



California Reopening: Returning to the Workplace & Employment-Related Issues


May 13, 2020



Jeff Bosley (Moderator) | Julie Capell | Aaron Colby |
Laura Heckathorn | Tyler Maffia | Arielle Spinner

Our Plan Today

- **Frameworks to Comply with COVID-19 Laws**
- **Navigating Public Health Orders**
- **“Hazard Pay,” Safety Concerns, and Refusals to Return to Work**
- **Re-hiring Laid Off Employees and Returning Furloughed Employees**
- **Managing Health Screenings and Privacy Concerns**
- **Returning and Remote Worker Wage and Hour Issues**
- **Status of AB 5 and other Classification Issues**
- **Questions**



Frameworks to Comply with COVID-19 Laws

Aaron Colby

Main Sources of California Laws, Regulations & Guidance

State

- Public Health Department Orders
- Executive Orders (Governor Newsom)
- State Agency Guidance (e.g., DFEH, DLSE)

County

- Public Health Department Orders
- County Board of Supervisors Ordinances
- County Agency Guidance

City

- Executive Orders (Mayor's Office)
- City Council Ordinances
- City Agency Guidance (e.g., Office of Wage Standards)

Types of Laws, Regulations & Guidance

- Stay-at-home / safer-at-home / shelter-in-place orders
- Social distancing protocols
- Supplemental COVID-19 paid sick leave orders
- Right of recall and worker retention ordinances
- Self-isolation and self-quarantine orders
- Worker protection orders
- Industry-specific regulations and guidance
- Cloth face coverings
- Reopening protocols
- Agencies' general COVID-19 guidance for businesses and employers
- FAQs
- **New FEHC regulations related to hiring (religion/age) – in effect July 1, 2020**

Available Paid Leaves

Normal State and Local Ordinance Paid Sick Leave

Normal PTO / Vacation

COVID-19 FFCRA (if <500 employees)

COVID-19 County Supplemental Paid Sick Leave

COVID-19 City Supplemental Paid Sick Leave

COVID-19 CA Supplemental Paid Sick Leave for Food Sector Employees (if 500+ employees)

Available Unpaid Leaves

FMLA / CFRA Leave

ADA / FEHA Disability Accommodation Leave

Workers' Compensation Leave

Labor Code 230.8 School Activities Leave (may be paid or unpaid, depending on employer's policy)



**CA Labor & Workforce
Development Agency:
Chart Showing
Available Benefits**

Program	Why	What	Benefits
Disability Insurance	Unable to work due to medical quarantine or illness related to COVID-19 (certified by medical professional).	Short-term benefit payments to eligible workers with full or partial loss of wages due to non-work-related illness, injury, or pregnancy.	Approximately 60-70% of wages (depending on income); ranges from \$50-\$1,300 a week for up to 52 weeks.
Paid Family Leave	Unable to work due to caring for ill or quarantined family member with COVID-19 (certified by medical professional).	Up to 6 weeks of benefit payments to eligible workers with full or partial loss of wages because need time to care for seriously ill family member.	Approximately 60-70% of wages (depending on income); ranges from \$50-\$1,300 a week for up to 6 weeks.
Unemployment Insurance (and UI benefits programs)	Lost job or have had hours reduced for reasons related to COVID-19.	Partial wage replacement benefit payments to workers who lose job or have hours reduced, through no fault of their own.	Range from \$40-\$450 per week for up to 26 weeks (plus additional weeks under extended UI benefits programs).
Pandemic Unemployment Assistance	Lost job or business or have had hours reduced for reasons related to COVID-19.	Partial wage replacement benefit payments for business owners, self-employed, independent contractors, those with limited work history or who have collected all available UI benefits, and others not eligible for regular UI benefits who are unemployed, partially unemployed, or unable or unavailable to work due to COVID-19.	Range from \$167-\$450 per week for up to 39 weeks.
CA Regular Paid Sick Leave	Employee or family member is sick or for preventive care, including when civil authorities recommend quarantine, isolation, or stay-at-home.	Leave employee has accumulated or employer has provided under the Paid Sick Leave law.	Paid at employee's regular rate of pay or an average based on the past 90 days.
CA COVID-19 Supplemental Paid Sick Leave for Food Sector Workers	Food Sector Workers who are (1) subject to government quarantine or isolation, (2) advised by HCP to self-quarantine or isolate due to COVID-19, or (3) prohibited from working by hiring entity due to COVID-19.	Up to 80 hours of supplemental paid sick leave for Food Sector Workers who work for hiring entities with 500+ employees in the United States.	Paid at worker's regular rate of pay, state minimum wage, or local minimum wage, whichever is higher.
FFCRA Emergency Paid Sick Leave	Unable to work because: (1) Subject to federal, state, or local quarantine or isolation order; (2) Advised by HCP to self-quarantine; (3) Experiencing symptoms of COVID-19 & seeking diagnosis; (4) Caring for someone subject to (1) or (2); (5) Caring for child whose school or place of care is closed, or care provider is unavailable, due to COVID-19; or (6) Experiencing other substantially similar condition specified by HHS.	Up to 80 hours paid sick leave for employees of private employers with <500 employees. (Exceptions may apply, including small business exemption from providing paid leave for child care.)	For employee: Higher of regular rate or minimum wage rate, not to exceed \$511/day and \$5,110 total. For family care: 2/3 regular rate, not to exceed \$200/day and \$2,000 total.
FFCRA Emergency Paid Family & Medical Leave	Unable to work because caring for child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19.	Up to additional 10 weeks of paid leave for employees of private employers with <500 employees (small business exemption may apply).	2/3 regular rate, not to exceed \$200/day and \$10,000 total.
Local Government Supplemental COVID-19 Paid Sick Leave	Workers in City of LA, unincorporated areas of LA County, San Francisco, and San Jose may be eligible for supplemental paid sick leave for COVID-19 reasons if not covered by the FFCRA.	Up to 80 hours of supplemental paid sick leave for covered workers.	Varies by locality.
Workers' Compensation	Employees who reported to worksite between March 19 and July 5, 2020 and tested positive or were diagnosed with COVID-19-related illness may be eligible for benefits under Gov. Newsom's May 6 Executive Order.	May receive up to 104 weeks of TD payments after exhausting federal or state COVID-19 PSL benefits. Stops upon return to work or doctor releases for work or says illness has improved as much as possible.	Generally 2/3 gross wages lost while recovering from work-related illness or injury, up to weekly maximum. Eligible employees entitled to treatment & additional payments if suffered permanent disability due to illness.



Navigating Public Health Orders

Tyler Maffia and Arielle Spinner

California Statewide Industry-Specific Public Health Orders

Health Care, Skilled Nursing, and Long-Term Care Facilities

Outpatient Healthcare Facilities

Food, Beverage, and Other Services

Food Industry and Food Supply Chain

Pharmacies

Agriculture and Farmworker Safety

Check [here](#) for specific industry guidance

Los Angeles County Industry-Specific Public Health Orders


- Retail Establishments
- Car Dealerships
- Golf Courses
- Television and Film Entertainment Production
- Licensed Congregate Health Care Facilities
- Wedding Venues
- Funeral Parlors and Mortuaries
- Commercial Shipping and Cruising
- Construction Sites
- Faith Based Organizations
- Food Facilities
- Restaurants Offering Groceries
- Food Street Vendors
- Mobile Food Facilities
- Farmers Markets
- Food Delivery Services
- Adult Day Health Centers
- Healthcare Professionals
- Dialysis Centers

Check [here](#) for specific industry guidance

Example:

Construction Sites in Beverly Hills

- Federal Agency Guidance (e.g., CDC, WHO)
- California Statewide Stay-at-Home Order
- Los Angeles County Stay-at-Home Order (with Social Distancing Protocol)
- Los Angeles County Department of Public Health Guidance for Construction Sites
- City of Beverly Hills Stay-at-Home Order
- City of Beverly Hills Guidelines for Construction Sites
- County & City Face Covering Orders



“Hazard Pay,” Safety Concerns, and Refusals to Return to Work

Tyler Maffia and Arielle Spinner

Employee Requests: Beware the Group Complaint

- Employee complaints, discussions, or actions about COVID-19 may be protected by the NLRA:
 - Hazard pay
 - Safety concerns
 - Refusing to work for safety concerns
 - Talking to media about concerns

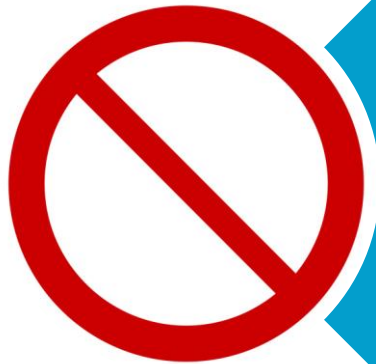


Hazard Pay and Refusal to Return



Hazard pay

- Not required
- Structure of pay has wage and hour implications



Refusal to return to work

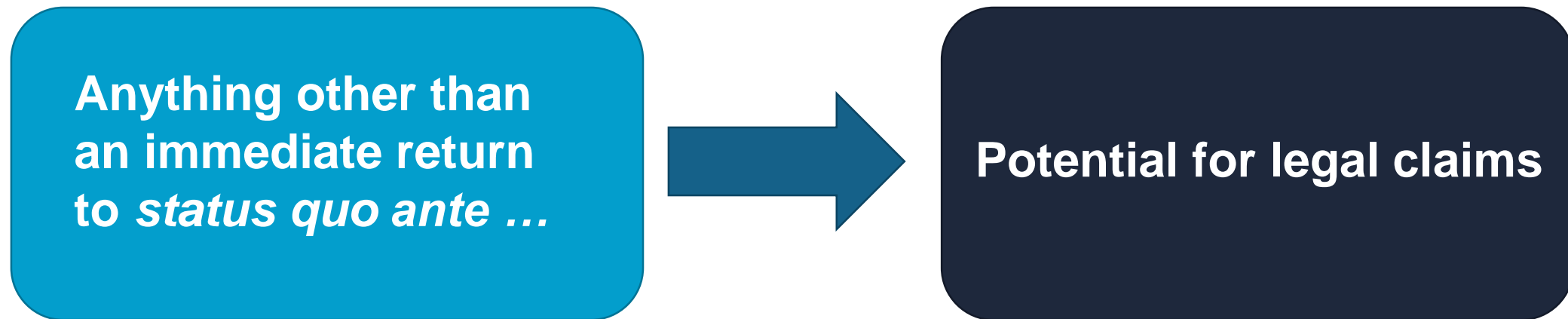
- High risk employees



Re-hiring Laid Off Employees and Returning Furloughed Employees

Julie Capell

Determining Recall & Reinstatement Best Practices, Available Options, and Legal Issues



Determining Recall & Reinstatement Best Practices, Available Options, and Legal Issues

Option 1: Allow employees to self-select

- Depending upon industry, demand may not be what it once was
- Resumption of operations may be gradual
- Personnel demands may operate at less than capacity
- Employees choose to return or stay home
- Be flexible within reason

Determining Recall & Reinstatement Best Practices, Available Options, and Legal Issues

Option 2: Use clear, legitimate criteria

- Focus on key positions/functions and staffing needs rather than specific individuals
- Selection based on **non-discriminatory** factors
 - Seniority
 - Particular skill set
 - Best performers
 - Team that works well together

Determining Recall & Reinstatement Best Practices, Available Options, and Legal Issues

- Under either option, be aware of the potential for disparate treatment
- **DON'T** assume
 - Woman with school-aged children would prefer to stay home
 - Older worker would prefer to stay home
 - Employee who complained about working conditions would prefer to stay home
- **DO** assume that you will have to explain/defend every reinstatement decision

Employees Who Are Reluctant to Return

Different approaches depending on status of employee and reason(s) for not returning:

Furloughed Employees – In most cases, approach like any other request for leave

- Obtain enough info to determine whether request must be approved (e.g. FFCRA, FMLA/CFRA, ADA, CA or local sick leave)

Laid-off Former Employees – In most cases, approach like new applicant

- Generally no obligation to offer FFCRA, FMLA/CFRA, or any other protected leave or benefit
- May be required to consider accommodations

Still Won't Return?

- Share info about safety efforts
- Share understanding of UI benefits
- Share that position may not be available in future

Reinstatement Assessment Checklist

- Reinstatement leave benefits?
 - Covered by FFCRA or local supplemental sick leave law?
- Reinstatement vacation leave?
- Reinstatement sick leave?
- Reinstatement medical benefits?
- New onboarding documents (note: good time to update)
- Training obligations





Managing Health Screenings and Privacy Concerns

Julie Capell

Employee and Customer Concerns



- This is a moving target!
- Creating a safe—and compliant—work environment
 - Changes to physical layouts and structures (“engineering controls”)
 - Changes to policies and practices (“administrative controls”)
 - Personal protective equipment (“PPE”)
- “At the front door”—inquiries and testing
 - Options
 - Privacy
 - Procedures
- When something goes wrong—notifications

Workplace Safety Checklist

- Safety and Health Communications Plan
- Physical Distancing
- Physical Barriers
- Personal Hygiene: Hand-Washing and Hand Sanitizer
- Screening/Monitoring
- Workplace Cleaning and Sanitizing
- Personal Protective Equipment
- Clients, Customers and Visitors

Social Distancing and Sanitation Measures

Must follow:

- L&I Workplace Safety and Health Guidance
 - Specific guidelines for certain industries: agriculture, childcare, construction, food processing, janitorial/environmental services, truck drivers, long-term care workers, grocery and retail workers
- US DOL Guidance on Preparing Workplaces for COVID-19
- Washington DOH Workplace and Employer Resources & Recommendations

Social Distancing

- Place staff members at least 6 feet away from each other
- Do not have in-person meetings
- If you must have an in-person meeting, meet in a large room and remain at least 6 feet from one another. Meet for as short as you can.
- Close lunch rooms and limit access to areas where people gather
- Limit visitors

Sanitation Measures

- Clean all high touch areas (stair handrails, elevator buttons, fitness equipment, door handles)
- Provide cleaning wipes so that “high touch” objects can be wiped after use



Returning and Remote Worker Wage and Hour Issues

Aaron Colby

Defining the Relationship

- Joint Employment
- Independent Contractors



Changing Compensation

Minimum Salary Threshold and Hourly Rate

Reclassifying Means Different Rules

Hazard Pay

- Weighted Average Overtime
- Regular Rate


Personal Protective Equipment, Handwashing, and Temperature Checks

- Compensable Time (Off-The-Clock Work)
- Reimbursing Expenses
- Reporting Time Pay



Employees Working Remotely (Telecommuting)

- Timekeeping at Home
- Reimbursement for Workstation and Connectivity
- Travel Time
- Day of Rest
- Wage Statements and New Paid Leave



Status of AB 5 and other Classification Issues

Laura Heckathorn

AB5/Dynamex in a post-COVID workplace

- *Why it matters*: changed economy, staffing considerations and reducing labor costs
- “Moral responsibility” to take care of essential workers
- Tension between safety and availability/desire to work
 - Federally funded unemployment insurance benefits are available under CARES if they do not qualify for state UI (self-employed, run out of regular benefits or did not work a sufficient amount of time)
 - Increased demand in some areas (food delivery) while ride-sharing companies suffer
- Expanded reach of numerous federal, state and local paid benefits to “workers”

Increased Visibility for Worker Safety

Worker safety and rights has the public's attention, especially gig workers



Misclassification Lawsuits

Expect increased enforcement from the state and a rise in misclassification lawsuits

- On May 5, 2020, Attorney General Xavier Becerra and the City attorneys of Los Angeles, San Diego and San Francisco sued Uber and Lyft under the state's Unfair Competition Law, seeking restitution for unpaid wages and immediate reclassification of drivers from contractors to employees.
- On April 8, 2020, a federal district judge in Northern California granted Lyft's motion to compel arbitration of a misclassification lawsuit from drivers seeking paid sick leave on the grounds it was "riddled with defects" and "filed hurriedly in an attempt to capitalize on the current coronavirus pandemic," but noted the workers were nevertheless employees

Questions



Thank You



Jeff Bosley
Partner, San Francisco

jeffbosley@dwt.com

415.276.6594



Julie Capell
Partner, Los Angeles

juliecapell@dwt.com

213.633.6845



Aaron Colby
Partner, Los Angeles

aaroncolby@dwt.com

213.633.6882



Laura Heckathorn
Counsel, Los Angeles

lauraheckathorn@dwt.com

213.633.8625



Tyler Maffia
Associate, San Francisco

tylermaffia@dwt.com

415.276.6556



Arielle Spinner
Associate, Los Angeles

ariellespinnerl@dwt.com

213.633.6879