

Operating In California for Hospitality Executives

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Rehiring/Returning to Work

When and how should we bring employees back?

- Reopening will be phased (and there is a possibility of renewed shutdowns).
- Review and analyze workplace safety requirements.
- Provide reasonable advance notice of returning to work and obtain written acknowledgment from employees of intent to return.
- Create deadlines for selected rehires to return to work.



Rehiring/Returning to Work

When and how should we bring employees back?

- Consider staggering return-to-work dates.
- Consider if the job is different from before.
- Consider continuing telework for all or part of employees' schedules where possible.
- Consider implication of Governor Newsom's Executive Order.



Rehiring/Returning to Work

How do we choose who to rehire?

- Determine which positions or functions are needed most immediately.
- Design a fair, consistent and nondiscriminatory selection process which could be based on a variety of documented nondiscriminatory factors.
- Document the process you use in a spreadsheet.



Rehiring/Returning to Work

How do we choose who to rehire?

- Certain jurisdictions may have specific requirements relating to rehiring workers whom they have laid off due to COVID-19.
 - The City of Los Angeles recently enacted an [ordinance](#) requiring employers in certain industries that generated more than \$5 million in business in 2019 to rehire laid-off workers (giving priority to those with the most seniority) before they can hire any new employees.
 - Others, including Oakland, California, are considering similar requirements.
- Review the terms of the collective bargaining agreement, if applicable.



Rehiring/Returning to Work

What are considerations in onboarding employees?

- New hires should sign new hire documents, including:
 - applicable Federal Arbitration Act (FAA) arbitration, and
 - class action waiver agreements.
- Consider whether the employee should execute a new Form I-9.
- Review benefit plans to determine coverage differences related to returning employees.
- Comply with all the statutory requirements of California's Uniform Electronic Transactions Act (CUETA) and the Federal E-SIGN Act for virtual onboarding.

Employee's refusal to work and requests to continue teleworking

- Assess rights to take time off due to FFCRA and/or applicable state or local laws.
- Paid protected leaves could include:
 - Normal State and Local Ordinance Paid Sick Leave (California/Los Angeles State Paid Sick Leave).
 - Normal PTO/vacation (the DLSE has guidance on this during COVID-19 pandemic).
 - Federal: COVID-19 FFCRA (if fewer than 500 employees).
 - County: COVID-19 Los Angeles County Supplemental Paid Leave (if unincorporated areas of the County and 500 or more employees).
 - City: COVID-19 Los Angeles City Supplemental Paid Leave (if 500 or more employees) and see here for a chart of other cities with supplemental paid leave.
 - State/Industry: COVID-19 California Supplemental Paid Leave for Food Sector Employers (if 500 or more employees).

Employee's refusal to work and requests to continue teleworking

- Unpaid protected leaves (i.e., an excused absence but without pay) could include:
 - FMLA/CFRA Leave
 - ADA/FEHA Disability Accommodation Leave
 - Workers' Compensation Leave
- A refusal to work may be protected conduct under OSHA and the National Labor Relations Act, or the employer may have a duty to provide reasonable accommodations under applicable disability laws.

Workplace Safety

Standards for the industry and jurisdiction

Know the standards for the industry and jurisdiction (Federal, State, County, City)

CDC (federal)

EEOC (federal)

OSHA (federal)

California
Department of
Public Health
(state)

California
Department of
Fair Employment
& Housing (state)

Cal-OSHA (state)

California Labor &
Workforce
Development
Agency (state)

Workplace Safety

COVID-19 mitigation plan

Cal-OSHA states that:

"California employers are required to establish and implement an IIPP (title 8 section 3203) to protect employees from workplace hazards, including infectious diseases. Employers are required to determine if COVID-19 infection is a hazard in their workplace. If it is a workplace hazard, then employers must implement infection control measures, including applicable and relevant recommendations from the Centers for Disease Control and Prevention (CDC), Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19), and Coronavirus Disease 2019 (COVID-19): How to Protect Yourself & Others. For most California workplaces, adopting changes to their IIPP is mandatory since COVID-19 is widespread in the community."

Workplace Safety

Physical distancing



- Implement physical distancing requirements or guidelines that remain in existence on federal, state, and local levels.
- This may require:
 - Reconfiguring internal work spaces, traffic patterns, schedules, and staffing levels.
 - Flexible scheduling with regard to the workday and to shifting some workers to a different.
 - Staggering break times.
 - Setting up job rotations, thus reducing the complement of on-site workers on any given day.

Workplace Safety

Physical distancing



- Discourage employees from sharing equipment and devices.
- Institute protocols for handling, cleaning, and sanitizing equipment that must be shared.
- Consider erecting physical barriers and controlling the number of employees who can access a particular area or workspace.

Workplace Safety

Screening/monitoring

- At a minimum, this will require notifying employees that they cannot come into work if they have symptoms of illness.
- Regularly monitor whether employees experience illness symptoms.
- Temperature-taking is permitted but should assess the following:
 - Keep records to demonstrate effort to protect workforce/clients/vendors.
 - Records must be kept confidential under ADA and any state/local laws pertaining to employee medical records.
 - Processes should be designed or reviewed by someone competent to identify hazards to the temperature-taker(s) and employees' whose temperatures will be taken.
 - Appropriate personal protective equipment must be used in the process.
 - Proper sanitizing procedures for equipment should be followed.
 - Employees who take the temperatures should be trained in the proper procedures (and the training needs to be documented).
 - Establish process for removing feverish employees and notifying exposed co-workers in the event employee tests positive.
 - The same general principles apply for COVID-19 testing.
 - Assess obligation to comply with the HIPAA.
 - Assess compliance with the CCPA.

Workplace Safety Training

- Consider implementing training for all supervisors on communicating and enforcing compliance.
 - Including how to deal with employee questions and whether all questions should be directed to a specific resource or person for consistency.
- Document notices and trainings with employee acknowledgments.
 - Even when not required by law as evidence to combat claims of lack of safety.

California's COVID-19 Employer Playbook

- On July 24, 2020, California released an Employer Playbook for a Safe Reopening summarizing:
 - existing industry-specific guidance and checklists,
 - workplace outbreak guidance,
 - enforcement, and
 - worker education.

California's COVID-19 Employer Playbook

- Local Health Departments Still Control.
 - Employers should review their county website or consult their county or local health department to ensure they have the most up-to-date information about what is allowed within their jurisdiction.
- Existing Law and Cal/OSHA.
 - The Playbook is not intended to revoke or repeal any worker rights, either statutory, regulatory or collectively bargained, and is not exhaustive as it does not include county health orders, nor is it a substitute for any existing safety and health-related regulatory requirements such as those of Cal/OSHA.

California's COVID-19 Employer Playbook

- Industry-Specific Guidance.
 - The California Department of Public Health and Cal/OSHA have issued statewide Industry-Specific Guidance and Checklists to help employers as they reopen their businesses.
- Before reopening, all facilities must:
 - Perform a detailed risk assessment and create a worksite-specific COVID-19 prevention plan.
 - Train workers on how to limit the spread of COVID-19. This includes how to screen themselves for symptoms and when to stay home.
 - Set up individual control measures and screenings.
 - Put disinfection protocols in place.
 - Establish physical distancing guidelines.
 - Establish universal face covering requirements (with allowed exceptions) in accordance with California Department of Public Health face covering guidelines.

California's COVID-19 Employer Playbook

Responding to an Outbreak:

- Steps to respond to a positive case of COVID-19 or an outbreak should be included in the employer's worksite-specific plan.
- Designate a workplace infection prevention coordinator to implement COVID-19 infection prevention procedures and to manage COVID-related issues among workers.
- Ensure that sick leave policies are sufficiently generous and flexible to enable workers who are sick to stay home without penalty and ensure that workers are aware of such policies.

California's COVID-19 Employer Playbook

Responding to an Outbreak (continued):

- Instruct workers to stay home and report to the employer if they are having symptoms of COVID-19, were diagnosed with COVID-19, or are awaiting test results for COVID-19.
- Develop mechanisms for tracking suspected and confirmed cases among workers in coordination with your local health department.
- Make every effort to maintain the confidentiality of workers with suspected or confirmed COVID-19 infection when communicating with other workers.
 - Employers should refer to the guidelines issued by DFEH and EEOC.

California's COVID-19 Employer Playbook

Responding to an Outbreak (continued):

- Close contacts of cases should be given instructions on home quarantine and symptom monitoring, information regarding the closest COVID-19 testing sites, and referral to their local health department.
 - A close contact is someone who spent 15 minutes or more within 6 feet of an individual with COVID-19 infection during their infectious period, which includes, at a minimum, the 48 hours before the individual developed symptoms.
 - Close contacts should be instructed to quarantine at home for 14 days from their last known contact with the worker with COVID-19 and should be tested for COVID-19.
 - Use employment records to verify shifts worked during the infectious period and other workers who may have worked closely with them during that time period.
- For returning to work:
 - Consult with the local health department and most recent CDC guidance for when a confirmed case may be released from home isolation and return to work.
 - The Playbook includes a table for reference.
 - The local health department may recommend a strategy for return to work, although some variation may occur by jurisdiction and outbreak.

Testing California Employees for COVID-19

May Employers Require COVID-19 Testing of California Employees?

- The answer is clear under federal law: Yes.
 - EEOC stated that it is legal for employers to require its employees to take COVID-19 viral tests.
 - ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity."
 - Employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a "direct threat" to the health of others.
 - An employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.
- The answer is not so clear under California law, however.
 - The California DFEH issued guidance on matters related to testing, but does not definitively state whether employer-mandated COVID-19 testing is permissible.
 - Some employers have opted to conduct less invasive methods of health screening.
 - In some industries, local orders provide more direction on the permissibility of employer-mandated COVID-19 testing.
 - This means that not only is COVID-19 testing of employees permissible for some employers in Los Angeles County—it is required.
 - In order to ensure legal compliance, employers should pay close attention to the local orders and guidance in which their employees perform work.



Testing California Employees for COVID-19



May California Employers Require Antibody Testing of Employees?

- EEOC issued updated guidance stating that employers cannot lawfully require employees to take antibody or serology tests.
- ADA's "job related and consistent with business necessity" legal standard for medical examinations or inquiries for current employees.
- While the guidance does not expressly prohibit employers from offering antibody tests for employees to take on a voluntary basis, doing so may bring more risk than reward (i.e., disability discrimination lawsuits).
- Under federal law:
 - If an employee tests positive for COVID-19, they currently have the virus and may spread it to their coworkers, so they may be barred from the workplace until they have recovered.
 - Conversely, an employee who tests negative for COVID-19 (likely) does not have the virus and (likely) is not at risk of spreading it to their coworkers, so they may be permitted to return to work.
 - However, the results of an employee's antibody test only inform whether the employee had the virus in the past.

Testing California Employees for COVID-19

Once determined that COVID-19 testing of employees is permissible in both their industry and jurisdiction, they still must ensure that the testing procedure is legally compliant, reliable, and effective.

- **Selecting the Right Test.**
 - Employers should select reputable testing companies to conduct their employees' COVID-19 testing.
 - California's COVID-19 Testing Guidance advises public health officials, healthcare providers, and laboratories to prioritize testing for certain populations over others.
 - This will add to employers' difficulty in obtaining timely test results for their employees.
 - The longer the turnaround time, the less useful the test results will be.
 - To the extent possible, employers should contract with reliable testing companies and conduct employee testing within 24 to 48 hours before they are expected to report to work.
- **Document the Process.**
 - Create a testing policy to defend claims of discrimination and gaps in the testing process.
 - Without a written policy, employees may claim they were singled out for testing based on illegal considerations.
- **Authorization Related to Medical Information.**
 - To comply with the federal HIPAA and California's CMIA, employers must obtain signed employee authorization forms, in which employees consent to the testing as a condition of their employment or continued employment and authorize the employer to consider the results when determining an employee's eligibility to work.
 - Depending upon the language used, these forms may permit an employer to receive employees' test results directly from the laboratory that conducted the tests.

Testing California Employees for COVID-19

Implementing Testing, Continued

- Confidentiality of Test Results.
 - COVID-19 test results are considered confidential medical information under both state and federal law.
 - They must be kept in a separate medical file that is viewed only by members of management with a true need to know.
 - Information about employees' test results may not be shared with other employees.
- Responding to Positive Tests.
 - If an employee tests positive for COVID-19, the employer must not reveal the employee's identity to others in the workplace.
 - California Department of Public Health's Guidance on Responding to COVID-19 in the Workplace instructs employers to notify all employees who were potentially exposed to the individual with COVID-19 ("close contacts").
 - Exposed employees should be provided with instructions on home quarantine, symptom monitoring, and COVID-19 testing.
 - Employers must be careful not to disclose the name or other identifying information about the sick employee.
- Remain Vigilant.
 - Where permissible, employers should consider using other health screening methods (e.g., temperature testing and/or symptom questionnaires) in conjunction with COVID-19 testing.
 - Maintaining physical distancing and proper hand hygiene, wearing face coverings and personal protective equipment, and following the CDC's cleaning and sanitation protocols are the best methods for preventing COVID-19 in the workplace.

Tipping

- Legal ownership of a tip
 - Tipping is a transaction between the customer and the worker, not the restaurant.
 - The entire tip belongs to whom it is left.
 - If a customer leaves a tip for a particular worker, the tip is the property of that person.
 - It doesn't matter if the worker is a server, host, or manager, as long as the tip is left for them.
- Tip pooling is allowed with limits
 - Many restaurants have voluntary or mandatory sharing of tips among co-workers.
 - Tip pools can be either voluntary or mandatory.
 - Workers may voluntarily share tips with co-workers who do not get tips from customers. Indeed, many servers (who get tips) share with bussers, hosts, and other restaurant employees.
 - Restaurants may force workers to share tips, subject to federal and state restrictions.



Tipping

- Among other things, mandatory tip pooling has legal limits on who contributes and receives tips from the pool:
 - The house gets nothing.
 - The restaurant itself may not keep any of the tips left by customers.
 - No manager or supervisor sharing.
 - Managers or supervisors may not receive tips from a mandatory tip sharing pool; if they do, the other workers sharing in the pool may claim tip theft. Generally, the only way a manager ever gets to keep a tip is if a customer leaves it to them.



Tipping

Excluding Managers And Supervisors From Tip Pools

- No Switching Back And Forth.
 - Whether a worker is a manager is not a shift-by-shift question.
 - Once a manager, always a manager, unless the worker is demoted.
 - This means that a worker who supervises (or in California, merely “directs”) a larger team cannot share in any tips, even when working a different shift in non-manager role.
- The Actual Job Duties Matter, Not The Title.
 - The reality and actual job duties, and not just the job title, determines who is a manager.
 - In theory, figuring out who is a manager is straightforward. In practice, the lines are blurred, especially with the delivery/take-out model.



Tipping

Excluding Managers And Supervisors From Tip Pools

- Federal And State Law Differ.
 - Federal law defines manager in terms of discretion to hire, fire, and discipline.
 - Generally, if paid a salary the worker is a manager who cannot share in the tip pool, meaning that an hourly assistant manager or shift lead could share in tips, though.
 - In California, anyone who has “authority to hire, discharge, supervise, direct, or control” cannot share in tips.
 - So, even though federal law allows it, California prohibits an hourly worker who merely directs other employees from sharing in a mandatory tip pool.
- Take-Out/Delivery Fulfillment
 - A tip left to a take-out/delivery fulfillment team of workers that includes managers and non-managers may be shared, but not with the manager, even though they are doing almost the same work as their teammates.
 - In California which defines manager narrowly, this means that even hourly managers are barred from receiving tips.
 - In the infrequent case a tip is left to a manager, the manager keeps it all, unless the manager decides to share it, but the restaurant cannot force the manager to share it.



Workers' Compensation

- Emergency legislation on federal, state, and local levels has increased paid and unpaid sick leave time off and unemployment insurance benefits for COVID-19-related absences and loss of work.
- But what about the essential employees who contract COVID-19 at work?
 - A workers' compensation insurance policy provides employees coverage and benefits for any illness or injury "arising out and occurring in the course of their employment."
 - When an employee contracts a fast-spreading, novel airborne illness while working during a pandemic it is less clear if it fits this definition.

Workers' Compensation

- Governor Newsom issued an Executive Order making it easier for employees to prove that they contracted COVID-19 at work and thus get workers' compensation benefits.
- The Executive Order changes all existing California workers' compensation policies by making it so that COVID-19-related illnesses of employees who worked outside their homes from March 19 through July 5, 2020 shall be “presumed to arise out of and in the course of the employment.”
- The California Governor flipped the script on the burden of proof, so that employee workers' compensation claims related to COVID-19 are presumed to be covered.

Workers' Compensation

- Unintended consequences of Governor Newsom's Executive Order:
 - Higher Insurance Premiums
 - Overloading Existing State Systems
 - Deterring Businesses From Returning Employees To Work
- Protection In Civil Lawsuits
 - COVID-19-related claims addressed through the workers' compensation system may provide employers with protection in employee civil lawsuits.
 - In California:
 - Civil lawsuits for negligence and wrongful death claiming that the employee contracted the virus at work due to unsafe work practices of the employer may be barred by the "workers compensation exclusivity doctrine" to the extent the employee received workers' compensation benefits.
 - While not a civil liability shield or immunity for businesses, it does provide a clear path to prevent an employee from getting both workers' compensation insurance benefits and civil damages for COVID-19.

Waivers

- A waiver agreement is a contract between two parties limiting one party's future legal rights against the other.
 - Waiver language is often found in a written agreement that requires acknowledgment or simply in a posted sign.
- A robust waiver agreement typically includes different sections aimed at protecting the restaurant against legal claims from the customer:
 - Informing of safety protocols
 - Assumption of risk
 - Covenant not to sue
 - Waiver of liability
 - Hold harmless / indemnification

Waivers

- A waiver:
 - is not a complete defense.
 - Does not cover future conduct, gross misconduct, or a government investigation or proceeding (like OSHA).
 - May not be enforceable if the conduct is intertwined with food and safety-related regulations.
- Legally speaking, it is simply one piece of evidence to help prove that the customer was put on notice of the risk and agreed to incur it.

Waivers can backfire

- If a customer waiver identifies safety procedures that the restaurant ultimately does not follow, the customer may use it against the restaurant.
- A restaurant that seeks a waiver from its employees may violate workers' compensation laws that require coverage no matter what an agreement says.
 - California law prohibits any agreement between an employer and employee that waives workers' compensation protection.
 - This is exactly what a waiver agreement seeks to do.

Waivers can backfire

- Forcing employees to sign waivers may lead to civil penalties for violating California Labor Code Section 432.5, which states that:

“no employer, ... shall require any employee or applicant for employment to agree, in writing, to any term or condition which is known by such employer ... to be prohibited by law.”
- Independent contractors do not have the same concerns.
 - Seeking a waiver from a worker classified as an independent contractor does not raise the same concerns, so long as the worker is properly classified, and not actually an employee per law.

Employer Checklist for Transition to Remote Work

- Implement a Remote Work Policy
- Employers should put in writing the key terms of the remote work arrangement, in what is often referred to as a "Telecommuting Agreement."



Employer Checklist for Transition to Remote Work

- Crucial terms to consider including:
 - Criteria for eligibility for remote work
 - Full- and part-time employees, exempt (salaried) and non-exempt (hourly) employees, objective factors such as job position/duties, and legitimate/non-discriminatory subjective factors such as length of employment or performance.
 - If the remote work is temporary or an ongoing arrangement.
 - If the arrangement is 100% remote or partial in-office work.
 - Workspace safety and security/privacy.
 - Performance and schedule expectations in remote environment.
 - Revise job descriptions to match remote work requirements.
 - Wage-and-hour compliance, including timekeeping, and break compliance.
 - Integration with existing employee policies.



Employer Checklist for Transition to Remote Work

Workweek, Scheduling, Breaks and Timekeeping

- The line between work and personal may become blurred when an employee uses the same location for both.
- Employers should define time management expectations for remote employees to address:
 - Flexible work hours (may be appropriate if telecommuting due to childcare issues)?
 - Virtual availability—e.g., email, phone, video—and to come into office on occasion?
 - Timekeeping policies apply to remote tracking of work hours and breaks.
 - Especially for non-exempt employees to avoid off-the-clock and break violations.
 - See the Department of Labor's updated FLSA FAQ nos. 14 and 15.



Employer Checklist for Transition to Remote Work



- Expense Reimbursement
 - Employers should determine everything employees need to work remotely, taking into account demands on productivity, and
 - Decide whether to provide or reimburse employees for it.
- Remote workers may need:
 - Computer/laptop
 - Internet (reasonable portion of employee's monthly plan)
 - Cell phone (reasonable portion)
 - Apps or software
 - Printers (only if documents cannot be utilized virtually for the position)
 - Office supplies (pens, paper, printer cartridges)
 - Ergonomic office furniture

Employer Checklist for Transition to Remote Work

- Comply with unique state legal requirements on expense reimbursement.
 - Many states have laws requiring employers to reimburse reasonable and necessary business expenses incurred by employees in the course of employment.
 - California
 - Requires employers to indemnify the employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties.
 - Whether certain expenses must be reimbursed will depend on whether the telework arrangement and/or related expenses are optional (i.e., either because they are not necessary to perform job duties or are available in the office).
 - Illinois, Massachusetts, Montana, and New Hampshire also have specific state law requirements applicable to employee expense reimbursements.
 - Employers in jurisdictions that do not have state-specific laws are not off the hook with regard to potential liability related to business expenses incurred by employees working from home.
 - Under the Fair Labor Standards Act, no employer can require an employee to pay for the employer's business expenses if doing so would reduce the employee's earnings below the required minimum wage.
- The method of reimbursing expenses should account for the fact that reimbursements are not wages for tax purposes.



Employer Checklist for Transition to Remote Work



Workspace Setup

- The type of work will impact the workspace needed to work remotely and meet the employer's expectations.
- Key considerations include:
 - The security of workspace.
 - This is particularly important for employees dealing with confidential trade secrets, customer information, or medical records.
 - The extent the employer may structure/monitor/inspect physical workspace.
 - If the employer or employee will provide desk, chair, office equipment supplies, IT equipment (computer/tablet/phone), and related support.
 - Bring Your Own Device (BYOD) policy for employee personal devices used for work purposes.

Employer Checklist for Transition to Remote Work

Workplace Safety for Remote Employees

- Federal OSHA does not have specific regulations regarding home-office/telework.
 - There is a general obligation (General Duty Clause) to protect employees from recognized hazards that arguably could apply to home offices.
 - See the Department of Labor's FAQ no. 12.



Employer Checklist for Transition to Remote Work



Workplace Safety for Remote Employees

- Record COVID-19 illness on OSHA 300 log or report the illness to OSHA.
 - If a home-office worker is infected with COVID-19 while engaged with work (even at home), and the infection qualifies as a recordable or reportable illness, then the employer must record the illness on its OSHA 300 log or report the illness to OSHA.
- Workers' compensation insurance may cover remote workplace injuries and illnesses.
 - Employees must report any work-related injuries if they occur while working remotely.

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