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## California's Roadmap to Reopening

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and Jason Mills  
June 11, 2020

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# Agenda

Section I: California and Local Guidance

Section II: Bringing Employees Back to the Workplace

Section III: Workplace Safety Issues

Section IV: Litigation on the Horizon

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# California and Local Guidance

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# Workplace Reopening Checklist (Excerpt)

## Create a Return to Work Team

- Convene a Team from Legal, HR, and Operations to Focus on Return to Work Issues
- Appoint a Point Person Responsible for Leading the Effort and Implementation

## Review Existing Essential Business and/or Reopening Guidance

- Federal, State, and Local Orders, Regulations, Guidelines, and Procedures
- OSHA Guidelines and Procedures
- CDC and Local Health Department Guidelines

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# **California Stay-at-Home Order and Industry Guidelines**

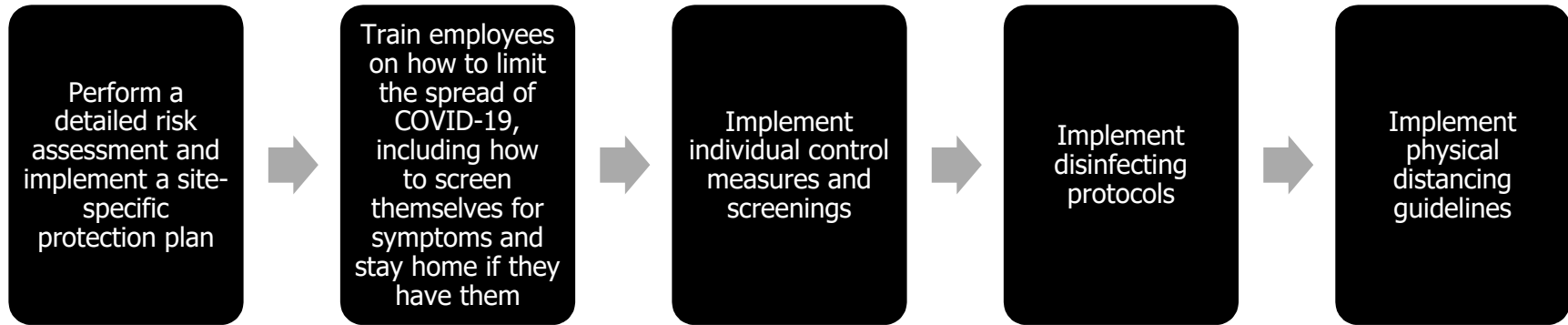
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# California Roadmap

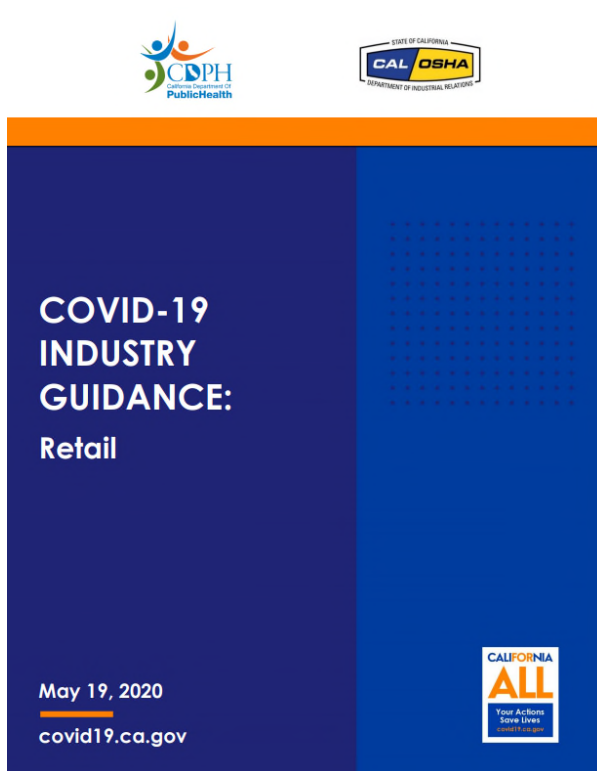


[COVID19.CA.GOV](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/California-Roadmap.aspx)

# Before Reopening, All Facilities Must:



# Posted Guidances and Checklists for Sectors Permitted to Open





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# **County Variance from State's Resilience Roadmap**

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# County Variance

## California Statistics

Total Population: 40,129,160

**37,211**

New Cases (Last 14 Days)

92.7 Per 100K

136,191 Total Cases

**892**

New Deaths (Last 14 Days)

2.2 Per 100K

4,776 Total Deaths

**803,904**

Tests Reported (Last 14 Days)

4.6% Test Positivity

1.4 Daily per 1,000 Residents

2,540,798 Total Tests Reported



# The following may open only in counties approved to advance more quickly than the State

- Dine-in restaurants
- Hair salons and barber shops
- Casinos

**The following may also open but the State has strongly encouraged counties to wait until June 12 (tomorrow):**

- Family entertainment centers
- Restaurants, wineries and bars
- Zoos and museums
- Gyms and fitness centers
- Hotels (for tourism and individual travel)
- Cardrooms and racetracks
- Campgrounds and outdoor recreation

**Industry guidance for these businesses is posted on the CA website on the County Variance page.**

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# **Reopening at the County and City Level**

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# County Differences (Office Workspaces Example)


- San Francisco – Offices not listed as permitted to reopen
- San Mateo – Offices only to the extent that persons working in those offices cannot perform their job duties from home
- Contra Costa – Offices subject to restrictions in the State's applicable industry guidance

# Some Counties Require a Social Distancing Plan On a Specific Form

These forms are in addition to the site-specific assessment and written plan the State references in its Guidance.

This is an example of the social distancing plan form required by San Francisco County:

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[Health Officer Order No. C19-07e](#)  
[Appendix A: Social Distancing Protocol](#) (revised 6/1/2020)

Each business operating in San Francisco must complete, post onsite, & follow this Social Distancing Protocol. See the attached **Instructions and Requirements** for details on what is required and how to complete this checklist.

Check off all items below that apply and list other required information.

**SDP**  
Social Distancing  
and Health Protection  
**Checklist**

Business/Entity name: \_\_\_\_\_ Contact name: \_\_\_\_\_  
Facility Address: \_\_\_\_\_ Phone / Email: \_\_\_\_\_

*(You may contact the person listed above with any questions or comments about this protocol.)*

**SIGNAGE & EDUCATION**

- Post signage at each public entrance of the facility requiring of everyone:
  - (1) avoid entering if experiencing COVID-19 symptoms;
  - (2) maintain a minimum six-foot distance from others in line and in the facility; and
  - (3) wear a Face Covering
- Post a copy of this two-page Social Distancing Protocol checklist at each public entrance
- Post signage showing maximum number of patrons who can be in line and in the facility
- Educate Personnel about this Protocol and other COVID-19 related items

**PROTECTIVE MEASURES**

- Follow Sections 2.1 through 2.4 below, including:
  - Ensure Personnel stay home or leave work if they are sick
  - Provide a copy of the Attachment to Personnel to ensure they understand when to stay home; translated versions of the Attachment are available online
  - Ensure Personnel review health criteria before each shift and advise Personnel what to

# Some counties require businesses to complete a site-specific protection form:

This is an example of the form required by Alameda County:



Alameda County Health Care Services Agency  
Public Health Department

Colleen Chawla, Director  
Kimi Watkins-Tartt, Director  
Erica Pan, MD, Interim Health Officer

## COVID-19 SITE-SPECIFIC PROTECTION PLAN GUIDANCE & TEMPLATE FOR DEVELOPING YOUR OWN PLAN

Order No. 20-14 - Appendix A

Updated on June 5, 2020

### PURPOSE OF THIS DOCUMENT

The purpose of this document is to provide each business with clear guidance for reopening in a manner that provides a safe, clean environment for employees and customers.

**This COVID-19 Site-Specific Protection Plan (Revised Appendix A) applies to all businesses, and gives a two week grace period to businesses already allowed to be operating under prior orders.** Please note that Essential and Outdoor Businesses, which were permitted to operate prior to May 18, 2020, and are currently following the Public Health Order's prior Appendix A "Social Distancing Protocol" may continue to conduct business consistent with that protocol until June 21, 2020. However, effective June 22, 2020, Essential and Outdoor Businesses shall comply with the updated Appendix A "COVID-19 Site-Specific Protection Plan Guidance & Template for Developing Your Own Plan."

Businesses and organizations allowed to reopen in Alameda County are **not** required to submit their COVID-19 Site-Specific Protection Plan to the State or the Alameda County Public Health Department for review and approval before reopening. Businesses and organizations may reach out to [COVIDRecovery@acgov.org](mailto:COVIDRecovery@acgov.org) for technical assistance.

### DESCRIPTION OF A COVID-19 SITE-SPECIFIC PROTECTION PLAN (SPP)

The Site-Specific Protection Plan (SPP) template below combines state-level guidance published in the California State [Resilience Roadmap](#) and guidance from the Alameda County Public Health Department.

The State of California requires all businesses to:

1. Perform a detailed risk assessment and implement a site-specific protection plan (SPP)
2. Restrict employees or contractors from the spread of COVID-19 by utilizing best practices for

# Some counties require completing a form affirming a plan specific to the business type

- For example, Los Angeles County. This is an example of the form for Los Angeles County for warehouses reopening:

COUNTY OF LOS ANGELES DEPARTMENT OF PUBLIC HEALTH  
ORDER OF THE HEALTH OFFICER



## Reopening Protocol for Warehousing, Manufacturing and Logistic Establishments: Appendix C

The County of Los Angeles Department of Public Health is adopting a staged approach, supported by science and public health expertise, to allow certain retail businesses to safely reopen. The reopening protocols below are specific to warehousing businesses that support Lower-Risk Retail Businesses that are permitted to reopen by the County Health Officer Order issue on May 13, 2020. In addition to the conditions required of these specific sectors by the State Public Health Officer these types of businesses must also be in compliance with the conditions laid out in the Checklist for Warehousing, Manufacturing and Logistic Establishments provided below.

Please note: This document may be updated as additional information and resources become available so be sure to check the LA County website <http://www.ph.lacounty.gov/media/Coronavirus/> regularly for any updates to this document

This checklist covers:

- (1) Workplace policies and practices to protect employee health
- (2) Measures to ensure physical distancing
- (3) Measures to ensure infection control
- (4) Communication with employees and the public
- (5) Measures to ensure equitable access to critical services.

These five key areas must be addressed as your facility develops any reopening protocols.



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# **Employee and Third-Party Temperature Checks and Testing**

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# Screening: California Requirements and Guidance

- Statewide Guidance requires all facilities before reopening to, among other measures:
  - Train employees “how to screen themselves for symptoms and when to stay home.”
  - Set up individual control measures and screenings.
- Industry-specific guidance may vary.
  - All or almost all require that the business “provide temperature and/or symptom screenings for all workers at the beginning of their shift and any vendors, contractors, or other workers entering the establishment.”

# Screening: California Requirements and Guidance (cont'd)

- Local Order requirements vary, and change – check for updates regularly
  - E.g., until June 3, San Diego County Order required that “[a]ll employees must have temperature taken upon reporting to work . . . .”
  - Until June 9, that all essential and reopened businesses “[p]rovide temperature and/or symptom screenings for all workers at the beginning of their shift and any vendors, contractors, or other workers entering the establishment.” Then San Diego updated its order again.
  - San Diego now requires only that the business “conduct symptom screening of all employees and prohibit employees with a temperature of 100 degrees or more, or employees exhibiting COVID-19 symptoms as described by the Centers for Disease Control and Prevention, from entering the workplace.”
- E.g., Los Angeles County requires for certain businesses that temperature checks be conducted at the worksite, “if feasible.”

# Privacy Considerations for Screening in California

- Right of privacy in CA Constitution
- CCPA
- California Labor Code Section 980
- California Labor Code Section 435

# HIPAA and Other Federal Law Considerations for Screening

## HIPAA

- HIPAA does not apply to employer collecting health information in its capacity as an employer
- BUT – employer-sponsored group health plans are subject to HIPAA
- There is ambiguity regarding the function that an employer is performing

## Other Federal Privacy Laws

- Implied right of privacy in US Constitution
- FCRA

# How Should Employers in California Prepare?



**Identify relevant laws and new requirements due to pandemic.**



**Review current employee privacy policies and make sure they align with pandemic protocols. Make needed updates and provide updated version to employees.**



**Considerations in preparing your Safety Plan also should include:**

- **Breakrooms, lunchrooms, kitchens, common areas, restrooms**
- **Any landlord or building manager requirements**
- **Ingress/egress issues – e.g., elevators, escalators, stairwells, parking, security**

# Can Employers in California Test Employees?

	Yes	TBD
Temperature	✓	
Virus Test	✓	
Thermal Imaging		✓

- Do not single out an employee or group
- Do not reveal test results to others
- Caution: False positives and negatives are possible

# How Much Can Employers in California Request?

- ✓ Reasons for absence, including whether because of illness
- ✓ Symptoms consistent with pandemic condition
- ✓ Require workers to stay home if ill or exposed
- ✓ Screen applications when job offer is made
- ✓ Delay starts or replace symptomatic candidate if needed to start immediately
- ✓ Inquire about recent travel
- ✓ Encourage/require remote work
- ✗ Inquire about medical conditions that make them vulnerable



# Contact Tracing Privacy Considerations

**Balancing employee  
privacy rights vs. public  
health considerations**

**In California, does your  
disclosure to employees  
cover contact tracing?  
(If not, update)**

**Risk mitigation  
considerations:  
Limit tracing to the  
workplace;  
Consider making  
participation voluntary**

# Serology Testing and Privacy Considerations

- First, there currently are significant limitations to serology (antibody) testing:
  - Reliability questions (FDA emergency review only; rates of false negatives and false positives)
  - Lack of studies indicating whether antibodies confirm immunity
  - Lack of studies indicating whether immunity, if there is any, has potential limitations
- Second, there are significant privacy considerations:
  - CA Confidentiality of Medical Information Act (Civil Code §§ 56, et seq.)
  - CCPA disclosures
  - CA constitutional right of privacy

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# **PPE Requirements: Face Coverings and Gloves**

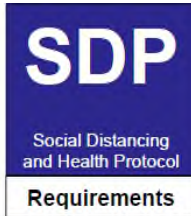
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# PPE: California Requirements and Guidance

- In general, the posted guidance for individual sectors and businesses states the following:
  - Employers should provide and ensure that workers use all required protective equipment, including face coverings and gloves where necessary.
  - Employers should consider where disposable glove use may be helpful to supplement frequent handwashing or use of hand sanitizer; examples are for workers who are screening others for symptoms or handling commonly touched items.
  - Face coverings are strongly recommended when employees are in the vicinity of others. Workers should have face coverings available and wear them when interfacing with other workers or the public, including within retail tenant facilities, in breakrooms and offices, loading docks/delivery areas, or in a vehicle for work-related travel when traveling with others. Face coverings must not be shared.
  - Businesses should check their industry's specific guidance because the guidance will vary somewhat depending on in the industry.

# PPE: Local Requirements and Guidance

Requirements at the local level also may vary. For example, San Francisco requires the use of PPE and also that *employers provide the PPE*. See Appendix A of the most recent San Francisco County Health Order:



[Health Officer Order No. C19-07e](#)  
[Appendix A: Social Distancing Protocol](#) (revised 6/1/2020)

**[You are not required to post these Instructions and Requirements]**

stations or spreading Personnel out, it must reduce the number of Personnel permitted in the business or facility accordingly.

- 2.8.** Provide Face Coverings for all Personnel, with instructions that they must wear Face Coverings at all times when at work, as further set forth in the Face Covering Order. A sample sign is available online at <https://sf.gov/outreach-toolkit-coronavirus-covid-19>. Allow Personnel to bring their own Face Covering if they bring one that has been cleaned before the shift. In general, people should have multiple Face Coverings (whether reusable or disposable) to ensure they use a clean one each day. The Face Covering Order permits certain exceptions, and the business should be aware of those exceptions (for example, children 12 years old or younger or based on a written medical excuse). When Personnel do not wear a Face Covering because of an exception, take steps to otherwise increase safety for all.

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# **Bringing Employees Back to the Workplace**

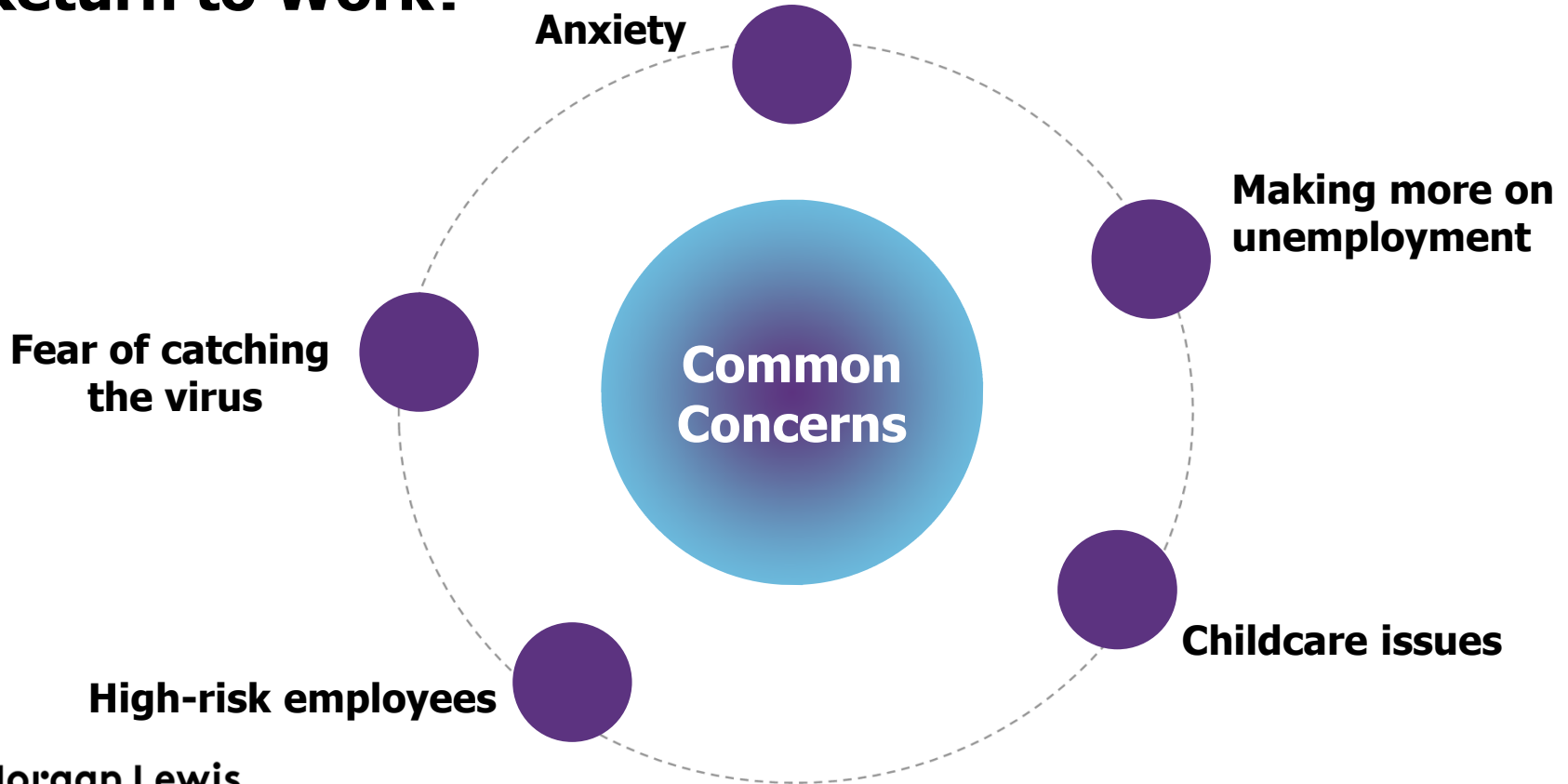
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# **Employees Unable/Refusing to Return**

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# What to Do About Employees Unable or Unwilling to Return to Work?





# What to Do About Employees Unable or Unwilling to Return to Work?

- Carrot and stick approach
  - Reassure employees of all efforts to make workplace secure
    - Social distancing
    - Masks and temperature checks
    - Not allowing sick employees to work
    - Extra cleaning
    - Limited use of common areas
    - Modifications to work environment/reconfiguring floor plan/one way pathways
    - Boxed lunches?
    - Providing hand sanitizer and cleaning materials

# What to Do About Employees Unable or Unwilling to Return to Work?

- What if employee still refuses to come to work?
  - Terminate
    - Unemployment benefits may be available [https://edd.ca.gov/about\\_edd/coronavirus-2019/faqs.htm](https://edd.ca.gov/about_edd/coronavirus-2019/faqs.htm).
  - Exhaust sick and vacation time
    - Check local ordinances
  - Leave/furlough
    - Including FFCRA for childcare if under 500 employees
    - FMLA/CFRA
  - Part-time work and pay
  - Allow employee to continue to work from home
    - Temporarily
    - Permanently

# Reasons Employees May Not be Willing or Able to Return to Work

Anxiety

Age

Pregnant

Caregiver

Living with high-risk individuals

Illness/Symptoms

Exposure to virus

# Return to Work Certification

- Consider whether to require a Certification/Fitness for Duty documentation as a condition of RTW, either for all furloughed employees or based on certain criteria (e.g., affirmative response to questions about symptoms or exposure):
  - Note that this is distinct from the issue of whether and to what extent temperature/symptom screening will be required to RTW.
  - FFCRA does not expressly prohibit or address RTW certifications following paid sick leave, but US DOL Guidance provides that normal FMLA certification requirements continue to apply to FMLA-qualifying leave. *See Q&A #16* (“Please also note that all existing certification requirements under the FMLA remain in effect if you are taking leave for one of the existing qualifying reasons under the FMLA.”).
  - Note, however, that:

The CDC has discouraged employers from requesting actual doctor’s notes for COVID-related return to work given burdens on healthcare system and difficulty of obtaining them.

Some state/local jurisdictions prohibit the employer from requiring a doctor’s certification as a condition of using paid sick time; similar restrictions could apply to RTW certifications.

State/local law also may impact the type/content of certification permitted (e.g., a “release to return” certification as California law generally prohibits “fitness for duty” releases).

Seeking a legally compliant RTW certification of some sort is prudent, particularly where an employee had symptoms of or was diagnosed with COVID-19. Per EEOC guidance, however, “new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp or an email to certify that an individual does not have the pandemic virus.”

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# **Wage and Hour**

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# Wage and Hour Considerations Related to Remote Work and Reopening

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## Wage and Hour/Compensation Plans

Compensable time for wait time for symptom/temp screening, temperature taking at home, building ingress/egress, and continuous workday issues

---

Reporting time and/or predictive scheduling obligations when announcing/adjusting schedules and sending employees home from work

---

Potential inclusion of additional incentive pay in regular rate

---

Preserving exemptions, including of remote workers whose duties have been modified or exempt workers covering nonexempt work resulting from lack of hourly workers

---

Expense reimbursement for masks/safety equipment and internet/cell phone for teleworking employees

---

Evaluate effect of shutdown periods on existing bonus/incentive plans

---

# Expense Reimbursement: Reasonable and Necessary

Must reimburse if activity was within the course and scope of employment

- Expenditures must be **reasonable** and **necessary**
  - May not be required to reimburse expenses such as internet and phone for employees who *voluntarily* work remotely *if* they have an option of working on-site (e.g. essential business, or after shelter-in-place lifts) - but if remote work is “strongly encouraged” then be prepared for arguments that such remote work isn’t fully voluntary

Employer must know (or have reason to know) that the employee has incurred an expense before the employer’s duty to reimburse is triggered

- Will extend to *necessary* expenses incurred for the sole benefit of the employer, such as work-related delivery costs
- An employer can identify in its policy any *unnecessary* items (i.e., printers or new furniture) that will *not* be reimbursed, or only reimbursed with preapproval
- Consider still making subject to exceptions policy (e.g., where employee might still demonstrate that the expense actually was necessary under the circumstances)

# Expense Reimbursement Amount

Often expenses have mixed personal and business use—such as cell phone usage/repair/purchase or home WiFi.

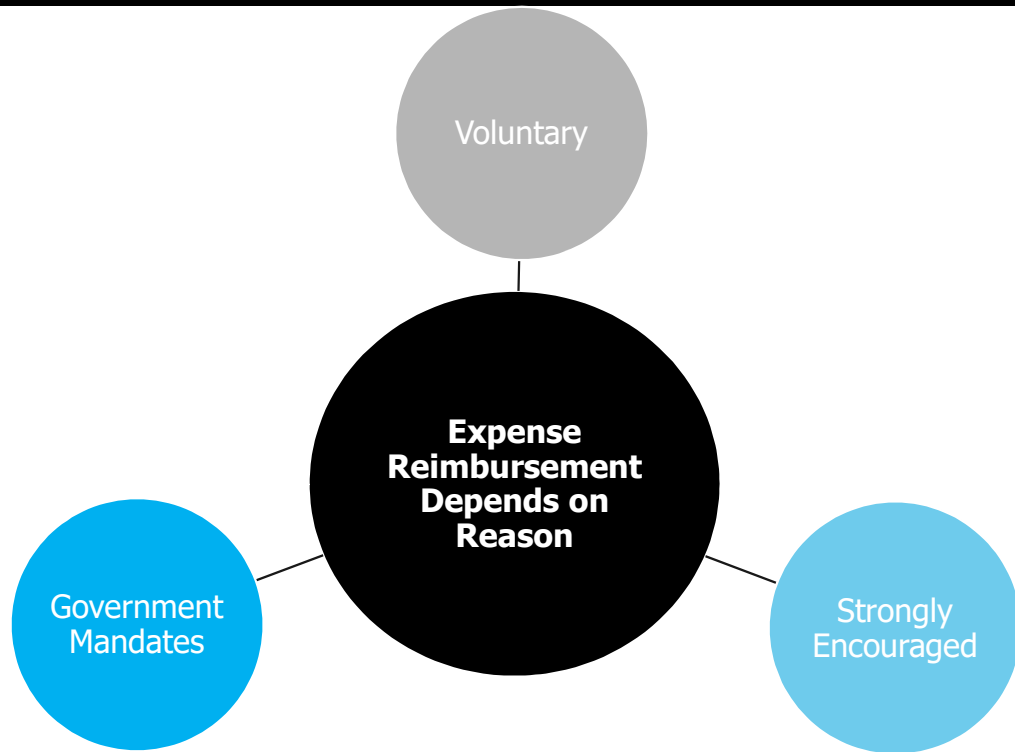
- In CA, even where employee may incur no additional out-of-pocket expenses (such as phone service with unlimited data plan), still required to reimburse for a “reasonable percentage” of such expenses.
- What is reasonable depends on the circumstances, such as the volume of personal versus work-related usage.
- Other states will vary – so multi-state employers may wish to have a different policy for CA.

An employer can reimburse a *reasonable estimate* rather than exact expenses, provided:

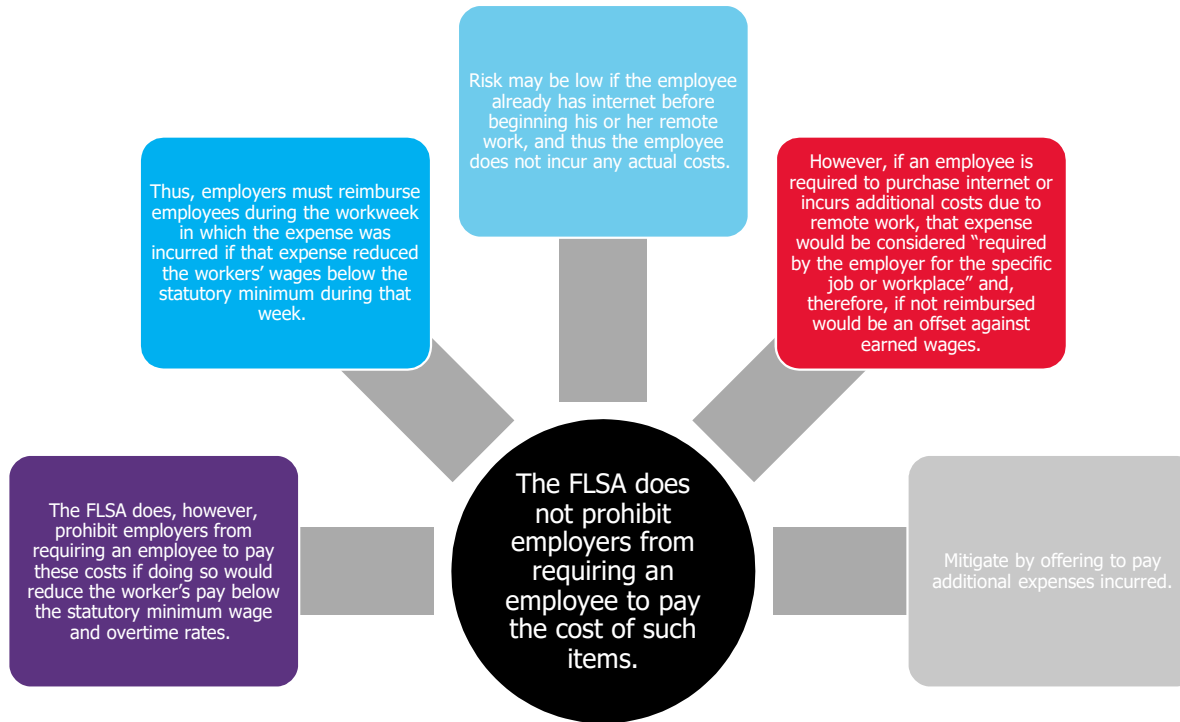
- the employer can provide some method or formula to identify the amount of the reimbursement; *and*
- if the estimated amount is insufficient, the employee has an opportunity to request additional reimbursement with supporting documentation showing why the estimate is inadequate.
- Consider creating a privileged file to demonstrate your good faith and reasonable estimate using publicly available data - can waive later if helpful.
- Avoid antitrust violations (i.e., benchmarking competitive pay information).
- Large employers might consider using a data economist.



# Expense Reimbursement Claims: Reason for Remote Work



# Federal Expense Reimbursement



# Issues Relating to Work Hours

- Establish expected work hours
  - Establish when workday will start and when it will end
  - Particularly for nonexempts, establish expected number of work hours per day and week, and require written approval to vary hours
    - Might reflect a reduced schedule, if full-time work is not sustainable
    - Consider posting requirements and have required posting documents available at accessible location for employees
  - Establish policy for variance from expected work hours
- Establish mechanisms to ensure that employees are actively working (including regular responsive communications with team members)
  - But be sensitive to morale and PR issues related to these mechanisms

# Compensation Issues for Nonexempt Employees

- Accurately record *all* hours worked
  - Consider current timekeeping systems and whether modifications are needed for remote setting
    - Consider attestations/acknowledgments regarding the complete and accurate recording of all time worked, and compliance with meal/rest period expectations
  - Avoid *de minimis* time; preliminary and postliminary activities (logging into computer systems, networks, etc.); email exchanges outside of normal work times; situations in which nonexempt employees must “call in” to determine work needs (can trigger reporting time)
  - Beware of “on-call” treatment, if employees are expected to stand by for assignments
  - Remote meetings and training are generally compensable, unless *completely voluntary; not directly related to employee’s job*; and no “productive work” performed during meeting/training
- Ensure proper calculation of “regular rate” (including any “hazard pay” or special bonuses associated with special circumstances)

# Meal and Rest Breaks for Hourly Remote Workers

- Requirements still apply, so ensure that expectations are properly set
- Meal Period:
  - 30 uninterrupted minutes (if interrupted, must restart the clock)
  - Must be timely (must begin before start of employee's sixth hour of work)
- Rest Breaks:
  - 10-minute rest break for every four hours worked (*or major portion thereof*)
  - In the middle of the work period
  - Cannot combine
- Uninterrupted and Duty-free:
  - Cannot make work-related requests/inquiry to employee during meal/rest breaks
  - No expectation of monitoring phone, email, etc. access during meal/rest breaks

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# **Workplace Safety Issues**

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# OSHA/Cal-OSHA – Guidance re: Reopening

- Cal/OSHA has published guidelines on protecting workers from COVID-19.
  - The general guidelines apply to all employers.
  - Also, there are industry-specific guidelines for the following fields: healthcare, agriculture, childcare, construction, grocery stores, logistics, mortuary and funeral homes.
- All California employers are required to establish and implement an IIPP to protect employees from workplace hazards, including infectious diseases.
- Cal/OSHA states that updating IIPPs to reflect the COVID-19 guidelines is “mandatory since COVID-19 is widespread in the community.”

# Low-Risk Workplace Measures

All California employers must implement the following minimum safety measures:

- ✓ Actively encourage sick employees to stay home.
- ✓ Immediately send sick employees home or to medical care, as needed.
- ✓ Ensure that employees who are out ill with fever or acute respiratory symptoms do not return until both of the following occur:
  - At least 72 hours pass with no fever (without the use of fever-reducing medications) and no acute respiratory illness symptoms; and
  - At least 10 days pass since the symptoms first appeared.
- ✓ Ensure that employees who return to work following an illness promptly report any recurrence of symptoms.



# Social Distances and Cleaning Measures

- Encourage employees to telework from home when possible.
- Practice physical distancing when possible, and avoid shared workspaces.
- Provide washing facilities that have an adequate supply of suitable cleansing agents, water, and single-use towels or blowers.
- Establish cleaning procedures for commonly touched objects and surfaces. Surfaces should be cleaned with soap and water prior to disinfection. These procedures should include:
  - Using disinfectants that are [EPA-approved](#) for use against the virus that causes COVID-19.
  - Providing EPA-registered disposable wipes for employees to wipe down commonly used surfaces before use.
  - Following the manufacturer's instructions for all cleaning and disinfection products (e.g., safety requirements, PPE, concentration, contact time).

# Procedures for COVID-19 Positive Employees

If an employee is confirmed to have COVID-19 infection:



- Inform employees of their possible exposure to COVID-19 in the workplace, but maintain confidentiality as required by the ADA.

- Temporarily close the general area where the infected employee worked until cleaning is completed.

- Conduct deep cleaning of the entire general area where the infected employee worked and may have been, including breakrooms, restrooms, and travel areas, with a cleaning agent approved for use by the EPA against coronavirus.

- Any person cleaning the area should be equipped with the proper PPE for COVID-19 disinfection (disposable gown, gloves, eye protection, mask, or respirator if required) in addition to PPE required for cleaning products.

# High-Risk Workplace Measures

Employers in retail and service industries must implement the following additional measures:

- Conduct even more frequent cleaning and disinfection of surfaces touched by the public.
- Provide workers handling items touched by the public with PPE (i.e., disposable gloves).
- Protect cashiers (and other workers who have frequent interaction) with screens and physical barriers.
- Schedule work to allow frequent handwashing by employees handling objects touched by members of the public.
- Encourage customers to wear face coverings, which are mandatory in some jurisdictions.
- Ask customers to take precautions such as only touching items they intend to purchase, and provide hand sanitizer stations.
- Enforce physical distancing by limiting the number of customers in retail space.

# Personal Protective Equipment (PPE)

- Cal/OSHA requires employers to conduct a hazard assessment to determine if any PPE is needed to protect employees from hazards that are present or are likely to be present in the workplace.
- Employers must select and provide employees with properly fitting and sanitary PPE that will effectively protect them against these hazards.
- Cal/OSHA does not currently recommend masks or respirators due to shortages.
- Cal/OSHA does recommend providing employees with cloth face covers or encouraging employees to use their own face covers whenever they may be in workplaces with other persons.
- Cloth face covers are NOT considered PPE.

# Employee Training

Employers must provide training on the following topics:

- General description of COVID-19, symptoms, when to seek medical attention, how to prevent its spread, and the employer's procedures for preventing its spread at the workplace.
- Cough and sneeze etiquette.
- Washing hands with soap and water for at least 20 seconds, after interacting with other persons and after contacting shared surfaces or objects.
- Avoiding touching eyes, nose, and mouth with unwashed hands.
- Avoiding sharing personal items with co-workers (i.e., dishes, cups, utensils, towels).
- Safely using cleaners and disinfectants, which includes:
  - The hazards of the cleaners and disinfectants used at the worksite.
  - Wearing PPE (such as gloves).
  - Ensuring that cleaners and disinfectants are used in a manner that does not endanger employees.

# Other Guidance – Federal, State, and Local

- The CDC provides extensive guidance to employers on COVID-19: <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.
- California also provides general guidance for employers at <https://covid19.ca.gov/business-and-employers/>.
- Be mindful of county and municipal guidance as well.
  - Los Angeles County: <https://covid19.lacounty.gov/covid19-2-2/consumers-businesses/for-businesses/>.
  - San Francisco: <https://oewd.org/businesses-impacted-covid-19>.
  - San Diego: <https://www.sandiego.gov/department/resource-guide-businesses-covid-19>.

# California says...

- Err on the side of recording!



# Items to Consider

Interaction with people known to be infected with COVID

Working in the same area where people known to have been carrying COVID had been

Sharing tools, materials or vehicles with persons known to have been carrying COVID




# No Obvious Contact?

- 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.

# BEWARE: Cal/OSHA PAGA Claims



# PAGA Procedural Requirements – Labor Code Section 2699.3

- Employee gives notice to Cal/OSHA with copy to LWDA
- Cal OSHA must inspect pursuant to its governing standards
- If Cal OSHA issues citation, no PAGA action
- If Cal OSHA doesn't issue a citation  Superior Court decides

# If Cal/OSHA Doesn't Inspect

- Move to next section of procedural requirements Lab. Code Section 2699.3(c)
- Written notice to LWDA
- 33 calendar days to cure
- If not cured ...



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# Key Provisions

8 CCR 342  
(Reporting)

8 CCR 3203  
(IIPP)

8 CCR 3380  
(PPE)

8 CCR 5199  
(ATD)

Labor Code  
Section  
2699.3

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# **Litigation on the Horizon**

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# Potential Legal Claims

- **Workplace Safety/Nuisance Claims** (litigation for alleged violation of safety/health standards or state laws requiring safe workplaces and related whistleblower/retaliation complaints)
- **Workers' Compensation or Tort Claims** (including whether WC laws will be exclusive remedy, possible wrongful death claims and third party liability claims from visitors, customers, employees' family members, etc.)
- **Failure to Accommodate Claims** (Is fear of coronavirus a disability? Is the provision of private transportation a reasonable accommodation?)
- **Wage and Hour Claims** (e.g., reimbursable expenses; overtime/meal breaks when working from home; being "on-call"; time waiting for medical screens and temperature checks; wage reduction claims)
- **Claims Arising Under Local, State, and Federal Leave Laws**



# Potential Legal Claims, cont'd.

- **Labor Claims** (e.g., violations of collective bargaining agreements, failure to negotiate actions taken in response to the virus, failure to abide by collective bargaining provisions relating to recall rights)
- **Furlough and Layoff Claims** (e.g., failure to provide WARN notice, failure to pay timely final payments, or failure to provide timely termination/benefit eligibility notices)
- **Invasion-of-Privacy Claims** (e.g., disclosure of confidential medical information; disclosure of confidential customer information by employees to family members or otherwise during remote working periods, etc.)
- **Discrimination and Retaliation Claims** (e.g., claims challenging process or decision-making for furloughs, layoffs, salary reductions, etc.; claims relating to employees' actual or perceived disabilities, etc.)

# Return to Work Resources for Employers

View a list of the [return to work resources](#) we have developed to support employers' efforts in safely returning to work.

Get more information on our [Return to Work – Stay in the Safe Zone](#) training program.

Access our [workplace reopening checklist](#).

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## RETURN TO WORK RESOURCES

Category	Work Product
Essential Business and/or Reopening Guidance	State and Local Orders, Ordinances, and Regulations Regarding Shelter in Place, Business Restrictions, and Business Reopening Chart <ul style="list-style-type: none"><li>We can also provide weekly updates</li></ul>
	We can also create customized charts of specific orders or just reopening orders. Examples: <ul style="list-style-type: none"><li>Requirements Regarding Temperature Screens and Symptom Screens</li><li>Requirements for PPE or Face Coverings</li></ul>
Workplace Screening, Social Distancing, PPE, and Sanitization Policies and Procedures	Social Distancing Policy Template, Customization Guidance, and Face Covering Policy Template
	Active Screening Protocol with Temperature/Symptom Screening Policy Template
	FAQs on COVID-19 Molecular and Serology Testing
	Infection Control Protocols for the Workplace
	<i>Policies and procedures can be customized for the company.</i>
Training	Webinar Training Program on Social Distancing and Safety Measures for Return to Work
Unions	Labor Management Return To Work Memorandum of Understanding Template

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## Additional Resources

Find resources on how to cope with the post-pandemic reality on our [Now. Normal. Next page](#) and our [COVID-19 page](#) to help keep you on top of developments as they unfold.

[Subscribe to receive our Daily Digest of Coronavirus COVID-19 alerts >](#)

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# Presenters



**Carrie Gonell**



**Daryl Landy**



**Kate McGuigan**



**Jason Mills**

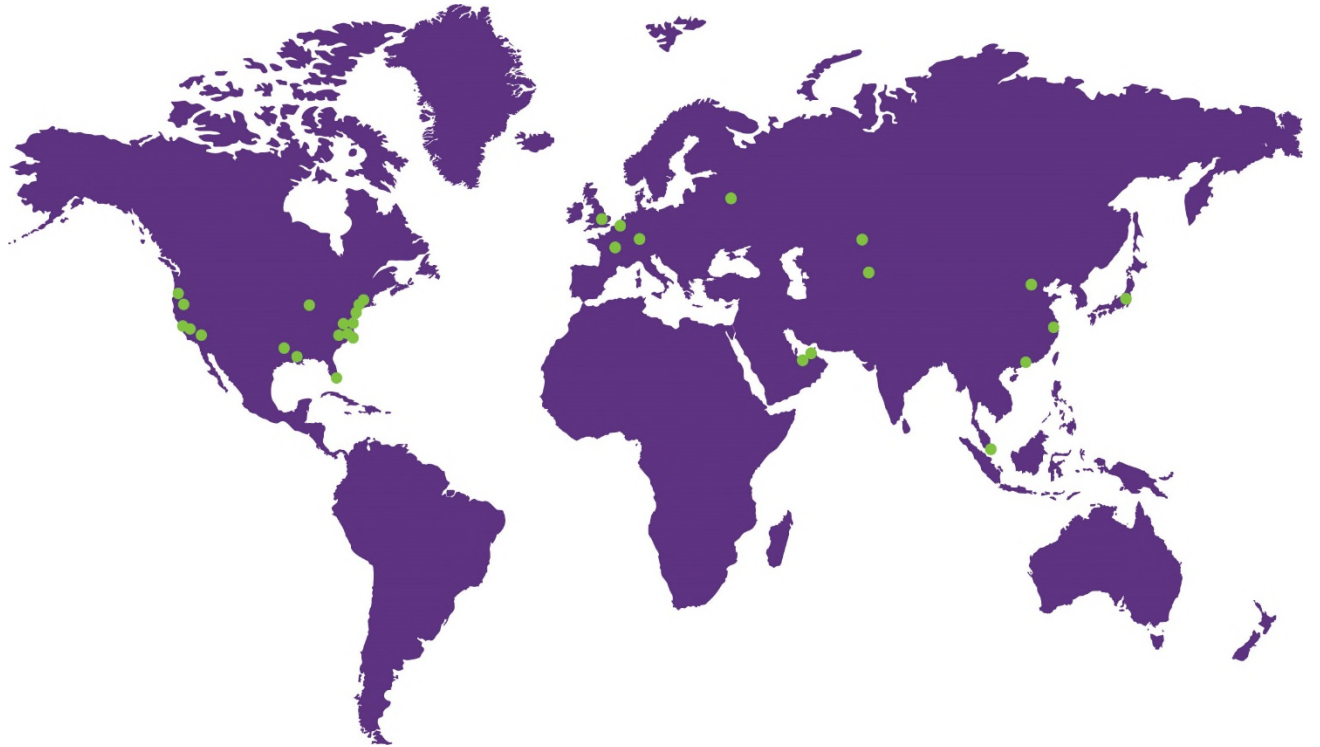
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**California's Roadmap to Reopening -  
Appendix**

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# **Appendix – Bringing Employees Back to the Workplace**

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# Underlying Health Condition (Including Anxiety)

- If employee articulates a specific disability/health-related concern, e.g., an actual or arguable request for accommodation, including due to alleged “anxiety” over risk of adverse health consequence or other mental health issue, request medical certification and conduct an ADA and analogous state/local law analysis, including as to reasonable accommodation requirements.
  - Does the person need to stay home as a reasonable accommodation? Can the accommodation be provided (i.e., can the person do the job from home)?
  - Does the accommodation pose an undue hardship (significant difficulty or expense)?
- It may be difficult to identify the line between unprotected “worry” and potentially protected anxiety disorder, particularly under state/local laws but, this should be addressed through a reasonable accommodations analysis. If generalized anxiety disorder is supported by medical documentation, then accommodation is reasonable and no undue hardship.
- Note that the EEOC’s “Pandemic Preparedness in the Workplace and the Americans With Disabilities Act” offers little if any guidance as to how to handle such issues after, as opposed to during, a serious pandemic. Note, however, that we may be in a pandemic for quite some time even after return to work (RTW).
- Review EEOC [FAQs](#) for updates.

# Other Vulnerable or High-Risk Employees

- Even if there is no legal right to accommodation, might there be groups of employees whom the employer will want to allow to work from home if the employees ask to do so (older or pregnant workers, those with caregiving responsibilities, those who live with high-risk individuals, anyone who wants to continue to telework, etc.)?
- If continued telework is available, consider reverse discrimination claims (no reverse discrimination under the ADA or ADEA, and childcare/family responsibilities are not protected under federal law, but review state law equivalents).
- Treat similarly situated employees the same.

# Employee's own illness, quarantine, exposure to others with COVID-19 or exhibiting symptoms, or dependent care

- If the employee cannot work from home, does he or she have any applicable leave/time-off rights under FFCRA/FMLA/other laws/employer policies? Starting date is nominal RTW date, e.g., restart paid leave from accrued/legally granted amounts (if any) if employee cannot return for such a qualifying reason.
- Ensure that those on furlough but ill/unable to return due to a potentially leave-qualifying reason under applicable law are "recalled" with other "similarly situated" furloughed employees and allowed to (again) begin utilizing legal/policy-based leave to the same extent such leave is available to "current" employees who become ill/unable to work. Legal risk of differential treatment includes claims of interference with leave rights, and discrimination.
- Employee rights to leave may depend to some extent (particularly under FFCRA) on whether a pandemic (or similar state/local) declaration then remains in effect.
- Note that "regular" FMLA requirements would still apply even absent a pandemic, subject to 1,250-hour requirement.
- Also review state/local requirements, i.e., CFRA, which may not run concurrently with FMLA for FFCRA leave reasons.

# Return to Work Certification

- Consider whether to require a Certification/Fitness for Duty documentation as a condition of RTW, either for all furloughed employees or based on certain criteria (e.g., affirmative response to questions about symptoms or exposure):
  - Note that this is distinct from the issue of whether and to what extent temperature/symptom screening will be required to RTW.
  - FFCRA does not expressly prohibit or address RTW certifications following paid sick leave, but US DOL Guidance provides that normal FMLA certification requirements continue to apply to FMLA-qualifying leave. *See Q&A #16* (“Please also note that all existing certification requirements under the FMLA remain in effect if you are taking leave for one of the existing qualifying reasons under the FMLA.”).
  - Note, however, that:
    - The CDC has discouraged employers from requesting actual doctors’ notes for COVID-related return to work given burdens on healthcare system and difficulty of obtaining them.
    - Some state/local jurisdictions prohibit the employer from requiring a doctor’s certification as a condition of using paid sick time; similar restrictions could apply to RTW certifications.
    - State/local law also may impact the type/content of certification permitted (e.g., a “release to return” certification as California law generally prohibits “fitness for duty” releases).
    - Seeking a legally compliant RTW certification of some sort is prudent, particularly where an employee had symptoms of or was diagnosed with COVID-19. Per EEOC guidance, however, “new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp or an email to certify that an individual does not have the pandemic virus.”

# Wage and Hour Considerations Related to Remote Work and Reopening

## Wage and Hour/Compensation Plans

- Compensable time for wait time for symptom/temp screening, temperature taking at home, building ingress/egress, and continuous workday issues
- Reporting time and/or predictive scheduling obligations when announcing/adjusting schedules and sending employees home from work
- Potential inclusion of additional incentive pay in regular rate
- Preserving exemptions, including of remote workers whose duties have been modified or exempt workers covering nonexempt work resulting from lack of hourly workers
- Expense reimbursement for masks/safety equipment and internet/cell phone for teleworking employees
- Evaluate effect of shutdown periods on existing bonus/incentive plans

# Expense Reimbursement: Reasonable and Necessary

- Must reimburse if activity was within the course and scope of employment
  - Expenditures must be **reasonable** and **necessary**
    - May not be required to reimburse expenses such as internet and phone for employees who *voluntarily* work remotely *if* they have an option of working on-site (e.g. essential business, or after shelter-in-place lifts) - but if remote work is “strongly encouraged” then be prepared for arguments that such remote work isn’t fully voluntary
- Employer must know (or have reason to know) that the employee has incurred an expense before the employer’s duty to reimburse is triggered
  - Will extend to *necessary* expenses incurred for the sole benefit of the employer, such as work-related delivery costs
  - An employer can identify in its policy any *unnecessary* items (i.e., printers or new furniture) that will *not* be reimbursed, or only reimbursed with preapproval
    - Consider still making subject to exceptions policy (e.g., where employee might still demonstrate that the expense actually was necessary under the circumstances)

# Expense Reimbursement Amount

- Often expenses have mixed personal and business use—such as cell phone usage/repair/purchase or home WiFi.
  - In CA, even where employee may incur no additional out-of-pocket expenses (such as phone service with unlimited data plan), still required to reimburse for a “reasonable percentage” of such expenses.
    - What is reasonable depends on the circumstances, such as the volume of personal versus work-related usage.
    - Other states will vary – so multistate employers may wish to have a different policy for CA.
- An employer can reimburse a *reasonable estimate* rather than exact expenses, provided:
  1. the employer can provide some method or formula to identify the amount of the reimbursement; *and*
  2. if the estimated amount is insufficient, the employee has an opportunity to request additional reimbursement with supporting documentation showing why the estimate is inadequate.
    - Consider creating a privileged file to demonstrate your good faith and reasonable estimate using publically available data – can waive later if helpful.
    - Avoid antitrust violations (i.e., benchmarking competitive pay information).
    - Large employers might consider using a data economist.

# Expense Reimbursement Claims: Reason for Remote Work

- Even in states requiring reimbursement, employers likely do not have to reimburse expenses such as internet and phone for employees who ***voluntarily*** work remotely if they have an option of working at a workspace provided by the employer.
- However, where working remotely is "***strongly encouraged***" it may, depending on the facts of the case, be considered involuntary.
- Some states focus on ensuring that an employer does not benefit from failing to reimburse and/or that employer operating costs are not passed on to an employee. As a result, employers *may* have an argument (which is untested) in some jurisdictions that they need not reimburse employees for expenses incurred as a result of ***government-mandated*** remote working — especially where employers are continuing to pay separately for expenses such as unused office space, electricity, and WiFi.



# Federal Expense Reimbursement

- The FLSA does not prohibit employers from requiring an employee to pay the cost of such items.
  - The FLSA does, however, prohibit employers from requiring an employee to pay these costs if doing so would reduce the worker's pay below the statutory minimum wage and overtime rates.
  - Thus, employers must reimburse employees during the workweek in which the expense was incurred if that expense reduced the workers' wages below the statutory minimum during that week.
  - Risk may be low if the employee already has internet service before beginning his or her remote work, and thus the employee does not incur any actual costs.
  - However, if an employee is required to purchase internet service or incurs additional costs due to remote work, that expense would be considered "required by the employer for the specific job or workplace" and, therefore, if not reimbursed would be an offset against earned wages.
  - Mitigate by offering to pay additional expenses incurred.

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# **Appendix – Workplace Safety Issues**

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# BEWARE: Cal/OSHA PAGA Claims

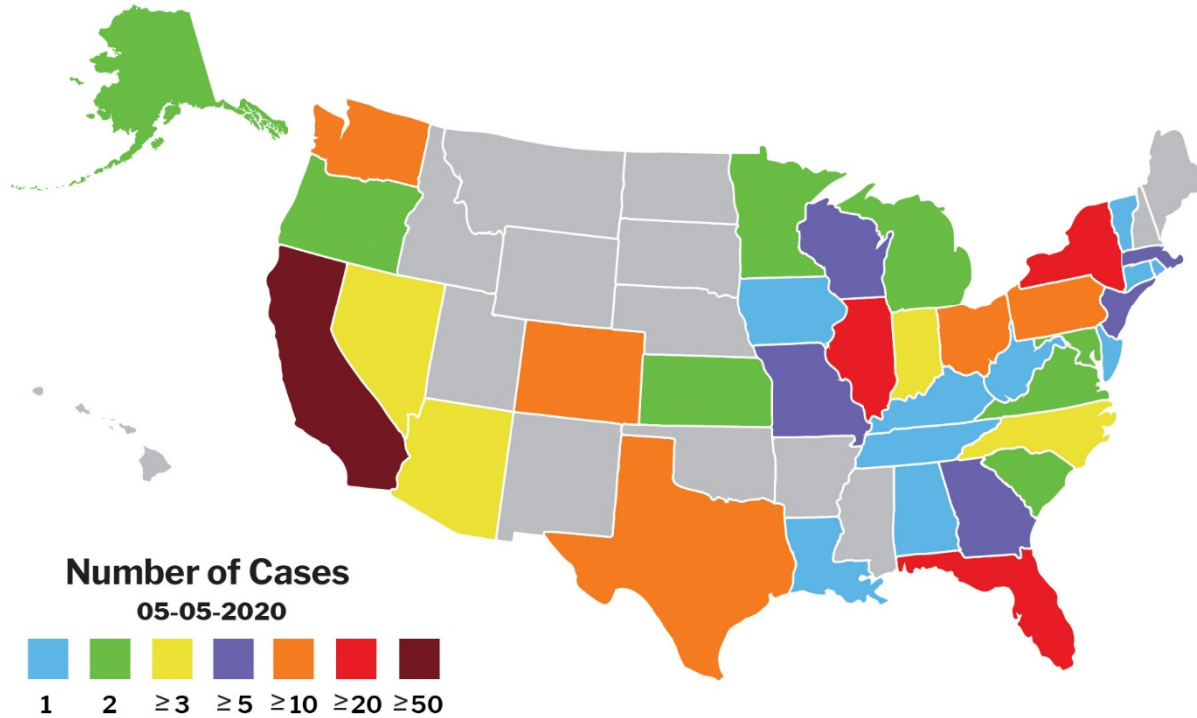
- If a California employer does not update its IIPP to reflect the Cal/OSHA guidelines, it risks exposure for PAGA claims.
- PAGA authorizes employees to file lawsuits to recover civil penalties on behalf of themselves, other employees, and the State of California for labor law violations.
- Any employee can bring a PAGA claim on behalf of all employees who are subject to the inadequate IIPP.
- No accident or injury need occur for an employee to have standing.
- The employer is liable for a separate penalty for each employee for every pay period within the statutory limit, so the numbers add up fast.
- There are administrative hurdles for plaintiffs, and the employer will have a temporary period to cure the violations.

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# **Appendix – Litigation on the Horizon**

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## COVID-19 Class Actions By State



# Disability Claims

- Discriminating against employees who have or had the virus, or have symptoms of the virus
  - Can sue for being regarded as disabled even if not actually disabled
  - Is a fear of getting the virus a disability?
- Claims for failure to engage in the interactive process
- Claims for failure to reasonably accommodate
  - Should “at risk” employees be accommodated, and if so, how?
  - Must employers accommodate employees whose family members are disabled?
  - Is working from home now a reasonable accommodation?
  - Provision of transportation as a reasonable accommodation?

# Leave/Sick Pay Claims

- Failure to provide leave under FFCRA, FMLA/CFRA, local ordinances
- Failure to provide sick pay as required by FFCRA and local ordinances
- Retaliation for taking leave
- Termination to avoid an employee's taking a leave?

# Liability Claims by Third Parties

- What about family members who get the virus from an employee who claims he/she contracted it at or through work?
  - Standard would be negligence
  - To date, these claims have been rare outside the healthcare industry
  - Can employers prove they exercised reasonable care to protect their employees and followed all safety standards?
- What about customers/vendors who get sick after contact with your employees?



# Workers' Compensation Claims

- If employees claim to have contracted the virus at work, then claim will be presumed covered by workers' compensation (unless rebutted with other evidence), and workers' compensation will generally be the exclusive remedy.
  - Note Governor Newsom's executive order on "presumption" that claims are work related. <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.6.20-EO-N-62-20-text.pdf>
  - Similar order was recently blocked in Illinois. <https://apnews.com/01e3eba58571b399ffbdd2fe72c7fa5e>
- Should you give workers' compensation forms to all employees who report that they got sick from the virus?
- Is it better for illness to be covered by workers' compensation than subject of civil lawsuit against employer?

# Furlough and Layoff Claims

- Failure to timely pay all final wages upon furlough/termination
- Failure to (timely) pay all vacation/PTO owed upon furlough/termination
- Selection criteria for furlough/termination was discriminatory
- Failure to provide WARN/Cal-WARN notices
- Failure to provide proper or timely COBRA notices

# Wage and Hour Claims

- Not being compensated for all hours worked
  - Waiting in line for temperature checks
  - No *de minimis* doctrine in California
- Potential reporting-time pay claim by non-exempt employees sent home from work
- Meal and rest break claims from non-exempt employees working at home
  - Send out reminders to employees
- Claims for compensation for “on-call” time
- Wage reduction claims including exempt/non-exempt misclassification
- Failure to pay bonus claims

# Failure to Reimburse Business Expenses

- In California may cover expenses even if no incremental cost to the employee
- Will typically be brought as a class action
  - If expenses, e.g., home internet, paper, ink, and other supplies, are not reimbursed or the amount of the reimbursement is insufficient
- Also can be brought as a PAGA claim
  - Up to \$100 per employee per paycheck in penalties
- Plus attorney fees (typically 25%-33% of amount paid in settlement)
- Failure to provide ergonomic assessments or ergonomic equipment
- Do employers have to provide and pay for face coverings, gloves, hand sanitizer?

# Whistleblower Claims/Unsafe Working Conditions

- OSHA and Cal-OSHA claims generally do not have a private right of action, except retaliation claims.
  - There is a private right of action for retaliating against someone who complains under Labor Code section 6310. *Taylor v. Lockheed Martin Corp.* (2000) 78 Cal.App.4th 472, 485 (“A private cause of action for retaliatory discharge under Labor Code section 6310 is part of California’s statutory scheme for occupational safety.”) (citing 29 C.F.R. § 1952.170(c)); *Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936, 947 (noting that plaintiff tethered her claim to the protections embodied in Cal-OSHA—i.e., Labor Code § 6300 et seq.—which specifically prohibits retaliation against an employee who makes a complaint with reference to employee safety or health under Labor Code § 6310).
- But Labor Code Section 1102.5 and wrongful termination in violation of public policy claims may be brought by employees who are fired or disciplined for complaining about unsafe workplaces.

# Engaging in Concerted Protected Activity

- Even by non-union employees under Section 7 of the NLRA
- Protesting working conditions
- Protesting failure to pay contractors during shutdown?

# Claims by Unionized Employees

- Violation of collective bargaining agreement
  - E.g., related to recall right
- Failure to negotiate actions taken in response to virus

# Other Potential Claims

- Claims for violation of Paycheck Protection Program Loans
  - [https://pdfserver.amlaw.com/legalradar/34091905\\_complaint.pdf](https://pdfserver.amlaw.com/legalradar/34091905_complaint.pdf).
- Failure to provide proper PPE and training re: proper usage of equipment
- Invasion-of-privacy claims for disclosing medical information