

COVID-19 Re-Opening
Phase II: Employment
Considerations



May 28, 2020

Jeanine DeBacker

jdebacker@mstpartners.com

<https://calemploymentlawblog.com>

About Today's Webinar

Schedule:

9:00- 9:45 – Presentation – overview of the issues

9:45-10:15 – Q&A (if I can!!)

Yes! The Power Point Deck will be Available!

Email Bonnie Adams info@mcha.net

Follow up with questions:

jdebacker@mstpartners.com

Agenda



Public Health Orders
and Industry Guidance



Federal Paid Sick Leave and Other Programs



Returning Employees to Work



Questions?

Public Health Orders

California Public Health Officer

“The risk of COVID-19 infection is still real for all Californians and continues to be fatal. That is why every business permitted to open should take every step humanly possible to reduce the risk of infection by following the state guidelines.”

COVID-19 Industry Guidance

When the County is granted permission to reopen certain industries, those industries are to comply with the guidance drafted by the CDPH and CalOSHA.

COVID-19 INDUSTRY GUIDANCE: HOTELS AND LODGING

<https://covid19.ca.gov/pdf/guidance-hotels.pdf>

COVID-19 INDUSTRY GUIDANCE: DINE-IN RESTAURANTS

<https://covid19.ca.gov/pdf/guidance-dine-in-restaurants.pdf>

COVID-19 INDUSTRY GUIDANCE: RETAIL <https://covid19.ca.gov/pdf/guidance-retail.pdf>

If the County issues guidance, the more protective / restrictive is to be followed.

Monterey County Public Health Orders

Order can be found: www.mtyhd.org/shelterinplace

Health Officer Order - Shelter-in-Place

Health Officer Order - Signed Order

[Appendix A Golf Safety Protocol](#)

[Appendix B Construction Protocol](#)

[Appendix C Social Distancing Protocol](#)

[Frequently Asked Questions](#)

Paid Sick Leave and Other Programs

Families First Coronavirus Response Act

Employers with **less than** 500 employees.

- Potential exceptions if small employer (but be careful).

Up to 80 hours of **Paid Sick Leave** for:

- own COVID-related time.
- to care for child whose school/child care is closed.
- to care for individual with COVID or symptoms

Up to 12 weeks (2 weeks Paid Sick Leave plus 10 weeks LOA) to care for child whose school/childcare is closed.

Families First Coronavirus Response Act

Different benefit amounts based on reason for time off (own illness, caring for other, child at home).

Certification requirements:

- Employee must identify health care provider or public health official who diagnosed COVID or required quarantined
- Different certification for “Child at Home” leave

Payroll tax credit for amount paid out.

- **Employee can choose** to take FFCRA **OR** paid time off you provide.
- You want them to use the FFCRA time if eligible as it “free” to employer.

Program runs through **December 31, 2020**.

Families First Coronavirus Response Act

Different benefit amounts based on reason for time off (own illness, caring for other, child at home).

Payroll tax credit for amount paid out.

- **Employee can choose** to take FFCRA **OR** paid time off you provide.
- You want them to use the FFCRA time if eligible as it “free” to employer.

Program runs through **December 31, 2020.**

Families First Coronavirus Response Act

Expanded FMLA leave if employee is caring for a child whose school/place of care is closed because of COVID: 10 weeks (plus 2 weeks of Paid Sick Leave)

Certification requirements for Paid Sick Leave not related to child whose school/childcare is closed: Employee must identify health care provider or public health official who diagnosed COVID or required quarantined

Certification requirements for Expanded FMLA: Identify child, school, and closure order. And: “I certify that I am unable to work (and unable to telework) because I am caring for a child (under 18 years of age) whose school or childcare provider is closed or unavailable for reasons related to COVID-19. I further represent that *no other suitable person will be caring for my child* during the period for which I am taking Federal Paid Sick Leave or Expanded FMLA.”)

Other Programs to Consider

- Local laws (San Francisco, San Jose, for example) regarding FFCRA, COVID, Paid Sick Leave, and Family Friendly Workplace . . .
- **CARES Payroll Protection Program**
 - Apply through SBA lender (likely your bank)
 - If 75% of loan used for payroll and payroll-related costs for 8 week period, loan is forgiven (remainder of loan can be used for rent, etc.)
 - **Cannot use PPP funds to pay the sick leave under FFCRA!**

Returning Employees

Prepare Your Workplace

Before reopening, State Orders / Guidance require that **all** facilities must:

1. Perform a detailed risk assessment and implement a site-specific protection plan
2. Train employees on how to limit the spread of COVID-19, including how to screen themselves for symptoms and stay home if they have them
3. Implement individual control measures and screenings
4. Implement disinfecting protocols
5. Implement physical distancing guidelines

Appendix C: Social Distancing Protocol (Updated April 29, 2020)

Business name: [Click or tap here to enter text.](#)

Facility Address: [Click or tap here to enter text.](#)

Approximate gross square footage of space open to the public: [Click or tap here to enter text.](#)

Businesses must implement all applicable measures listed below, and be prepared to explain why any measure that is not implemented is inapplicable to the business.

Signage:

Signage at each public entrance of the facility to inform all employees and customers that they should: avoid entering the facility if they have COVID-19 symptoms; maintain a minimum six-foot distance from one another, sneeze and cough into a cloth or tissue or, if not available, into one's elbow; wear face coverings, as appropriate; and not shake hands or engage in any unnecessary physical contact.

Signage posting a copy of the Social Distancing Protocol at each public entrance to the facility.

Measures To Protect Employee Health (check all that apply to the facility):

Everyone who can carry out their work duties from home has been directed to do so.

All employees have been told not to come to work if sick.

Symptom checks are being conducted before employees may enter the work space.

Employees are required to wear face coverings, as appropriate.

All desks or individual work stations are separated by at least six feet.

Break rooms, bathrooms, and other common areas are being disinfected frequently, on the following schedule:

Break rooms:

Bathrooms:

Other ([Click or tap here to enter text.](#)): [Click or tap here to enter text.](#)

Disinfectant and related supplies are available to all employees at the following location(s):

Hand sanitizer effective against COVID-19 is available to all employees at the following location(s):

Soap and water are available to all employees at the following location(s): [Click or tap here to enter text.](#)

Copies of this Protocol have been distributed to all employees.

Optional—Describe other measures: [Click or tap here to enter text.](#)

Measures To Prevent Crowds From Gathering (check all that apply to the facility):

Limit the number of customers in the store at any one time to [Click or tap here to enter text.](#), which allows for customers and employees to easily maintain at least six-foot distance from one another at all practicable times.

Post an employee at the door to ensure that the maximum number of customers in the facility set forth above is not exceeded.

Appendix C: Social Distancing Protocol (Updated April 29, 2020)

Placing per-person limits on goods that are selling out quickly to reduce crowds and lines. Explain:

Optional—Describe other measures: [Click or tap here to enter text.](#)

Measures To Keep People At Least Six Feet Apart (check all that apply to the facility)

Placing signs outside the store reminding people to be at least six feet apart, including when in line.

Placing tape or other markings at least six feet apart in customer line areas inside the store and on sidewalks at public entrances with signs directing customers to use the markings to maintain distance.

Separate order areas from delivery areas to prevent customers from gathering.

All employees have been instructed to maintain at least six feet distance from customers and from each other, except employees may momentarily come closer when necessary to accept payment, deliver goods or services, or as otherwise necessary.

Optional—Describe other measures: [Click or tap here to enter text.](#)

Measures To Prevent Unnecessary Contact (check all that apply to the facility):

Preventing people from self-serving any items that are food-related.

Lids for cups and food-bar type items are provided by staff; not to customers to grab.

Bulk-item food bins are not available for customer self-service use.

Not permitting customers to bring their own bags, mugs, or other reusable items from home.

Providing for contactless payment systems or, if not feasible, sanitizing payment systems regularly. Describe: [Click or tap here to enter text.](#)

Optional—Describe other measures (e.g. providing senior-only hours): [Click or tap here to enter text.](#)

Measures To Increase Sanitization (check all that apply to the facility):

Disinfecting wipes that are effective against COVID-19 are available near shopping carts and shopping baskets.

Employee(s) assigned to disinfect carts and baskets regularly.

Hand sanitizer, soap and water, or effective disinfectant is available to the public at or near the entrance of the facility, at checkout counters, and anywhere else where people have direct interactions.

Disinfecting all payment portals, pens, and styluses after each use.

Disinfecting all high-contact surfaces frequently.

Optional—Describe other measures: [Click or tap here to enter text.](#)

* Any additional measures not included here should be listed on separate pages and attached to this document.

You may contact the following person with any questions or comments about this protocol:

Name: [Click or tap here to enter text.](#)

Phone number: [Click or tap here to enter text.](#)

Who is Returning to Work?

Your legal obligations can turn on the status of the individual:

- “Laid Off” (and all accrued time off paid out)?
- “Furloughed” to return at a later date?
- Employee who had been working from home?
- New employee?

The “Reluctant” Employee

If the workplace is not supposed to be open, it does not matter if you offer the employee work. The employee remains eligible for UI.

If you are looking to rehire an employee you furloughed, and they “[make more](#)” on UI . . .

- [Anecdotal](#).
- Offer the job if you want that person back; if they refuse it is between the person and the EDD. You only respond – no affirmative acts.
- If the person refuses because of [fear or risk](#) . . . The EDD has addressed this.

The “Reluctant” Employee

EDD FAQ: [Would I qualify for benefits if I choose to stay home from work due to underlying health conditions and concerns about exposure to the virus?](#)

You can be eligible for benefits if you choose to stay home. Once you file your claim, the EDD will contact you if we need more information.

The “Reluctant” Employee

EDD FAQ: Will I lose UI if I refuse to work because I am in a category identified as having elevated risk for contracting COVID-19?

Individual is **disqualified** if refuse to accept **suitable employment** when offered.

The EDD will consider whether the particular work is “suitable” in light of factors such as the degree of risk involved to the individual’s health and safety, and as a result whether the individual has good cause for refusing the work.

But . . . If **working from home** is offered – and declined, likely ineligible for UI.

What if an Employee is not Truthful?

What if Employee was less than truthful?

- A criminal complaint in Atlanta claims that an employee committed wire fraud in trying to convince his employer he had COVID-19.
- Company had to shut down –which it claims cost \$100,000.
- Full disinfecting process.
- Four other employees shut down for quarantined due to alleged exposure.

This is a very rare exception. Your employees are nervous and scared for their physical and financial health. Don't impose more stress on them! And don't impose how YOU react as a litmus test.

What if an Employee Tests Positive?

Do **not** identify (name) the individual to others. Medical privacy laws are in effect.

Notify all employees **or** use a shared facility **or** are “near” (“6-15-48”) a positive individual: “We learned that an employee at [location] tested positive for the COVID-19 virus. The employee received positive results of this test on [date]. This is to notify you that you have potentially been exposed to COVID-19 and you should contact your local public health department for guidance and any possible actions to take based on individual circumstances.”

This notice is not required by law, but it is “approved” by the DFEH to protect employee safety and privacy while still protecting your company.

Liability if Illness

Guests? Call your insurance broker!

Employee? Potential workers compensation issue.

Workers' Compensation

Governor Gavin Newsom signed an executive order creating a **rebuttable presumption** that employees who contract COVID-19 are entitled to workers' compensation benefits **if the employee tested positive for or was diagnosed with COVID-19 within 14 days after a day (on or after March 19, 2020) that the employee performed labor or services at the employee's place of employment (and not the employee's home or residence) at the employer's direction.**

Wage and Hour Compliance

The Labor Commissioner has made **no exceptions for COVID** – so all wage and hour rules must be followed!

Failure to comply with wage and hour issues – even during a crisis – can lead to class actions and PAGA lawsuit.

Wage and Hour Compliance

Compensable Time – *Remember Starbucks!*

Waiting to go through screening is compensable time.

Consider staggering start times.

Wage and Hour Compliance

DLSE FAQ: Is an employee entitled to compensation for reporting to work and being sent home?

- Generally, if an employee reports for their regularly scheduled shift but is required to work fewer hours or is sent home, the employee must be compensated for at least two hours, or no more than four hours, of **reporting time pay**.
- For example, a worker who reports to work for an eight-hour shift and only works for one hour must receive four hours of pay, one for the hour worked and three as reporting time pay so that the worker receives pay for at least half of the expected eight-hour shift.

Home screening? Temperature Check? Remember Tilly's!

Wage and Hour Compliance

Meal and Rest breaks – continue to provide the opportunity.

State Public Health Guidance: “**Stagger employee breaks**, in compliance with wage and hour regulations, maintain physical distancing protocols.”

- Reconfigure, restrict or close **breakrooms** and create alternative space for breaks where physical distancing is possible.
- Set up outdoor areas with sufficient distancing if possible.

Other Companies' Employees

State and County Guidance:

Ask non-employee truck drivers, delivery agents, or vendors who are required to enter workspace to have their employees follow the guidance of local, state, and federal governments regarding wearing face coverings and PPE.

Questions?



Thank you!

Jeanine DeBacker

McPharlin Sprinkles & Thomas LLP
mstpartners.com

jdebacker@mstpartners.com

<https://calemploymentlawblog.com>