form.aspx)



## PROVIDE AND USE MASKS IN THE WORKPLACE

### A. BASICS

With CDC and governmental regulations recommending masks in public, and some California cities and counties requiring it, employers in essential industries are asking whether they should require masks in the workplace.

### B. DETAILS

While the position taken on this by federal, state, and local officials, as well as agencies like the CDC, is fluid and changing rapidly, the present guidance from the CDC and state and federal officials is that at a minimum, cloth-based masks (not medical N95 masks) are recommended for everyone in public. At the same time, several cities and counties (such as the City of Los Angeles and Riverside County) now require masks to be worn in public, including in the workplace. California law allows employers to require employees to wear masks, though that guidance (from the DFEH) predates the current pandemic. If your business operates in one of the locales mandating masks, then your business must provide them for all employees and/or reimburse employees who provide their own masks.

### C. CAUTION

Considering optics, consistency, and good health and safety practices, we believe it is a best practice to encourage employees who are still coming to work (i.e., not working remotely) to wear a mask at work. If the employer recommends or requires masks, then the employer must provide the masks or reimburse employees for the cost of the masks. Businesses of course will need to weigh the logistical and financial implications of such a policy. Many individuals and businesses are currently manufacturing cloth-based masks and they are easier to obtain than they were a few weeks ago. If your business recommends or requires masks and does not provide the mask, you should provide a means for employees to request and obtain reimbursement for bringing their own mask(s). Although there is no standard for what reasonable reimbursement is in this context, having some type of reimbursement (even if only a few dollars per week/pay period) is better than having no reimbursement. Giving employees the right to request additional reimbursement if their actual costs exceed the set amount, will protect you from potential unreimbursed expense claims, which we expect to see following the pandemic (see #5 below).

#### D. RESOURCES

California's DFEH has some information available related to masks. Employers should also check local ordinances for guidance on this topic.

DFEH Guidance:

- I. [HTTPS://WWW.DFEH.CA.GOV/WP-CONTENT/UPLOADS/SITES/32/2020/03/DFEH-EMPLOYMENT-INFORMATION-ON-COVID-19-FAQ\\_ENG.PDF](https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-EMPLOYMENT-INFORMATION-ON-COVID-19-FAQ_ENG.PDF)

Local Ordinances on Masks:

- II. [HTTPS://WWW.NATLAWREVIEW.COM/ARTICLE/CALIFORNIA-COUNTIES-AND-CITIES-BEGIN-TO-MANDATE-FACE-COVERINGS-FURTHER-EFFORTS-TO](https://www.natlawreview.com/article/california-counties-and-cities-begin-to-mandate-face-coverings-further-efforts-to)

Fresno (Masking Guidelines):

- III. [HTTPS://WWW.CO.FRESNO.CA.US/HOME/SHOWDOCUMENT?ID=43176](https://www.co.fresno.ca.us/home/showdocument?id=43176)

California Department of Public Health:

- IV. [HTTPS://WWW.CDPH.CA.GOV/PROGRAMS/CID/DCDC/PAGES/FACE-COVERINGS-GUIDANCE.ASPX](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Face-Coverings-Guidance.aspx)

Federal:

- V. [HTTPS://WWW.OSHA.GOV/PUBLICATIONS/OSHA3990.PDF](https://www.osha.gov/publications/OSHA3990.pdf)

## IV

### POST, COMMUNICATE, AND FOLLOW MANDATORY SOCIAL DISTANCING GUIDELINES

#### A. BASICS

Many California counties and cities now require employers in those areas to “develop, post, and distribute” specific social distancing guidelines.

#### B. DETAILS

As of the date this resource was published, thirteen California counties (San Francisco, Alameda, Contra Costa, Placer, Riverside, San Bernardino, San Diego, San Mateo, Santa Clara, Marin, San Joaquin, Sonoma, and Santa Cruz), along with the City of Berkeley have new shelter-in-place orders that impose obligations on employers in those areas. Some of these went into effect on April 2, 2020 and some have gone into effect as recently as April 15, 2020. Any California employers in these affected areas need to “develop, post, and distribute” new social distancing guidelines in the manner set forth in the resources section below. Because the orders require distribution as well as posting, employers must provide copies to every employee in addition to posting at each Bay Area worksite, such as through an email and providing copies to any employees who do not have company email.

#### C. CAUTION

Although this only applies to certain counties and localities at present, others will likely follow suit and have the same requirements in the coming weeks. Thus, a best practice currently—particularly for optics, consistency, and overall safety—is to provide these guidelines to all California employees. The potential burden on employers is relatively low to develop, post, and distribute social-distancing guidelines, but the risk is high for not having such guidelines. Because obligations can change frequently, employers are encouraged to check county websites and sign up for county alerts. A complete list can be found at [COVID19.CA.GOV](https://www.covid19.ca.gov).

#### D. RESOURCES

More information on social distancing guidelines can be found at the California Department of Industrial Relations' website and we've also included examples of a social distancing protocols. Los Angeles:

- I. [HTTP://PUBLICHEALTH.LACOUNTY.GOV/MEDIA/CORONAVIRUS/GUIDANCESOCIALDISTANCING.PDF](http://publichealth.lacounty.gov/media/coronavirus/guidancesocialdistancing.pdf)

Santa Clara:

- II. [HTTPS://WWW.SCCGOV.ORG/SITES/COVID19/DOCUMENTS/APPENDIX-A-SOCIAL-DISTANCING-PROTOCOL.PDF](https://www.sccgov.org/sites/COVID19/documents/appendix-a-social-distancing-protocol.pdf)

California:

- III. [HTTPS://WWW.DIR.CA.GOV/DLSE/SOCIALDISTANCINGNOTICE.HTM](https://www.dir.ca.gov/dlse/socialdistancingnotice.htm)

Template Social Distancing Protocol:

- IV. [HTTPS://WWW.SCCGOV.ORG/SITES/COVID19/DOCUMENTS/APPENDIX-A-SOCIAL-DISTANCING-PROTOCOL.PDF](https://www.sccgov.org/sites/COVID19/documents/appendix-a-social-distancing-protocol.pdf)

## V

### PROACTIVELY MANAGE WAGE AND HOUR ISSUES, WHICH MAY BE THE GREATEST POST-PANDEMIC THREAT TO YOUR BUSINESS

#### A. BASICS

Employment lawsuits (particularly wage and hour lawsuits) increase in an economic downturn. Businesses that are looking ahead to the future must not overlook employment law compliance in the near term and must instead double down on policies, communication, and training around wage and hour issues, especially given the changing working environment (particularly with remote work).

#### B. DETAILS

Before COVID-19 hit, the biggest legal risk to California employers was a wage and hour class action and/or action under the Private Attorneys General Act ("PAGA"). Although California courts are largely shut down for civil cases, we anticipate a wave of new wage and hour lawsuits once courts reopen, focusing on actions businesses have taken to adapt to the pandemic. Amongst the millions of employees being laid off are the future plaintiffs of tomorrow who will be suing businesses during or after the pandemic. Many of these employees will be out of work and out of unemployment benefits in the coming months, and there is no shortage of employment lawyers in California looking for new cases to file on their behalf. These types of lawsuits typically are not covered by insurance and oftentimes have exposure in the six, seven, or even eight figures. Businesses that want to thrive after the pandemic is over must keep the threat of employment lawsuits squarely in their sights during the midst of navigating COVID-19 and take proactive steps to protect themselves with good policies, communication, and training.

#### C. CAUTION

Mistakes made now related to furloughs, leaves, remote work, wage payments, expense reimbursement, and payroll can come back to haunt businesses and have the potential to cause greater financial burdens and liabilities than those experienced from the pandemic. There are a number of potential employment law risks that have been amplified as a result of COVID-19. Notably, there are no government relief programs to assist in the event of an employment lawsuit. Below are the top three risks currently.

- I. **Penalties for Mishandling Layoffs, Leaves, and Terminations:** There are a variety of potential wage and hour violations that can result from mishandling furloughs, leaves, and employee terminations. This is why it is important to consult with employment law counsel on these matters.
- II. **Remote Work Wage and Hour Challenges:** As many California businesses have shifted some or all their workforce to remote work, this greatly magnifies the risk of wage and hour violations for nonexempt hourly employees. For instance, employees working from home are less likely to be diligent in taking complete, timely, and uninterrupted meal and rest breaks. They may also be more likely to work off the clock (such as in an effort to help the company out during a downturn by not reporting extra hours and/or overtime). Remote work was a challenge before COVID-19, and if not managed correctly can lead to expensive lawsuits.
- III. **Expense Reimbursement Issues:** Many employers will likely misunderstand or forget their obligation to pay for all necessary business expenses related to working from home, such as reimbursing a portion of home internet costs, all necessary office equipment, and possible cell phone reimbursement. Reimbursement for work-related cell phone use has been one of the fastest growing claims in the last few years and will only increase with more remote work and social distancing.

#### D. RESOURCES

For those unfamiliar with wage and hour lawsuits, we've included some short videos that explain the potential threat. We've also provided some links to general information related to wage and hour compliance, including a link to California Compliance Solutions, which provides wage and hour training, including training for remote work employees.

Videos explaining wage/hour lawsuits:

- I. [HTTPS://MEDINAMCKELVEY.COM/WHAT-WE-DO/WAGE-HOUR/](https://medinamckelvey.com/what-we-do/wage-hour/)

California:

- II. [HTTPS://WWW.DIR.CA.GOV/DOSH/CORONAVIRUS/HEALTH-CARE-GENERAL-INDUSTRY.HTML](https://www.dir.ca.gov/dosh/coronavirus/health-care-general-industry.html)

SHRM:

- III. [HTTPS://WWW.SHRM.ORG/RESOURCESANDTOOLS/PAGES/COMMUNICABLE-DISEASES.ASPX](https://www.shrm.org/resourcesandtools/pages/communicable-diseases.aspx)

CalChamber:

- IV. [HTTPS://ADVOCACY.CALCHAMBER.COM/CORONAVIRUS-COVID-19/](https://advocacy.calchamber.com/coronavirus-covid-19/)

Compliance and certification resources to reduce wage/hour lawsuits:

- V. [HTTPS://CALCOMPLY.COM](https://calcomply.com)

IF YOU HAVE QUESTIONS PLEASE REACH OUT  
TO BRANDON MCKELVEY AT [BRANDON@MEDINAMCKELVEY.COM](mailto:BRANDON@MEDINAMCKELVEY.COM)  
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