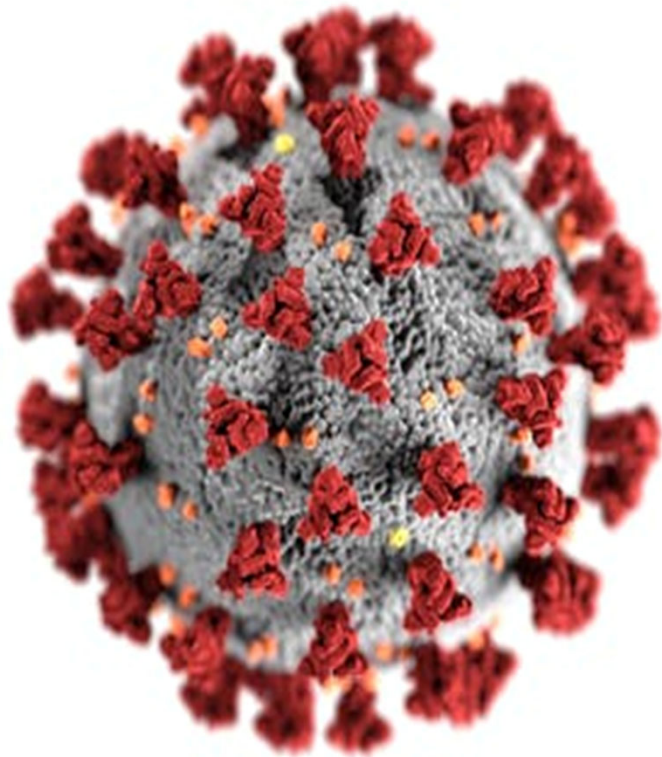




RAINESFELDMAN



The New Normal For Employers:

***How to Avoid COVID-19
Legal Landmines***

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- Information is current as of May 15, 2020

ROADMAP

- Federal, State, and Local Guidelines and Regulations
- Developing Comprehensive Detection and Prevention Protocols
- Handling Suspected and Confirmed Cases in Workplace
- Discrimination and Privacy Considerations
- Wage and Hour Considerations
- Litigation Forecast
- A Word on the Payroll Protection Program
- Key Takeaways



Overview of New Guidelines & Regulations

GUIDELINES AND REGULATIONS

Location Matters: Federal – State – County – City

Requirements

- U.S. Dep't of Labor
- OSHA
- Federal Motor Carrier Safety Administration (Drivers)
- Federal Aviation Administration (Pilots & Flight Attendants)
- Cal/OSHA
- State of California Emergency Orders
 - Governor's Executive Orders
 - Department of Public Health Orders
- County Examples:
 - County of Los Angeles Safer at Home Order
 - County of Los Angeles Reopening Protocol for Retail Establishments
- City Examples:
 - City of Los Angeles Safer at Home Order
 - City of Los Angeles Worker Protection Order
 - City of San Diego Mayoral Executive Orders

Guidelines

- Federal Agency Guidelines
 - CDC
 - OSHA
- State of California Agency Guidelines
 - Cal/OSHA Guidelines
 - California Department of Public Health Guidelines
- County Examples:
 - County of LA Guidance for Cloth Face Coverings
 - LA County Dep't of Public Health Guidance for Social Distancing
- City Examples:
 - City of LA Distancing Protocols
 - City of LA Retail Establishment Protocols
 - San Diego "Ready" – Strategies to Reopen

WHERE TO FIND LATEST RULES

Requirements & Guidelines Are Changing Rapidly – Sometimes Hourly

- <https://www.osha.gov/SLTC/covid-19/>
- <https://www.dir.ca.gov/dosh/Coronavirus/>
- <https://www.cdc.gov/coronavirus/2019-ncov/communication/guidance-list.html?Sort=Date%3A%3Adesc>
- <https://www.eeoc.gov/coronavirus>
- <https://covid19.ca.gov/>
- <http://publichealth.lacounty.gov/media/coronavirus/>
- <https://corona-virus.la/>
- <https://www.lamayor.org/COVID19Orders>
- **Raines Feldman LLP COVID-19 Resource Page!**





Developing Comprehensive Detection and Prevention Protocols

BEST PRACTICE MITIGATION RECOMMENDATIONS



- Stay Home If Sick
- Social Distance (6 Feet Apart)
- Disinfect Work Spaces Routinely
- Personal Protection Equipment (PPE)
 - Masks/Shields
 - Gloves
 - Hand Sanitizers
 - Readily Available Cleaning Wipes/Spray
- Screening
 - Symptom Questionnaire
 - Daily Temperature Check
 - COVID-19 Testing

PREPARING THE WORKPLACE FOR COVID-19

- Develop an Infectious Disease Preparedness and Response Plan
 - Assess exposure risk level of business (e.g., medium exposure risk)
 - Must be comprehensive
 - Specific to the business and industry; no one-size-fits all
- Prepare to Implement Basic Infection Prevention Measures
 - Source cleaning products and PPE
 - Available to the public and visitors?
 - Consider installing physical barriers
 - Staggered schedules
 - Limitations on access
 - Engage experts where needed

PREPARING THE WORKPLACE FOR COVID-19 (CONT'D)

- Develop, Implement, and Communicate about Workplace Flexibilities and Protections
 - Transparency is key
 - Train employees
- Cost and Impossibility Considerations
 - Cal-OSHA and OSHA enforcement considers employers' good faith compliance efforts
 - Document all efforts to comply with guidelines, including lack of supplies and PPE availability, as well as obstacles making it difficult or impossible to comply.

SYMPTOM & TEMPERATURE CHECKS

- Symptom Checks Recommended by CDC; Mandated in Many Locale
 - Health questionnaires designed to elicit information about common symptoms
 - Temperature Checks
 - Oximeters
- Concerns and Considerations
 - Lack of medical training
 - Logistics
 - Privacy (don't collect information)
 - Cost and expense
 - Wage and hour (discussed below)
 - California Consumer Privacy Act (CCPA)



CAL-OSHA Example of Guidance – May 12, 2020

General Checklist for Dine-in Restaurants



- Physical Distancing Guidelines including:
 - Encourage reservations
 - Customers wait in cars and notify table readiness via mobile phones
 - Physically separate tables 6+ feet
 - Require face covers
 - Stagger breaks
 - Reconfigure break areas to keep physical distancing
 - Close bar areas
 - Screen guests for symptoms
 - Prop open doors
 - Implement queuing procedures





Notice, Sanitation, and Return-to-Work Policies and Procedures

SUSPECTED OR CONFIRMED POSITIVES

➤ Detect, Notify, Track, and Remediate

- Immediately send the infected employee home, document the infection, and advise the employee of available leave
- Disinfect areas the employee used before other employees can have access to them again
- Notify employees of the infection while maintaining confidentiality
- Take remedial action by sending employees home if they had significant interaction with the infected individual and disinfect any areas the employee or others identified as possible contamination points
- Monitor



RETURN TO WORK STANDARDS

- Based on Current CDC Guidelines
 - Unconfirmed COVID-19 with illness
 - At least 3 days have passed since recovery, with no fever for minimum of 72 hours without use of fever-reducing medicines
 - Improved respiratory symptoms
 - 7 days have passed since beginning of symptoms
 - Confirmed COVID-19 with illness not requiring hospitalization
 - Same as above
 - No continuing illness, i.e., no symptoms of COVID-19
 - The employee has had 2 confirmed negative COVID-19 tests, administered by a medical professional and spaced at least 24 hours apart
 - May ask for medical clearance to return-to-work



Discrimination and Privacy Concerns

EEOC PANDEMIC GUIDANCE

- Interplay Between the Americans with Disabilities Act (ADA) and Safety Precautions
 - ADA applies but should not interfere with employer's ability to comply with CDC or public health authority guidance
 - Established policies must be “job related and consistent with business necessity”
 - Must be applied consistently

EEOC PANDEMIC GUIDANCE (CONT'D)

➤ EEOC Guidance Permits:

- Sending employees home if they exhibit COVID-19 symptoms
- May ask employees who are sick questions about symptoms and diagnosis
- May ask about personal travel
 - What about other off-duty conduct?
- May require employee to wear PPE
 - Consider reasonable accommodations
- May require employee to take COVID-19 test before entering workplace
 - Consider test accuracy and reliability
 - Consider privacy concerns

EEOC PANDEMIC GUIDANCE (CONT'D)

➤ EEOC Guidance Prohibits:

- Employers may not refuse to return employees to work solely because they are over the age of 65 or have medical conditions like serious heart problems, diabetes, asthma and severe obesity that have been identified by the CDC as being at greater risk
 - Must establish that employee's disability poses a "direct threat." Must make individualized assessment for each employee and consider the duration of the risk, the nature and severity of harm, and imminence of harm
- Employers may not ask employees who *do not* have COVID-19 symptoms to disclose whether they have a medical condition that the CDC says could make them more vulnerable
- While there is currently no vaccine, prior EEOC guidance suggests that employer can not require employee to get COVID-19 vaccine when available



COMPLIANCE & ENFORCEMENT

COMPLIANCE PROTOCOLS - EMPLOYEES

- Ensure employees have acknowledged receipt of your COVID-19 protocol, which should include discipline as a remedy for noncompliance
- Make certain that you have provided employees with the tools (PPE) to comply
- Discipline
 - First Offense: Remind employee of policy and that disciplinary action will be taken if the offense is repeated
 - Further Offenses: If an employee still refuses to follow company policy, send them home immediately. Only allow the employee to return when they agree to comply. Terminate the employee if a resolution cannot be reached
- All employees must be treated the same in terms of penalties for noncompliance

COMPLIANCE PROTOCOLS - CUSTOMERS

- Post signs announcing policies at all customer entrances
- Train employees on dealing with a noncompliant customer
- If possible, post an employee with appropriate PPE, preferably security, at entrances to ensure compliance
- Monitor facility interiors to ensure continued compliance by customers
- Do not wait for a conflict to intervene. If a customer is seen violating social distancing, or is not wearing a mask, politely ask them to comply
- When a customer refuses to comply, ask them to go outside with you to discuss
- If the customer does not have a valid reason (i.e., disability) for not complying with the company's policies, bar the customer from reentry. Call the police if necessary
- If the customer has a seemingly valid reason not to comply, discuss alternatives for providing service, i.e., allowing the customer to order and pay by phone and then picking up purchases curbside

REFUSALS TO RETURN TO WORK

- Employees are only entitled to refuse to return to work if they reasonably believe they are in “imminent danger”
 - Includes “any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated”
 - Case-by-case determination
 - If employee is terminated, employee may file OSHA “whistleblower” claim
- Unemployment insurance
 - Employees are disqualified from UI if they refuse “suitable employment.”
Considerations:
 - Does the business provide essential services and is it in industry reopening
 - Has business complied with health and safety protocols
 - Does the employee have high risk factors



Wage and Hour Considerations

WAGE AND HOUR CONSIDERATIONS

- Even a Global Pandemic Doesn't Change Wage and Hour Considerations
 - All “hours worked” must be paid
 - Compensable work is any “time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.” Cal. Code Regs. tit. 8, § 11070
 - Absent specific guidance, time spent waiting for and having COVID-19 symptom checks is likely “work” and must be paid. *See Frlekin v. Apple Inc.*, 8 Cal. 5th 1038, 1056 (2020) (“exit searches are required as a practical matter, occur at the workplace, involve a significant degree of control, are imposed primarily for Apple’s benefit, and are enforced through threat of discipline. Thus, according to the “hours worked” control clause, plaintiffs ‘must be paid.’”)
 - Whether time spent taking a COVID-19 test off-premises is an open question.

WAGE AND HOUR CONSIDERATIONS (CONT'D)

➤ De Minimis Standard?

- Federal de minimis rule can be a defense to allegations of “trifling amounts” of off-the-clock work
- BUT, California does not recognize federal de minimis rule. All time worked, even if negligible, is compensable. *Troester v. Starbucks Corp.*, 5 Cal. 5th 829, 844 (2018), *as modified on denial of reh'g* (Aug. 29, 2018)

➤ Reporting Time Pay If Sent Home Following Symptom Check? Likely not.

- IWC Wage Orders provide exemptions for:
 - When operations cannot begin or continue due to threats to employees or property, or when civil authorities recommend that work not begin or continue; or
 - When the interruption of work is caused by an Act of God or other cause not within the employer's control.
- Sick leave may be available



Litigation Forecast

ANTICIPATED LITIGATION TRENDS

- Discrimination Claims Based on Improper Layoff Criteria
- Disability Discrimination Claims
- Increased Worker's Compensation Claims
 - California rebuttable presumption applies
 - Worker's Compensation exclusivity
 - Serious & Willful claims
 - Psych claims
- Premises liability/negligence
 - Applies to customers
- Whistleblower complaints
- Wage and hour claims
- Expect past employees to resurface



Payroll Protection Program: Maximizing Loan Forgiveness

HOW TO GET PPP FORGIVEN

- Apply for forgiveness through your lender;
- Funds must be used within 8 weeks of initial receipt
 - even if business is shut down and employees are paid to stay home;
- For complete forgiveness, must use at least 75% of the funds on payroll;
- Up to 25% of funds can be used on utilities, mortgage/rent, interest on debt;



HOW TO GET PPP FORGIVEN



- Payroll must meet headcount and compensation levels that existed prior to the pandemic for full forgiveness;
- Businesses may hire different (new) employees to satisfy headcount;
- Wages paid under PPP cannot exceed \$100,000 in annualized salary to any individual employee.



Key Takeaways

RAINES FELDMAN RESOURCES

REAL ESTATE

- Rent Negotiation
- Lease Termination Issues

BANKRUPTCY

- Filing for Chapter 11
- Creditor Negotiation

LITIGATION

- Business Disputes
- Insurance Litigation

WE ARE HERE TO HELP



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