

Morgan Lewis

CALIFORNIA EMPLOYMENT LAW IN A TIME OF PANDEMIC

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Legal Considerations for California Employers

- Shelters in Place and Remote Work Considerations
- Best Practices for Continues On-Site Work
- Paid Time Off (PTO/Vacation/Sick)
- California Furloughs/Layoffs
- FFCRA for California Employers

SHELTERS IN PLACE AND REMOTE WORK CONSIDERATIONS

Example of Shelter-in-Place Orders

Northern California Shelter in Place Orders

Essential Activities:	<ul style="list-style-type: none"> • Tasks essential to health – visiting doctor, care for pets, supplies needed to work from home • Obtain necessary services or supplies – food, necessary household goods • Engage in outdoor activity – walk, hike, run so long as maintain six foot distance • Perform work providing essential products and services, including minimum basic operations • To care for a family member or pet in another household
Essential Businesses (General):	<p>Essential businesses include:</p> <ul style="list-style-type: none"> • Healthcare operations – providing health services, supplies for health services, veterinary care – construed broadly (this does not include gyms) • Essential infrastructure – construction, airports, water/sewer/gas, trash collection, telecommunications/internet • First Responders – emergency personnel, court and law enforcement • Essential Government Functions – services necessary to ensure the continuing operation of government agencies, for health, safety, and welfare of the public
Essential Business (Misc.):	<p>The order also includes a potpourri list of other essential businesses, generally including:</p> <ul style="list-style-type: none"> • Grocery stores and other stores that sell human and animal food • Food cultivation • Businesses that provide services to the needy • Media – newspapers, tv, radio • Automobile –gas station, auto supply and repair • Banks and financial institutions • Hardware stores • Plumbers, electricians, exterminators and other businesses that provide services necessary to the safety, sanitation, and essential operations of residences • Shipping/mailing • Educational institutions for purposes of providing distance learning • Laundromats / dry cleaners • Restaurants – delivery or take out only • Businesses that supply products needed for people to work at home • Businesses that supply other essential businesses with the support or supplies necessary to operate • Ship or delivery groceries / goods to residences • Airlines, taxis, transport • Home-based care for seniors, adults, children • Residential facilities for seniors, adults, children • Professional services (legal/accounting) if necessary to assist in compliance with legally mandated activities • Childcare – 12 or fewer children, static groups, static care providers
Non-Essential Business:	<p>Allowed to engage in minimum basic operations – Minimum necessary staff (using social distancing) to:</p> <ul style="list-style-type: none"> • Maintain value of inventory, ensure security, process payroll / benefits • Maintain remote work capabilities
Essential Travel:	<p>Allowed to perform essential activities, care for elderly/dependents/vulnerable, travel for meals, to place of residence outside jurisdiction, if required by law enforcement.</p>
Enforcement:	<p>Govt Code 26602, 41601; Health and Safety Code 101029</p>

Importance of Setting Expectations

- Send communication (or enter into agreement) to clarify remote working expectations and parameters
 - Whether voluntary or mandatory (important for expense issues)
 - Productivity and compensation expectations
 - Work-hour expectations
 - Meal/rest break expectations
 - Recordkeeping expectations
 - Workers' compensation/OSHA issues
 - Protecting proprietary information
 - Expectations as to supplying equipment
 - Expense reimbursement obligations

Productivity and Duration

- Productivity
 - Established productivity expectations are key to successful relationship
 - Part-time expectations (and/or rotating schedules) should be established in advance
 - Targets and goals should be clear and regularly revisited
 - Ensure that primary duty for exempt employees remains exempt work
- Duration
 - Avoid guarantees for duration of pandemic
 - Set periods for reevaluation, based on performance
 - Termination “at will” (or reserve right to transfer to unpaid leave or non-exempt status)

Issues Related to the Work Area

- The home becomes the workplace
 - Employee must report work-related injuries
 - Try to limit third-party access to the work area (consider high-density population areas and likelihood of roommates and/or family members sharing confined spaces)
- Provide necessary supplies and equipment (laptops/computers, monitors, general office supplies)
 - Consider any ADA/FEHA accommodations that may be needed (e.g., ergonomic chair, keyboard)
- Try to limit distractions during working times
 - However, be realistic with respect to tensions between work and family obligations

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) and 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:
 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 anti-trust violations (*i.e.* benchmarking competitive pay information)
 - Large employers might consider using a data economist

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 employee must “call in” to determine work needs (can trigger reporting time)
 - Beware of “on-call” treatment, if employees are expected to standby 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

Remotely Protecting Proprietary Information (not California-specific, but important to our CA clients)

- Determine information system security issues
 - Remote working agreement should address protection of proprietary information.
 - Access to proprietary information should be through a secure, encrypted connection.
- Remote workers should access confidential information only on a need-to-know basis (including any hard-copy information brought to their remote worksites)
- Ensure that employees understand and comply with provisions to secure information, considering others who may also be in the home (roommates, family, visitors)
 - Equipment should be password protected and shut down when not in use
 - Phone calls addressing confidential information should be taken in private areas
- Remote workers should be required to take reasonable precautions to protect company equipment from theft, damage, or misuse
- Physical documents taken to remote sites must be properly disposed of or secured for return to the company
- Many companies have BYOD policies that might be helpful to modify and use for remote work

Foreign National Workers as Remote Workers (not California-specific, but important to our CA clients)

- Form I-9 Compliance
 - Temporary relief from in-person review for employers taking physical proximity precautions
 - Authorized representatives may be a workable solution
 - Anyone can be an authorized representative (neighbor, roommate, etc.) - no special agency appointment needed
- H-1B, H-1B1, E-3 Nonimmigrants
 - Work from home in same commuting area is possible
 - “No Benching” rule applies to work and wage reductions
 - Maintain wage requirements
 - Termination triggers 60-day grace period provisions (must withdraw petition and offer H-1B return transportation)
- L-1 Intracompany Transferee
 - Transfer to another employer is impractical
- Avoid preferential treatment of foreign workers - potentially discriminatory
- See Immigration materials at [Coronavirus COVID-19 resource page](#) for additional guidance

BEST PRACTICES FOR CONTINUED ON-SITE WORK

Issues Related to the Work Area – Essential Businesses who are open

- Bay Area Orders, amended March 31, 2020 require essential businesses to post a social distancing protocol **by midnight on April 2**
 - Limit number of people in the facility, maintaining six foot increments in lines, provide hand sanitizer / soap and water / disinfectant, contactless payment systems, disinfect high touch surfaces, post sign that symptomatic people should not enter
 - **Social distancing protocol form is attached to each Bay Area order**
- Certain counties require employers to perform employee illness screens
 - Fresno, Madera, Mariposa, Mono, and Tuolumne Counties require employers to screen employees for illness and order symptomatic employees to isolate.
- <https://www.morganlewis.com/pubs/northern-and-central-california-counties-issue-important-updates-to-shelter-in-place-orders-cv19-lf>.

Best Practices for Continued On-Site Work

- Provide employees with letters explaining why they are essential so that they can show them if stopped.
- Remind employees not to come to work if sick!
- Practice social distancing.
- Clean facilities often.
- If premium pay is offered, make sure it is included in the regular rate of pay.

Signage at Entrance and Notice to Employees

- Place signage at all entrances and notify employees and third parties (contractors, vendors, visitors) not to come to work or enter the premises if they can answer “yes” to any of the following questions:
 - Do you currently have a fever, cough, sore throat, shortness of breath, or any other COVID-19 or flu-like symptoms?
 - Have you been diagnosed with COVID-19?
 - In the last 14 days, have you had close contact (within 6 feet or living in your household) with a person who has been diagnosed with COVID-19?
 - Have you been told by a healthcare provider or public health official that you should self-quarantine due to potential COVID-19 exposure(s) or are suspected of having COVID-19?
 - In the last 14 days, have you traveled internationally, or traveled to any area in the United States that has a high COVID-19 infection rate?

Best Practices for Continued On-Site Work

- Can I take the temperature of employees who are coming in to work?
 - Yes.
 - While the ADA typically prevents employers from doing so, since it is a medical examination, there is an exception for pandemics.
 - The DFEH has confirmed that temperature testing is allowed.

Best Practices for Taking Employee Temperatures

- Make sure employees practice social distancing while waiting in line
- Use a healthcare professional if available.
- Train screeners and provide them with protective equipment
- Avoid discrimination issues.
- Send employee home if temperature is over CDC recommendation, i.e. 100 degrees or other symptoms are present.
 - Check if CDC guidance changes

Best Practices for Taking Employee Temperatures

- Don't record temperatures.
- Consider whether to require clearance from healthcare professional before employee returns to work.
- Consider whether reporting-time pay is owed.
 - Is employee being sent home because he or she sick?
 - Does paid sick time cover reporting-time pay obligation?
- Consider if non-exempt employee needs to be paid while waiting in line to be checked.

What if an Employee Tests Positive or Has Been in Contact with Someone Who Has Tested Positive?

- Determine when employee was last at work and, if possible, with whom the employee was in contact.
- Advise employee with fever to consult CDC or WHO guidelines and to contact his or her healthcare professional.
- Don't give medical advice.
- OK to put restrictions on return to work date.
- Consider whether to require release to return to work.

What if an Employee Tests Positive or Has Been in Contact with Someone Who Has Tested Positive?

- Consider notifying health department to ask for advice.
- Consider notifying employees who worked close by.
- Consider notifying customers or others employees has been in contact with.
- Consider extra cleaning of the workplace.

Best Practices for Continued On-Site Work

- Remember to comply with California's seventh day-of-rest requirements.
- Remember to provide religious accommodations if possible
 - Does pandemic create undue hardship?
- Remember to consider California predictive scheduling requirements.
 - Some cities have their own additional predictive scheduling requirements
 - Check to see if they have been relaxed.
- Remember to comply with reporting-time pay and call-in/call-back pay obligations, and provide sufficient advance notice of whether an employee is required to come in to work.

Best Practices for Continued On-Site Work

- Should I send all of my employees more than 65 years old home because they are at increased risk of catching or dying from the virus?
 - *United Automobile Workers v. Johnson Controls*, 499 U.S. 187 (1991)
 - Employer could not prevent women who might become pregnant from coming to work even though it might be harmful to the mother and unborn child if they became pregnant.
 - Paying employees not to work would mitigate the risk.

Best Practices for Continued On-Site Work

- What if I have an employee who refuses to come to work because the employee feels it is unsafe?
- Option 1
 - Agree that employee does not have to work, and put employee on an unpaid, personal leave.
 - You do not have to continue benefits, or you can continue benefits but require that the employee make their contributions contemporaneously.
 - You do not need to payout vacation/PTO, etc. unless you are treating this as a resignation.
 - Employee may not be eligible for unemployment benefits.
- Option 2:
 - Treat the refusal to work as a resignation/job abandonment.
 - Pay out final pay.
 - Employee may apply for unemployment benefits.

PAID TIME OFF (PTO/VACATION/SICK)

California – Paid Sick Leave

- California law requires three days of paid sick leave if front-loaded, or one hour for every 30 hours worked.
 - The California Department of Labor Standards Enforcement (DLSE) has issued guidance on the use of paid sick leave during the COVID-19 pandemic:
 - <https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm>.
- The employer may not require employees to use paid sick leave. If employees choose to use it, the employer can require employees to take a minimum of two hours.
- Cannot require doctor's note in advance
 - Debated as to whether you can require it after the fact

California – Paid Sick Leave – COVID-19

- California paid sick leave can be taken for:
 - Absences due to illness; the diagnosis, care, or treatment of an existing health condition or preventive care for an employee or the employee’s family member.
 - Preventive care may include self-quarantine as a result of potential exposure to COVID-19 if quarantine is recommended by civil authorities.
 - Q: Does this include shelter-in-place orders?
 - Preventive care may include where there has been exposure to COVID-19 or where the worker has traveled to a high-risk area.
- **Recommendation:** Allow employees to use all their California paid sick leave if the absence is related to COVID-19.
 - Employees may use it to “top off” capped pay under FFCRA.

California – Paid Sick Leave

- The employer may not require a doctor's note.
- An employer that has already provided, or will provide, the same or better paid leave, on the same or better terms, on or after March 4th, pursuant to the terms of the ordinance, will have fulfilled its obligation.
- Many cities have their own ordinances, which are different and more generous.
 - Some cities allow paid sick leave for school closures.

Local Sick Leave Ordinance Example – Los Angeles

- Los Angeles passed an ordinance requiring employers with 500 or more employees nationwide to provide employees working in the City of Los Angeles 10 days' paid sick leave capped at \$511/day if:
 - a public health official or healthcare provider requires or recommends that the employee self-isolate or self-quarantine to prevent the spread of COVID-19;
 - the employee is at least 65 years old or has a health condition such as heart disease, asthma, lung disease, diabetes, kidney disease, or weakened immune system;
 - the employee needs to care for a family member who is not sick but for whom public health officials or healthcare providers have required or recommended isolation or self-quarantine; or
 - the employee needs to provide care for a family member whose senior care provider or whose school or childcare provider caring for a child under the age of 18 temporarily ceases operations in response to a public health or other public official's recommendation.

California – Other Paid Benefits

- California employees are also entitled to Paid Family Leave (PFL), a paid benefit provided by the State of California and funded by employee payroll deductions.
https://www.edd.ca.gov/Disability/About_PFL.htm.
- California employees are also entitled to State Disability Insurance (SDI), a paid benefit provided by the State of California and funded by employee payroll deductions.
[https://www.edd.ca.gov/disability/About the State Disability Insurance \(SDI\) Program.htm](https://www.edd.ca.gov/disability/About_the_State_Disability_Insurance_(SDI)_Program.htm).
- Some employers also have STD and/or LTD insurance plans.
 - Give notice and provide documentation where appropriate.

California – School Activities Leave

- California allows employees at worksites with more than 25 employees 40 hours of time off each year if, among other reasons, their children’s school or childcare providers are closed or unexpectedly unavailable under [California Labor Code 230.8\(a\)\(1\)\(B\)](#).
- Under the statute, employers may require employees to use vacation, PTO, or personal leave during this time off unless otherwise provided by a CBA, but consider interaction with expanded FMLA, as well as state guidance and local ordinances.
 - See DLSE COVID Guidance and SF and San Diego Ordinances
- An employee may also use time without pay for this leave.

California – Paid Sick Leave

- Many companies have their own policies, which are more generous, or which combine paid sick leave and vacation (although there are disadvantages to doing so).
- Employers with “unlimited” or “discretionary” policies may need to consider how to administer their policies, based on policy language.

“Unlimited” Vacation or Sick Leave

- Some companies have adopted unlimited vacation and/or unlimited sick leave policies.
- Review the terms of the policies carefully to determine whether they cover employees unable to work for COVID-19 issues.
- Determine advisability of terminating employees rather than furlough.
- Determine whether to revise the policies to clarify what they cover.
 - Is notice required?
 - Consult with counsel before doing so.

“Unlimited” Vacation or Sick Leave

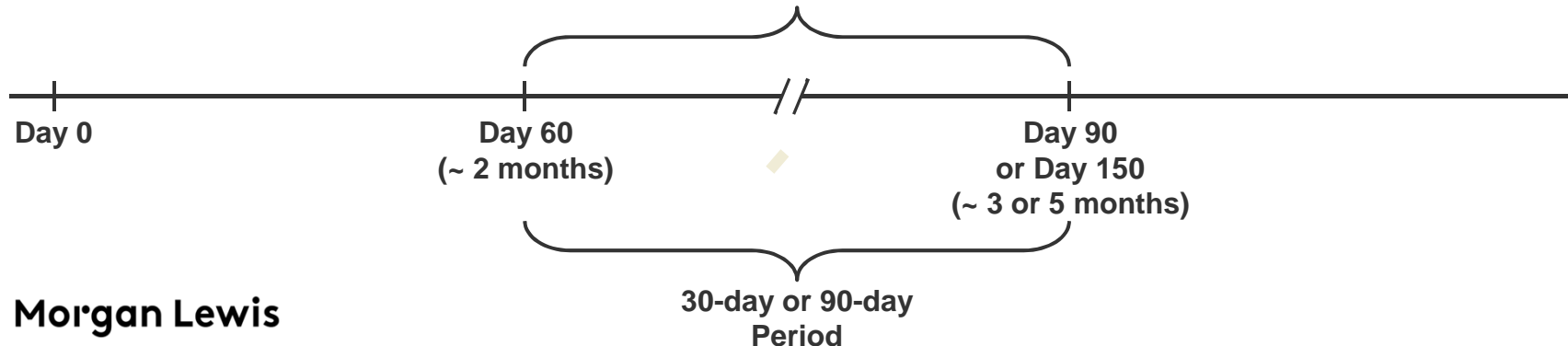
- *McPherson v. EF Intercultural Foundation Inc.*, decided April 1, 2020 by the California Court of Appeal, discussed the validity of unlimited vacation policies in California.
 - Watch for our LawFlash.
 - Consider revising policies to make clear that they are flexible time away policies.
 - Consult with legal counsel before doing so.

CALIFORNIA FURLOUGHS/LAYOFFS

WARN Notice and COVID-19: What You Need to Know

WARN basics

1. Watch out: WARN requires written notices before a “plant closing” or “mass layoff,” **but these terms are misleading.**
2. WARN requires 60 days’ written notices before large numbers of **any** of the following actions (which the statute calls “employment losses”) within a 90- or 30-day period:
 - employment **terminations**;
 - **layoffs** exceeding six months;
 - **Hours’ reductions** of more than 50 percent during each month of any six-month period



WARN Notice and COVID-19: What You Need to Know

WARN basics (cont.)

3. How many “employment losses” trigger WARN notice requirements?

- WARN counting focuses on each location separately, over a 90-day (sometimes 30-day) period
- **plant closing**: shutdown of a site, facility/building or operating unit, causing 50 or more employment losses at a single site; excludes “part-time” (and short-service) employees
- **mass layoff**: 50 or more employment losses that constitute 33 percent of a site’s employees or 500 or more employees at a site; excludes “part-time” (and short-service) employees

4. Who must receive WARN notices?

- unrepresented employees, AND
- the chief elected official of any unions (for represented employees), AND
- the chief elected local government officials, AND
- the state dislocated worker unit (i.e., the state’s rapid response coordinator/agency)

WARN Notice and COVID-19: What You Need to Know

WARN basics *(cont.)*

5. What **WARN exceptions** are most relevant to **COVID-19** separations?

There are four key concepts.

- **Key Concept 1** – **Layoffs (or furloughs) expected to be six months or less** do NOT trigger WARN (these are NOT “employment losses” under WARN)
- **Key Concept 2** – You should “**announce**” **in writing** that short-term layoffs/furloughs are expected to be six months or less (under WARN, this permits you to later issue mid-stream WARN notices if **unforeseeable circumstances arise** during the course of such short-term layoffs/furloughs, which cause the layoffs to be extended to more than six months)

WARN Notice and COVID-19: What You Need to Know

WARN basics (cont.)

5. What **WARN exceptions** are most relevant to **COVID-19** separations? (cont.)

There are four key concepts. (cont.)

➤ **Key Concept 3** – At present, if COVID-19 issues cause immediate separations triggering WARN notice requirements, most employers can invoke **WARN’s “unforeseeable business circumstances”** and/or **“natural disaster” exceptions**, but the employers **must still issue WARN notices** that . . .

- are **served as soon as “practicable” (even if after-the-fact)** to **all** required notice recipients;
- **comply with all other WARN requirements** (except for 60 days’ notice); and
- contain **“a brief statement of the basis for reducing the notification period”**

➤ **Key Concept 4** – California’s WARN

State/local WARN-type Laws: What You Need to Know

➤ **California:**

- Covers *short-term* layoffs; *no* “unforeseeable business circumstances” exception; *no* 33% mass layoff threshold
- But **is “suspended” by executive order** (essentially incorporating “unforeseeable business circumstances”), but notices still required to employees
 - Statement as to why 60-day notification period could not be met
 - Permanent or temporary
 - Entire location to close or only a portion
 - Expected date the action will commence and expected date of separation
 - Whether bumping rights exist
 - Name and telephone number of company official
 - If you have lost your job or been laid off temporarily you may be eligible for Unemployment Insurance, More information on UI and other resources available for workers is available at labor.ca.gov/coronavirus2019
- To EDD, Local workforce Development Board, and chief elected official with specific requirements: https://www.edd.ca.gov/about_edd/coronavirus-2019/faqs/Warn.htm

Pay Reductions, Furloughs, Layoffs, and Separations

Three general types of workforce change alternatives conceptually:

- Temporary furloughs with a definite anticipated return to work;
- Indefinite furloughs which are equivalent to layoffs
- Pay and/or hours reductions
 - Nonexempt employees
 - Exempt employees

Workforce Change Alternatives

- **Temporary furloughs** with a **definite** return date
 - Employees remain employed without pay
 - Employer provides a definite return-to-work within 10 days
 - Benefits may continue
- **Indefinite furloughs/layoffs**
 - Employees do not work and are not paid
 - The time period of the furlough is unclear and not defined
 - In general, indefinite furloughs with no pay are considered an employment termination event
 - Benefits may continue for a period of time

Workforce Change Alternatives

- **Pay and/or hours' reductions**
 - Employees remain employed and continue to receive health benefits
 - Hours and/or hourly rate reductions for nonexempt employees
 - Salary and/or work expectation reductions for exempt employees
- Consider eligibility for expanded unemployment benefit in connection with all alternatives

Temporary Furloughs (Continuing “Employment”)

- Evaluate **Cal-Warn** applicability
- **Families First Act**
 - Required for employers smaller than 500 employees
 - Quarantine or isolation order, healthcare provider advice, care for a quarantined or isolated family member, or care for a child
- **Sick leave mandated** by state or local paid sick leave ordinances
 - Must require use for covered reasons
- **Vacation/PTO use** during the temporary furlough
 - DLSE takes the position that PTO cannot be forced
 - Whether use can be denied depends on vacation policy
 - If temporary furlough extends longer than 10 days, vacation/PTO must be paid regardless

Temporary Furloughs (Continuing “Employment”)

- **Benefits paid by the state** (unemployment, disability, and paid family leave)
 - Unemployment – may qualify if hours or pay reduced (check individual circumstances)
 - Wages payable reduced by \$25 or 25%, whichever is greater
 - If Weekly Benefit Amount (up to \$450) is more than 75% of earnings, then eligible a benefit
 - If California participates, may also be eligible for new federal benefit if California signs up
 - Paid Family Leave if unable to work because caring for ill or quarantined family member
 - Disability insurance in unable to work because ill, quarantined or isolated
 - Make sure to inform employees these benefits and provide required forms

Temporary Furloughs (Continuing “Employment”)

- **FMLA/CFRA**

- Employers with fewer than 500 employees must provide benefits under the Families First Act
- Employers must allow time off for qualifying purposes, but pay during leave is defined by employer’s policy

- **CBA Benefits**

- **Maintaining health benefits**

- Check plan terms for minimum hours’ requirements
- Does not impact entitlement to Unemployment Insurance in most states (some exceptions)

Temporary Furloughs (Continuing “Employment”)

- Many employers are **paying employees while on leave** (or paying a **percentage** of wages) if possible to:
 - (1) encourage reporting of symptoms;
 - (2) support their workers; and
 - (3) mitigate potential claims from employees who may otherwise argue that being sent home without pay was discriminatory.
- Ultimately, this is a **business decision**, depending on the circumstances and degree of spread of COVID-19.

Indefinite Furloughs/Layoffs

- With no definite return date and no pay, an indefinite furlough in California requires payout of final wages (technically a termination for wage payment statutes)
- Provide Cal-WARN notices if applicable
- Sick leave
 - No obligation to pay sick leave if employment ends
 - Under the Families First Act, we believe that benefits are not required if employment ends
 - However, strongly consider providing benefits before employment terminates

Indefinite Furloughs/Layoffs

- **Vacation/PTO**
 - Must pay final wages including accrued/unused vacation/PTO
- **FMLA and CFRA**
 - Generally allow termination if the adverse action would have occurred regardless of leave status
- Provide information about **state-sponsored benefits**
 - Unemployment
 - Disability
 - Paid Family Leave (California)
 - Workers' Compensation (if applicable)
- Remain aware of **labor contract issues and constraints**

Hours and Pay Reductions

- **All Employees**

- Hours' reduction of more than 50% may trigger WARN or Cal-WARN obligations
- Families First benefits need to be provided (if applicable)
- Must allow sick leave for sick leave purposes
- Must allow FMLA/CFRA
- Vacation/PTO can be denied only if policies permit denial, and should be a last resort

- **Nonexempt Employees**

- Must only receive pay for hours worked
- May be entitled to UI for hours or pay reduction, but only up to the state's maximum weekly benefit
- Provide as much notice as possible
- Remain aware of "reporting time" issues
- Remain aware of obligations to compensate for certain "on-call" time

Hours and Pay Reductions

- **Exempt Employees**

- Must receive salary if an exempt employee works at all during a workweek
 - Exceptions: full day absences caused by vacation or illness, if a program to pay for sick leave exists
 - In California, for example, even checking email counts as work
- The salary can be a combination of pay and time from leave banks, or just time from leave banks
- To maintain exempt status, salary cannot be reduced below salary-basis threshold
 - California = \$1,040 per week

Other Considerations

- Pay and quarantine decisions **may affect other legal issues**. Examples:
 - extended exempt employee leaves may impact exempt-salaried basis test
 - if unpaid, salaries may fall below prevailing wage-rate levels for H-1B Visa employees
- Employees who go on COBRA lose their right to go on the Exchange prior to the next Open Enrollment Period
 - Subsidizing COBRA may incentivize employees to go on COBRA and lose their right to go on the Exchange.
 - Generally, better option is to give the employee cash for any purpose (but taxable income to the employee)
- Also consider **notice** requirements in executive contracts.
- Additional considerations:
 - Coverage for absent employees and overtime for others
 - Flexible leave policies
 - Watch for impact on incentive programs – bonus, pay match, variable compensation
 - Pay incentives during outbreak (to ensure continuance of your operations)
 - How much vacation may be used under an unlimited vacation policy
- If an employee is infected at work (though questions exist about how this could be established), he or she may be eligible for workers' compensation benefits.

FFCRA FOR CALIFORNIA EMPLOYERS

The FFCRA for Employers with Fewer Than 500 Employees

- The Families First Coronavirus Response Act (FFCRA) **requires** employers with fewer than 500 employees to grant all full- and part-time employees :
 - 10 days of paid sick leave for COVID-19 reasons
 - Prorated for part-time employees
 - The maximum payments will be \$511/day (\$5,110 in aggregate) for an employee's own needs and \$200/day (\$2,000 in the aggregate) for an employee's caregiving needs.
 - 12 weeks of job-protected family leave (10 weeks paid) if employee cannot work (or telework) **in order to care for a child** if the child's school or care location has been closed, or if the child's care provider is unavailable due to COVID-19.
 - Payment is two-thirds of the employee's wage but is capped at \$200/day and \$10,000 in the aggregate under FFCRA.
- The federal government will reimburse employers for the cost.
- See: <https://www.morganlewis.com/pubs/new-mandate-for-paid-sick-leave-and-long-term-leave-for-some-employers-due-to-covid-19-emergency>

The FFCRA for Employers with Fewer Than 500 Employees

- Does NOT apply to businesses who temporarily shutter operations or furlough employees.
- Paid sick leave includes employees prevented from working or tele-working due to governmental orders to shelter in place, stay home, quarantine, or “otherwise restrict their own mobility”.
 - Would the employee have been able to work but for the governmental order?
 - Does not apply if employer has no work for the employee.
 - That employee would be eligible for unemployment benefits
- DOL says up to 61 million workers will be eligible.
- Can’t discriminate or retaliate against an employee for taking the leave.

The FFCRA for Employers with Fewer Than 500 Employees

- Companies with fewer than 500 employees **must provide** 10 days of paid sick leave for COVID-19 reasons and 12 weeks of job-protected family leave (10 weeks paid) if employee cannot work (or telework) **in order to care for a child** if the child's school or care location has been closed, or if the child's care provider is unavailable due to COVID-19.
 - DOL is working hard to constantly update its FAQs to answer many of the questions unanswered by the statute.
 - <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
 - DOL has now issued 124 pages of regulations:
<https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/FFCRA.pdf>
 - New Expanded Federal Family leave runs concurrent with FMLA
 - i.e., don't get 24 weeks
 - Employer consent required to take leave intermittently (like FMLA)

Which Employees Count Toward the 500?

- Only US-based employees.
- Employers must count any employee whose name appears on payroll records, including part-time and seasonal employees, whether or not any compensation is received for the workweek, and any employee on paid or unpaid leave, as long as there is a reasonable expectation the employee will return to active employment.
- You have to count employees who are placed at your business from temp agencies. *See* 20 C.F.R. § 825.106(d).
- You shouldn't include independent contractors.
- If a company dips below 500 employees before April 1 (the law's effective date) because it has laid off people, it has triggered the FFA's obligations and benefits.
- If a company ends up below 500 employees after April 1, as soon as it dips below 500 it has triggered the obligations and benefits under the Act.

Which Employees Count Toward the 500?

- All entities with “integrated operations” (as those terms are defined under existing FMLA authority) should be counted.
- Consult counsel to determine if your operations are integrated.

The FFCRA for Employers with Fewer Than 500 Employees

- Employers must “post” the required notice **by April 1.**
 - https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf.
 - Email is fine if employees are working from home.
- Employers should revise policies to cover FFCRA paid sick leave and extended family leave.

Interaction Between FFCRA Paid Sick Leave and California Law

- Assume an employee has:
 - California paid sick leave
 - Employer-provided paid sick leave and vacation or PTO
 - FFCRA paid sick leave
- How much paid leave does the employee receive?:
 - FFCRA paid sick leave is in addition to state and company provided paid sick leave.
 - Employee chooses which leave to take first.
 - Employees earning more than \$511/\$200 a day will likely use California paid sick leave and company-provided paid sick leave first, unless they want to save it and use it later in the year.
 - Employees earning less than \$511/\$200 a day will likely use the FFCRA paid sick leave first.

Expanded Federal FMLA and CFRA Leave

- DOL has made clear that the 12 weeks (10 weeks paid) of FFCRA expanded family leave runs concurrent with FMLA.
- Unclear if the same will be true under CFRA.
 - The FMLA for purposes of CFRA is the FMLA based on the statute and the implementing regulations of March 8, 2013.
 - Consult with counsel before denying CFRA leave based on exhaustion of expanded Federal FMLA leave.

California – CFRA vs. FFCRA FMLA – Differences

- There are significant differences between leaves under California’s Family Rights Act (CFRA, California’s version of FMLA) and the Families First FMLA.
 - **Families First:** all employees.
 - California: 50 employees within 75 miles.
 - **Families First:** working 30 days - no time or hours limits.
 - California: 1 year/1,250 hours.
 - **Families First:** paid up to cap.
 - California: unpaid.
 - **Families First:** Available *only* if an employee cannot work (or telework) in order to care for a child if the child’s school or care location has been closed, or if the child’s care provider is unavailable due to COVID-19.
 - California: Same purposes as FMLA, but different under expanded Federal FMLA.

California – CFRA vs. FFCRA FMLA – Differences

- California: doesn't cover employees disabled by pregnancy or childbirth.
 - Baby bonding in addition to pregnancy disability leave.
- California: no diagnosis allowed.
 - Different from screening which is specifically allowed due to pandemic.
- California: covers domestic partners.
- California: employer cannot contact an employee's healthcare provider to "clarify" a certification.
 - An employer may, however, ask employees to cure deficiencies in certifications and insist upon receiving a complete and sufficient medical certification.

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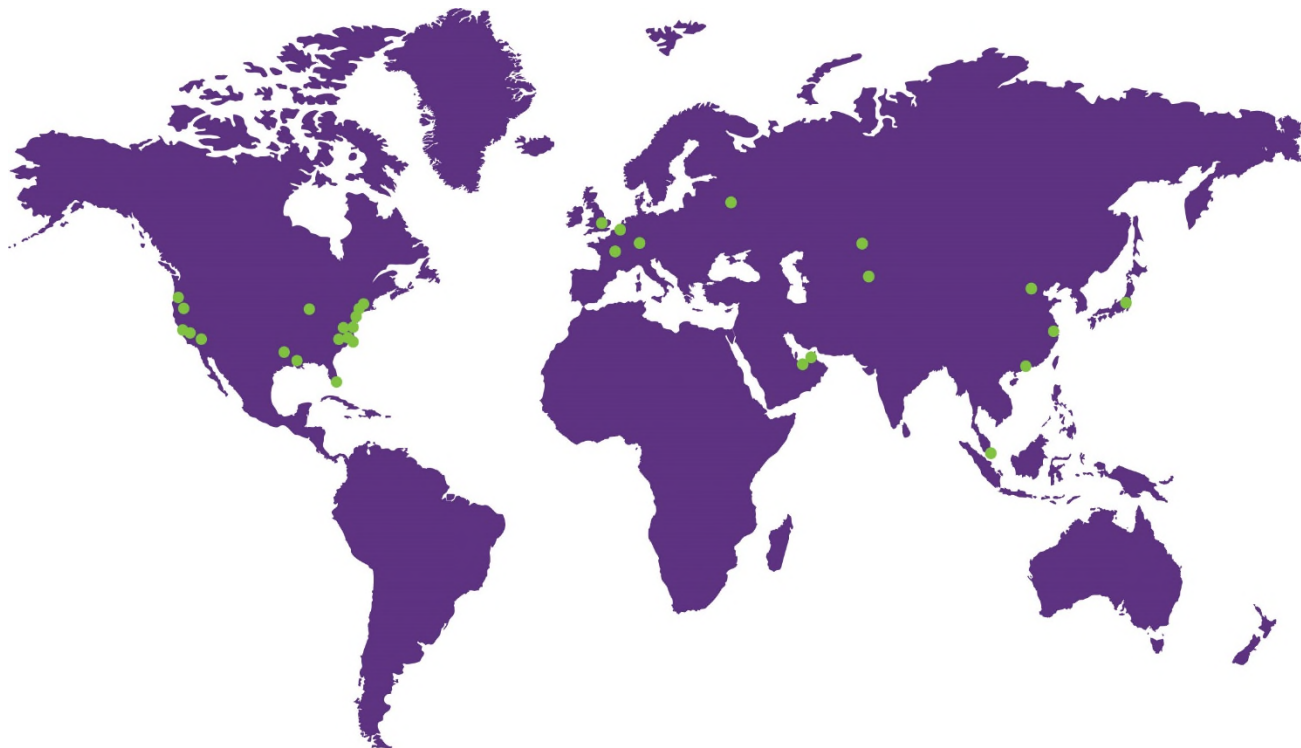
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