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NAVIGATING THE NEXT.

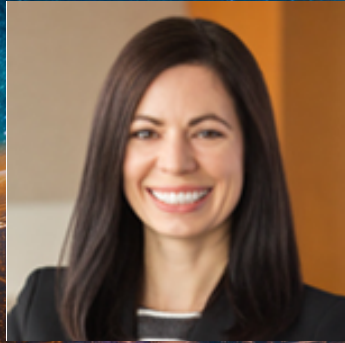
**Biweekly Webinar Series: Returning to Work
in California: Highlights of Major State and
Local Orders**

Kate McGuigan, Nicole Beckley, and Claire Lesikar
January 27, 2021

Presenters



Kate McGuigan



Nicole Beckley



Claire Lesikar

Morgan Lewis

**REGIONAL STAY-AT-HOME ORDERS
LIFTED: RETURN TO BLUEPRINT FOR A
SAFER ECONOMY AND TIER
ASSIGNMENTS**

Blueprint for a Safer Economy and Tier Assignments Resume

- On January 25, 2021, California lifted the regional stay-at-home orders as the Southern California, San Joaquin Valley, and Bay Area regions' four-week ICU projections will be above the 15% threshold, allowing the regions to exit the order
- State-wide cases are down. As of Saturday, the 14-day average was 31,299 cases. On January 1, the 14-day average was above 40,000. The California death toll remains high, but the lag is expected.
- The Blueprint for a Safer Economy and color-coded tiers will resume statewide. Weekly tier updates will continue to be provided on Tuesdays.
- Current Tiers:
 - Red (Substantial): Trinity, Mariposa, Alpine Counties
 - Orange (Moderate): Sierra County
 - Purple (Widespread): All other counties (Los Angeles, Santa Clara, San Francisco, etc.)

California's Tier System

- Updates and lists of permissible activities for each tier are available at covid19.ca.gov.
- Purple Tier:
 - Offices: non-essential indoor business operations still prohibited; remote work only
 - Retail: open with modifications; max 25% capacity
 - Restaurants: outdoor only, with modifications
- Can search by county or by activity.

County risk level	New cases	Positive tests
WIDESPREAD Many non-essential indoor business operations are closed	More than 7 Daily new cases (per 100k)	More than 8% Positive tests
SUBSTANTIAL Some non-essential indoor business operations are closed	4-7 Daily new cases (per 100k)	5 – 8% Positive tests
MODERATE Some indoor business operations are open with modifications	1 – 3.9 Daily new cases (per 100k)	2 – 4.9% Positive tests
MINIMAL Most indoor business operations are open with modifications	Less than 1 Daily new cases (per 100k)	Less than 2% Positive tests

Blueprint for a Safer Economy and Tier Assignments Resume

- The Limited Stay At Home Order limiting non-essential activities between 10:00 pm and 5:00 am is also lifted
- CDPH continues to emphasize using masks, maintaining physical distance, frequent handwashing, avoiding gatherings and mixing with other households, following all state and local health department guidance, and getting the vaccine when it becomes available
- Issue: It is unknown yet how the high transmissibility of the new COVID-19 variants may impact California. Employers should remain prepared for future regional stay-at-home orders.

EDD: UPDATE ON THE UNEMPLOYMENT STATUS IN CALIFORNIA, RESOLUTION OF EDD CLAIMS BACKLOG, AND CLEARING OF FRAUDULENT CLAIMS

EDD: Claims Status and Resolving the Backlog

- Unemployment rose .9 percentage points to 9.0 percent in December. California has lost 52,200 (non-farm) jobs since November, the first month-over-month job loss increase since April 2020.
- 1,007,331 people were signed up for unemployment insurance (UI) during the week of December 19, 2020, down 270,889 from November.
- Week of January 16, 2021 saw 59,044 new UI/PUA and extension claims.
- 99% of the 1.6 million backlogged claims identified in September 2020 have been resolved. This includes initial claims and continued claims that take more than 21 days to issue first payment or disqualification.
- <https://edd.ca.gov/newsroom/unemployment-december2-2020.htm>;
<https://www.edd.ca.gov/newsroom.htm#UIDataDashboard>.

EDD: Clearing Suspended Claims

- EDD has seen widespread fraud on its UI program, where perpetrators have been using stolen identity information from data breaches to open UI claims
- EDD is still working on validating the identities of the 1.4 million California workers whose UI claims have been linked to fraud.
- 1.2 million are being directed to validate their identities through ID.me or EDD's manual ID verification process for those without a UI Online account. Claimants have 30 days to verify their identities with ID.me before an EDD notice of disqualification is issued.
- The remaining 200,000 suspended claimants are either being sent a questionnaire to complete to help EDD determine if they meet eligibility requirements for continued benefits, or receiving a notice of disqualification that describes their appeal rights.

EDD: Scam Warnings

- EDD has received reports that individuals are impersonating EDD and ID.me to get individuals to divulge their personal identifying information
- EDD warns that EDD or ID.me does not send representatives to homes and will never contact individuals via social media and other websites
- The actual Caller ID for EDD may show: “St of CAEDD” or the UI Customer Service number, 1-800-300-5616
- Those who opted into SMS text alerts will receive messages from 510-74 or 918-06, and only to the phone number listed on their UI claims
- https://edd.ca.gov/About_EDD/pdf/news-21-03.pdf;
https://www.edd.ca.gov/unemployment/fraud_and_penalties_what_you_need_to_know.htm

THE BIDEN ADMINISTRATION AND FUTURE OF CAL-OSHA EMERGENCY TEMPORARY STANDARDS

The Biden Administration and Future of Cal-OSHA Emergency Temporary Standards

- On January 20, 2021, President Biden immediately signed an executive order (EO) implementing mask wearing, physical distancing, and following other public health measures by on-duty or on-site federal employees/contractors and all persons in federal buildings or on federal lands.
- Biden also signed an EO on protecting worker health and safety, directing the Assistant Secretary of Labor for OSHA to take the following actions:
 - OSHA must meet with other department and agency heads and issue revised COVID-19 guidance to employers on workplace safety based on the best available scientific knowledge
 - Consider whether a COVID-19 emergency temporary standard is necessary, and, if so, issue them by March 15, 2021
 - Review OSHA's existing enforcement efforts and strategies related to COVID-19 and identify short-, medium-, and long-term changes to better protect workers and ensure equity in enforcement
 - Launch a national program to focus enforcement efforts on violations that put the largest number of workers at serious risk or are contrary to anti-retaliation principles
 - Coordinate with relevant departments to conduct an outreach campaign to inform workers and their representatives of their rights under applicable law

The Biden Administration and Future of Cal-OSHA Emergency Temporary Standards

- These EOs signal the Biden administration's focus on reducing COVID-19 transmission by requiring the Department of Health and Human Services and CDC to engage with state, local, and tribal officials, businesses, and other groups to determine maximum compliance with mask wearing and other guidance, as well as what businesses might expect to see in an employer mandate under OSHA.
- Federal OSHA emergency regulations would not preempt already existing state emergency standards, but OSHA requires state plan enforcement to be at least as effective as OSHA's; if the OSHA emergency standard is more stringent, the state plan would be required to similarly align.
- California's Emergency Temporary Standards, which are already robust, may be revised as the federal program develops.

COVID-19 LITIGATION

Trends in US COVID-19 Litigation

- Most common COVID-19-related causes of action
 - Wrongful termination 31%
 - Discrimination 29%
 - Retaliation for complaints related to COVID-19 workplace conditions 19%
 - Leaves of absence 11%
- Most affected industries:
 - Healthcare 21%
 - Manufacturing 6%
 - Hospitality 5%
 - Essential retail 5%

Trends in US COVID-19 Litigation

- Sample litigation allegations
 - Harassment of Chinese employees due to the origin of COVID-19 in China.
 - Furlough of employees due to their higher risk of severe COVID-19 illness due to age or medical condition.
 - Replacement of laid-off employees with younger employees.
 - Discriminatory comments that people over the age of 60 should be euthanized.
 - Denied accommodation to work remotely due to a medical condition that puts an employee at a higher risk of severe COVID-19 illness.
 - Terminated after losing childcare due to the COVID-19 pandemic.
 - Harassed for being a single mother after it was revealed while she was working from home.
 - Failure to pay for time spent submitting to COVID-19 screening.
 - Terminated an employee who could not wear a face covering due to a sinus condition.

VACCINES

Vaccine Legal Issues

- Currently:
 - No federal requirement for employers to provide or offer to provide the vaccine.
 - No federal prohibition on employers mandating or recommending the vaccine.
- EEOC: An employer may mandate COVID-19 vaccines
 - Provided that reasonable accommodations (absent undue hardship) are provided under the ADA (for disabilities) and Title VII (for sincerely held religious beliefs)
 - EEOC position may not be accepted by the courts
 - State laws may provide additional exceptions or broader accommodation requirements (e.g., political objectors)

Vaccine Legal Issues

- EEOC: Vaccine requirement is a permissible safety-based qualification standard under the ADA, if an unvaccinated employee poses a direct threat to the health and safety of others in the workplace.
 - Direct Threat – “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.”
 - Must conduct an individualized assessment and rely on current medical judgment.
 - “Direct Threat” is unlikely to exist for remote workers.
 - EEOC: An employer’s “conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus in the worksite.”
 - Assessment should be ongoing and evolve, as risk factors may change over time.

Vaccine Legal Issues: Liability

- Workers' compensation
 - State-specific analysis, potentially dependent on:
 - Whether vaccination is mandated
 - Where vaccination occurs (on-site vs. off-site)
- The PREP Act provides broad protection from liability for COVID-19 vaccines under EUA or that receive FDA approval which may apply to certain private employers with respect to COVID-19 vaccination by:
 - Establishing a program for vaccination of employees;
 - Retaining a vendor to administer vaccines to employees; or
 - Providing the use of a company facility for administration of vaccines.

Accommodating Unvaccinated Employees

- Accommodations may include additional protective gear, isolating or moving an employee's workstation, modifying nonessential job duties, or temporary reassignment.
- EEOC: It is lawful to exclude an employee who cannot get vaccinated because of a disability or sincerely held religious belief if there is no available reasonable accommodation.
 - ADA: Consider undue-hardship and direct-threat analysis
 - Title VII: Consider undue-hardship analysis (which may include safety risks)
- If no workplace accommodations are available, consider whether the employee may be able to perform the position remotely.
- If remote work is not possible, consider available leave options under federal, state, and local laws and the employer's policies.

Mandating Vaccines – Practical Considerations

Consider the impact on employee morale

- Safety concerns (particularly with respect to vaccines approved under an EUA)
- Ideological or political objections
- Potential for increased union-organizing efforts

Potential turnover and staffing shortages

- Some employees may feel so strongly in their convictions that they choose to quit
- If a significant number of employees stand to quit, then what?
- Must be prepared and willing to terminate (otherwise high-performing) employees who refuse vaccination

Voluntary Vaccines – Incentives Generally

Big Question: How to increase the number of employees who get vaccinated if it's not mandatory?

- Employers have broad discretion in encouraging employees to get vaccinated.
- Incentive efforts:
 - Financial incentives
 - Health and wellness campaign
 - Video of senior leadership getting vaccinated (if eligible)
 - Gift cards/swag/store credit
 - PTO time


Return to Work Resources for Employers

View a list of the [return to work resources](#) that 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](#).

[Questions on Vaccines?](#)



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NOW. NORMAL.
NEXT.

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">We can also provide weekly updates
	We can also create customized charts of specific orders or just reopening orders. Examples: <ul style="list-style-type: none">Requirements Regarding Temperature Screens and Symptom ScreensRequirements for PPE or Face Coverings
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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Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at

[www.morganlewis.com/
topics/coronavirus-
covid-19](http://www.morganlewis.com/topics/coronavirus-covid-19)

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple “Stay Up to Date” button.

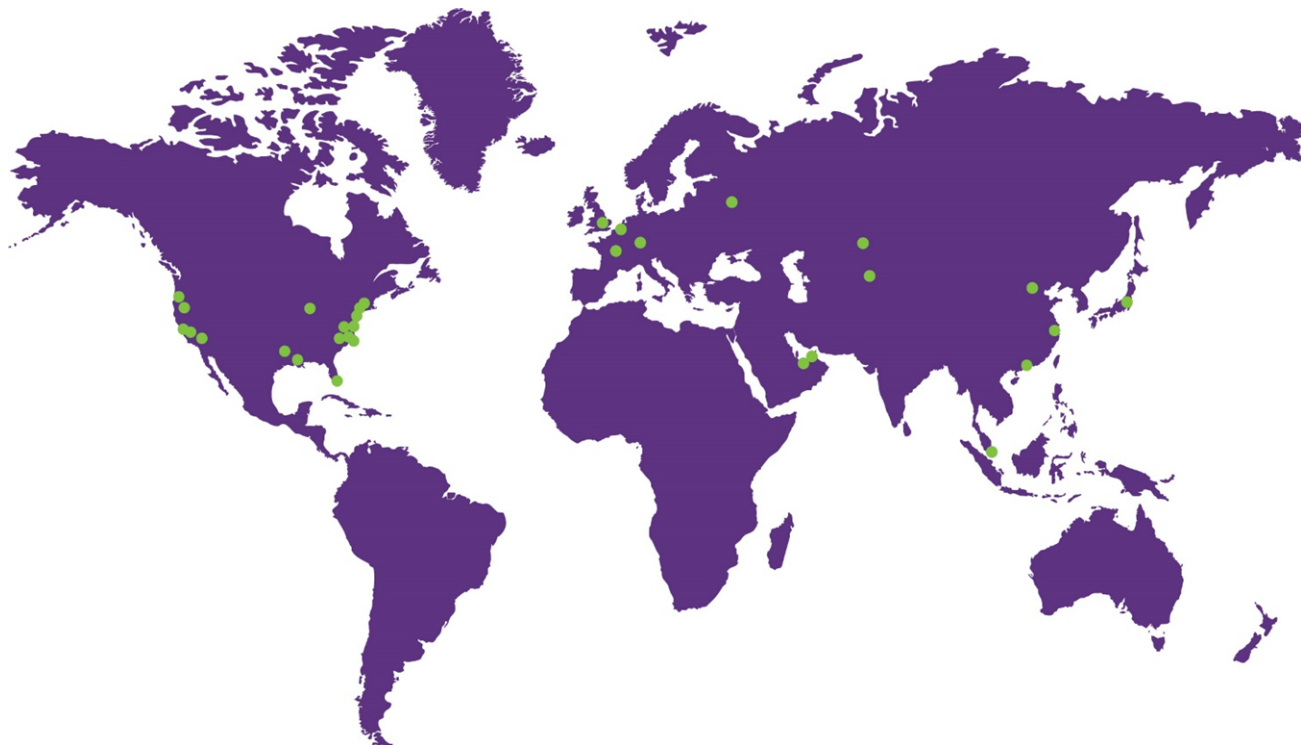


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