BUSINESS BRIEF:
CALIFORNIA QUARTERLY EMPLOYMENT LAW UPDATE

VOLUME 5 , JULY 9th 2020

RAINESFELDMAN

THIS EDITION

Please visit our COVID-19 resource center at https://www.raineslaw.com/covid-19/

COVID-19 PAGES 1 -4
CIVIL RIGHTS PAGES 5
WAGE & HOUR PAGES 6

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Individualized Inquiry Required for Employees Who Refuse to Return to Work

BY: RICARDO ROZEN AND PHILLIP R. MALTIN

ISSUE As businesses prepare to reopen (in some case only to close again), many employees refuse to return to work. How should employers respond? The answer depends on why the employee refused.

SUMMARY Below we analyze some common reasons employees give for refusing to return to work; and we survey ways to respond. Remember, the law may protect some employees who refuse to return. In general, determining the proper response requires a fresh and individualized look at each situation.

THE EMPLOYEE WHO FEARS THE VIRUS A general fear of the virus is not legally sufficient to refuse to return to work. But, fear based on "imminent danger" may be. The California Employment Development Department advises that employees merely afraid of the virus do not have good cause to refuse to return. That reason may disqualify the employee from collecting unemployment benefits. (This discussion assumes the business is following all state and local reopening mandates and protocols.) If the employee can identify mandatory safety measures the employer is not taking, he/she may have good cause not to return. If the employer takes an adverse employment action based on the complaints, the employee may have a whistleblower or retaliation claim against the business. Additionally, a group of employees that raises safety concerns may receive protection under the National Labor Relations Act for "protected activity." It is important to discuss with the employee the reasons behind the decision not to return.

THE EMPLOYEE WHO IS VULNERABLE TO THE VIRUS BECAUSE OF UNDERLYING HEALTH CONDITIONS Employees who report (and document) underlying health conditions that make them more vulnerable may have a right to refuse to return to work. Under the Americans with Disabilities Act, and the California Fair Employment and Housing Act, an employer must engage in an interactive process to find a reasonable accommodation for an employee who discloses a disability. An employee with a disability who has been working remotely may ask to continue doing that. In fact, the reopening protocols of the Los Angeles County Department of Public Health ("LACDPH") state that all businesses must ensure that "Vulnerable staff (those above age 65, those who are pregnant, and those with chronic health conditions) are assigned work that can be done from home whenever possible. . . ." If remote work is not possible, the employer should evaluate whether physical accommodations exist, like separating the at-risk employee from interactions with coworkers and clients. If they do not, consider placing the employee on leave.

THE EMPLOYEE WHO LIVES WITH SOMEONE WHO IS VULNERABLE If the employee is caring for a family member with COVID-19, the employee may be eligible for paid time off under the Families First Coronavirus Response Act ("FFCRA") (or other sick leave laws) to care for that family member. The employee may also qualify for FMLA leave. Employers should discuss with the employee all available leave options. Generally, an employee does not have a right to refuse to return because the employee lives with a family member or roommate who is vulnerable to COVID-19. If telework is available, the employer should consider offering it.

THE EMPLOYEE WHO IS OVER 65 If an employee is 65 or older and has health reasons that make the employee vulnerable, follow the analysis above regarding employees with underlying health conditions. If the employee is in good health, over 65, and refusing to return because the CDC has stated individuals over 65 are at higher risk for a severe case of COVID-19, then the employer should consider if the employee can work remotely (as the LACDPH requires).

BUSINESS BRIEF:
CALIFORNIA QUARTERLY EMPLOYMENT LAW UPDATE

VOLUME 5 , JULY 9th 2020

RAINESFELDMAN

If the job does not permit telework, employers should consider offering (but not requiring) an unpaid leave, and make individualized assessments regarding employees at least 65 years old who wish to telework.

THE EMPLOYEE WHO IS MAKING MORE MONEY ON UNEMPLOYMENT Thanks to the $600 federal unemployment insurance supplement, some employees are refusing available work because they earn more on unemployment than they would by working. Employers should inform employees who refuse to return that rejecting a job offer for an unprotected reason may jeopardize unemployment benefits. Employers should tell employees their positions may no longer be available after the federal supplement expires at the end of July, even if they wish to return to work at that time. (Remember to document the exchange with the employee. It may be useful when requesting PPP loan forgiveness.)

THE EMPLOYEE WHO IS HAVING CHILDCARE ISSUES If the employee is unable to return because their child's school remains closed or their childcare (including summer camp) is unavailable, the employer should offer protected FFCRA paid leave (or local jurisdiction equivalent, if any), including Emergency FMLA.

THE EMPLOYEE WHO PREFERS TO WORK REMOTELY Many employees enjoy working from home and want to continue after their offices reopen. The LACDPH mandates that a business ensure "everyone who can carry out their work duties from home has been directed to do so." Employers must have compelling and documented reasons why the employee cannot carry out their duties remotely before demanding they physically return.

TAKEAWAY Addressing employee refusals to return to work requires employers to analyze federal and local law established before, and during, the COVID-19 pandemic. It also requires individualized consideration of each employee's refusal. Businesses should document all interactions with employees refusing to return.

Maximizing Revenue During COVID-19 Restrictions

BY: ELAINE CHANG AND PHILLIP R. MALTIN

SUMMARY Companies need to continue to innovate to respond to the intractable COVID-19 pandemic. With safety the priority, companies need to follow all applicable state and local health department orders. This means companies must consider how these orders affect their business operations and plan accordingly. Below are some ideas. The needs of each business invite a separate analysis. Please consult with your lawyers to determine what will work best for you.

BEST PRACTICES

Online symptom checks for employees and customers Online symptom checks for employees can limit exposure to those with symptoms and save time. However, companies should monitor the use of online symptom checks to ensure employees are accurately completing them and not just clicking through the "right" responses.

Reminder: Employee time spent responding to symptom checks is on the clock, even if completed at home.

For businesses with closer in-person contact such as salons and therapeutic services, consider requiring appointments and emailing online symptom-check questionnaires to customers 24 hours in advance. This allows businesses to book another customer if necessary.

Reminder: Companies using symptom checks with customers may be subject to the California Consumer Privacy Act.

Online ordering Many retail stores and restaurants offer "contactless" curbside or drive-thru pickup. Take-out remains a safer option given capacity limits and restrictions on indoor dining.

Although the City of Los Angeles has temporarily capped third party delivery fees, some restaurants are concerned that delivery options will raise costs for the consumer and reduce take-out volume. Some restaurants have chosen to forgo or limit delivery through lower cost platforms such as Tock or Toast. Platforms like Tock allow restaurants to sell a la carte or prix fixe meals with time slots to manage orders and determine labor and supplier needs in advance.

Reminder: Companies with websites must comply with ADA accessibility requirements at their location and online.

Increasing outdoor space The risk of COVID-19 transmission is significantly lower when people are outside, or large open windows allow cross ventilation. Some companies can take their in-person classes outdoors– whether fitness, wine tasting, or art. Even smaller retail stores can maximize their sidewalk or patio space where available.

Some restaurants without existing patio or rooftop dining have converted their parking lots and sidewalks, or even removed windows and roof panels, to create more open-air space.

Reminder: Any changes to your facilities (including tables) and parking lot must comply with building codes and ADA accessibility requirements.

BUSINESS BRIEF:
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VOLUME 5 , JULY 9th 2020

RAINESFELDMAN

Plexiglass dividers If outdoor space is not available, plexiglass dividers can limit the spread of particles between employees and customers. Plexiglass dividers may be most beneficial where employees are stationary, such as behind a customer service counter or sushi bar/chef's counter.

Reminder: Plexiglass dividers can reduce the spread of aerosol particles in their immediate area, but they do not eliminate the risk of COVID-19. Evaluate air flow and ventilation indoors to optimize the circulation of outdoor or filtered air in conjunction with plexiglass installations.

Virtual experiences Companies, particularly those in the hospitality industry, can offer both live and virtual experiences to customers to maximize revenue. Some companies have capitalized on their virtual offerings to expand their customer base worldwide or provide "exclusive" virtual access. Creative ways to offer customized virtual experiences include interactive shows, guided food or wine tastings (with delivery or advance pick up), interactive or recorded classes (with shipping or pick up of course materials), personal shopping or consultations, escape rooms, or guided tours. By recording a live class or show, companies can later sell streaming access.

Reminder: Analyze data from streaming platforms or ticket sales to explore untapped markets or regions. Utilize surveys to learn what your customers want and how to improve.

TAKEAWAY Businesses can, and some must, respond to the pandemic with innovative pivots to their business plans. They should consider how to reposition themselves while maintaining the safety and health of their customers and employees.

Liability Waivers that Customers Sign Before Entering a Business May Protect the Business from Lawsuits

BY: PHILLIP R. MALTIN

SUMMARY As states lift their safer-at-home orders, some businesses, particularly those where workers interact with customers, are considering liability waivers to protect against claims they exposed customers to COVID-19. A liability waiver can be a simple and inexpensive way to protect against claims the business exposed a customer to the virus. When a person signs a liability waiver, the person assumes the risk of injury from a known danger. Businesses, and lawyers, frequently and successfully use them in a variety of contexts. While no California court has published a decision on whether a COVID-19 liability waiver required by a service provider or retail business is valid, the state has a robust history of analyzing these agreements. We summarize the principles that should guide a business and its lawyers when drafting COVID-19 waivers of liability.

RULE A business may claim that a customer should not recover damages from COVID-19 related illness and injury if the customer agreed, before entering, not to hold the store responsible for the customer contracting the virus. If the business proves that it had such an agreement, then the business is not responsible for the customer's injury. A key exception applies: liability waivers do not protect a business from its "gross negligence." This means the waiver will not help if a judge or jury finds the business acted either with a "want of even scant care," or "an extreme departure from the ordinary standard of conduct." In other words, a liability waiver does not give a business the unconditional right to place customers at risk.

An effective liability waiver must be "clear, unambiguous, and explicit." Proper drafting is central to a valid agreement. The release must articulate the risk and it must state the customer is waiving liability for negligence by the business that causes illness, injury, or death related to COVID-19. One court said that if the business wants "to use the agreement to escape responsibility for the consequences of his negligence, then it" should use the word "negligence" in the waiver. While the agreement need not be perfect, ambiguity in its terms can lead a court to strike it.

A customer must know about the agreement. For example, a court found persuasive a customer's argument that he did not "freely and knowingly" agree to waive liability against a business because an employee told the customer to sign a sign-in sheet attached to a clipboard. The sheet contained a waiver/release that the metal clip at the top partially covered. The court determined the agreement was invalid.

TAKEAWAY A liability waiver may protect a business from claims it negligently caused a customer to contract COVID-19. The waiver must clearly statue rights waived and risks faced. The business must also ensure the customer knows about the agreement. Clarity and transparency are key to a successful liability waiver.

BUSINESS BRIEF:
CALIFORNIA QUARTERLY EMPLOYMENT LAW UPDATE

VOLUME 5 , JULY 9th 2020

RAINESFELDMAN

Public Nuisance Claims Against Businesses for Failing to Protect Employees Are on the Rise

BY: PHILLIP R. MALTIN

SUMMARY In most states, a public nuisance is an unreasonable interference with a right common to the general public. A public nuisance occurs when a business causes substantial and unreasonable interference with the interests of the community or with the comfort and convenience of the general public, as when fishermen sued after a tanker spilled 100,000 gallons of oil along a coastline in Maine. Claims that businesses create a public nuisance by failing to follow government mandated procedures designed to protect employees from COVID-19 are beginning to appear across the country. The employees bring the virus home and infect their families or members of the community. This contributes to the spread of the virus and interferes with the public's "right to health, safety, and welfare." The plaintiffs ask for damages on behalf of themselves and the community, and for attorneys' fees.

RULE To prove a business has caused a public nuisance, a person suing the business must prove, among other things, that (i) the business did something, or failed to do something, that created a harm to the employee's health, (ii) the actions, or inaction, of the business affected a substantial number of people, (iii) the seriousness of the harm outweighs the social utility of the business's conduct, and (iv) the action, or inaction, of the business was a substantial factor in causing the harm.

A person can sue in California for public nuisance even if the business cannot stop the problem. As one court explains it, in California, "[p]ublic nuisance liability does not hinge on whether the defendant . . . is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance." *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542. California businesses alone cannot defeat COVID-19, but they can, according to the cases recently appearing, help suppress it.

Cases filed across the country show that courts vary in what they require businesses to do to protect employees and the community from the spread of COVID-19. Early in the pandemic, employees sued Smithfield Foods, a pork processing plant, in Missouri. The claim, however, failed when a federal court concluded that measures Smithfield took to protect its employees were "reasonable under the circumstances." It found, among other things, that Smithfield performed pre-shift temperature checks on employees, sent people home who exhibited one or more COVID-19 symptoms (while instructing them on good healthcare practices), performed enhanced cleaning and disinfecting inside the plant (while it deep-cleaned the facilities over the weekend), and provided masks and protective equipment to each employee every day. The court declined to tell Smithfield how to follow government safety protocols, instead inviting the business to preserve "the flexibility needed to quickly alter workplace procedures to remain safe during the ever-changing circumstances of this pandemic."

In a case against franchisees owning two McDonald's restaurant locations in Illinois, a state court judge ruled that both locations needed to improve their training on social distancing. The court also ruled that, while the stores had "the right idea" for protecting their workers, they did not apply protective measures "exactly as McDonald's envisioned, thus endangering public health." The court concluded the restaurant locations needed more robust enforcement of their policy requiring employees to wear masks.

A public nuisance case out of Oakland, California, against another McDonald's franchisee involves allegations that, if true, show extreme and callous disregard for the safety of the restaurants' employees, the employees' families, and the restaurants' customers. The plaintiffs allege the employer did not give employees protective equipment, provide adequate sanitation, follow public health directives for stopping the spread of the virus, or train employees on techniques federal and local authorities recommend for worker safety. (As we publish this report, the court in Oakland has ordered the restaurants to remain closed while the judge considers whether to mandate improvements to their health and safety practices.)

Businesses can defeat public nuisance claims through a variety of fact-based and legal defenses. A successful factual defense centers on ensuring that workers receive protective equipment, that businesses follow federal and local safety protocols, and that everyone in the workplace receives training on how to use the protective equipment and adhere to public health protocols. As the Missouri court observed, no one can guarantee the health of employees during a global pandemic. But a business sued for public nuisance is more likely to succeed if the evidence shows that it follows everything public health officials recommend.

TAKEAWAY The lesson of public nuisance cases across the country is that businesses should do all of the following: (i) designate one person as the "safety compliance official" who will ensure that all employees comply with the business's policies and health officials' directives, (ii) train supervisors and employees to use protective equipment, maintain distance, and clean areas and equipment after use, (iii) deliver instructions to supervisors on how to monitor workers to ensure they follow health and safety rules, (iv) establish hotlines and text numbers for complaints, and (v) require everyone to follow the safety compliance official's directions.

BUSINESS BRIEF:
CALIFORNIA QUARTERLY EMPLOYMENT LAW UPDATE

VOLUME 5 , JULY 9th 2020

RAINESFELDMAN

Black Lives Matter Apparel in the Workplace

BY: BETH SCHROEDER

SUMMARY Companies worldwide have been publishing statements of solidarity with the Black Lives Matter movement. Some of these businesses have learned that their own dress and grooming policies, which commonly ban political speech in the workplace, may conflict with support of the Black Lives Matter movement.

Starbucks recently came under fire for a long-standing dress code that prohibits employees from wearing shirts or pins that display political messages. Starbucks made a quick public relations decision and issued official Starbucks "Black Lives Matter" uniforms, thereby doubling down on its support of solidarity with BLM, while controlling the brand and uniformity of its dress code. In reality, this departure from policy should not have been that difficult; Starbucks previously issued official "LGBTQ" employee pins.

TAKEAWAY You may not be able to create your own branded Black Lives Matter clothing to address this issue, but it may be the right time to revisit your own workplace political speech policy. Would there be a risk in creating an exception for Black Lives Matter messaging without opening the door to everything else? Yes, but that risk cannot outweigh the benefits of visibly proclaiming support for your Black workers and community, which is its own defense. The argument is that this is not just any political speech, but a company-wide statement of solidarity, consistent with an ongoing culture of inclusion, diversity, and racial equality. That is how Starbucks justified it.

At the end of the day, what is the cost if you do not stand behind this message when the fight against racism is so important? If not now, when?

Supreme Court Expands Title VII's Employment Protections to LGBT Workers

BY: MATTHEW GARRETT-PATE AND PHILLIP R. MALTIN

SUMMARY In a landmark ruling for LGBT civil rights, the United States Supreme Court ruled against three employers who claimed federal law permitted them to terminate their employees because they are gay or transgender. Interpreting Title VII's federal prohibition on sex discrimination, Justice Neil Gorsuch, writing for the majority, relied on the definition of "sex" as understood when Congress passed Title VII into law in the 1960s to find that "sex" includes sexual orientation and gender identity. The opinion discussed workplace discrimination, but may have far reaching consequences given Justice Gorsuch's unambiguous statement that LGBT discrimination cannot be divorced from a person's gender and/or sex. The Supreme Court's opinion extends federal protections against sex discrimination in the workplace only to sexual orientation and gender identity. However, the ruling is likely to invite a wave of litigation expanding any law affording protections based on sex to the LGBT community (e.g., housing, public accommodations, healthcare, etc.).

RULE Title VII's prohibition of discrimination on the basis of sex in the workplace includes a prohibition on sexual orientation and gender identity discrimination. It is unlawful in the United States to discriminate against an employee on the basis of their sexual orientation or gender identity.

TAKEAWAY Businesses should update handbooks and harassment training programs. Company policies should reflect the new protections afforded to LGBT employees and employers should immediately issue new nondiscrimination policies. We will have new sample policies available for clients that do not already include sexual orientation and gender identity protections in their handbooks. Note: California employers should already include sexual orientation and gender identity in their nondiscrimination policies.

Audit Your Hiring, Promotion and Payroll Practices for Fairness

BY: ALLISON WALLIN

SUMMARY During the second quarter of 2020, the country experienced significant civil rights activities, from the landmark Supreme Court ruling on LGBT rights to the Black Lives Matter movement. This social awareness is going to invite lawsuits against employers over unequal treatment of their employees. We encourage businesses to audit their hiring, promoting and payroll practices to ensure that workers across "protected classifications" receive equal treatment and outcomes.

BUSINESS BRIEF:
CALIFORNIA QUARTERLY EMPLOYMENT LAW UPDATE

VOLUME 5 , JULY 9th 2020

RAINESFELDMAN

RULE Employment practices audits are a critical first step to uncover unfair practices that may trigger liability under California's Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964 (federal), the California Equal Pay Act, and the Lilly Ledbetter Fair Pay Act of 2009 (federal). The inquiry should include:

- a company-wide pay equity audit;
- audit of compensation setting procedures; and
- audit of other practices such as recruitment, training, performance reviews, promotion, discipline, recall, and termination demographics.

Should audits reveal a potential problem such as unequal pay, or disparities in hiring, discipline or promotion, the business should determine the origin of the issue and consult with outside auditors or lawyers to identify the necessary remedial actions.

TAKEAWAY Businesses may wish to audit payroll practices. Workplace diversity and equal opportunity inspire morale and help avoid lawsuits.

Stand-By and On-Call Shifts May Subject Employers to Reporting Time Pay Liability

BY: ALLISON WALLIN

SUMMARY In *Ward v. Tilly's, Inc*. (2019), the California Court of Appeal addressed what "reporting for work" means, and when a business must pay an employee who has reported for work but receives none. In California, when an employee reports to work and receives less than half the hours scheduled, or no work, the business must pay the employee for half the scheduled time, but no less than two hours, and no more than four. Tilly's had a policy of "on call scheduling" that required employees to call-in exactly two hours before the start of on-call shifts. Tilly's appears to have created that policy to avoid paying employees who physically reported for work, but who learned that Tilly's had canceled their shift. The Court rejected Tilly's argument that reporting time pay was only due when employees physically report to work. The Court held that Tilly's call-in requirement triggered reporting time pay for employees who called and were not given work.

RULE For the purposes of reporting time pay, "report for work" includes an employer's requirement that employees call in to check on the employer's labor needs prior to an on-call shift. The manner of reporting is up to the employer, and if an employer chooses to have an employee "report" via telephone, and the employee complies, the employer has reporting time pay obligations. The Court reasoned that the employee is under the employer's control due to the telephonic reporting requirement, and therefore the employer must pay the employee for the time spent under its control. Stand-by shifts pose the same issue and courts have since extended the holding in *Tilly*'s to that circumstance.

TAKEAWAY Employers should carefully analyze any call-in or stand-by shift practices to ensure they do not violate the Tilly's rule. Failure to pay reporting time risks significant liability for Labor Code violations, including class action claims and PAGA lawsuits.

Please note: The changes to California employment laws in 2020 are numerous and significant. Please closely review the articles above and contact us with any questions or concerns.

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https://www.raineslaw.com/quarterly-employment-law-update