

Coronavirus and COVID-19: Issues for Employers

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What We Will Cover

- Are you allowed to operate your business under the Governor's "stay at home" order?
- Dealing with employees who have COVID-19 or have been exposed to it.
- Dealing with employees who come to work sick.
- Must you pay employees when you require them to go home?
- May employees refuse to come to work out of fear of contracting the coronavirus?
- Must you allow and can you require employees to work from home?
- What your remote work policy should say.

What We Will Cover

- Layoffs and the federal and state WARN Acts.
- Partial furloughs of exempt employees.
- The new federal paid sick leave legislation.

Are you allowed to operate your business?

Basic rule is that those who can work at home must work at home, but certain “Critical Infrastructure Sectors” may remain open to the public for business:

- Hospitals, clinics and doctors’ offices
- Manufacturers and distributors of pharmaceuticals and medical supplies
- Police, fire and EMS
- Public works employees
- Plumbers, electricians, exterminators
- Agriculture
- Food processors
- Grocery and food stores

Are you allowed to operate your business?

“Critical Infrastructure Sectors” (continued):

- Electric, gas and petroleum workers
- Transportation and logistics (trucking, warehouse, mass transit, railroad, shipping, aviation)
- Private & public postal services
- Auto repair and maintenance
- Taxi & delivery drivers (including Uber & Lyft)
- Cable and internet providers
- Radio, television and media services
- Data center, service center and communications center employees
- IT workers supporting Critical Infrastructure Sectors

Are you allowed to operate your business?

“Critical Infrastructure Sectors” (continued):

- Private security
- Construction workers
- Retail stores that provide auto supplies, hardware and home repair, home appliances and pet supplies
- Pharmacies
- Law and accounting firms that assist clients with compliance
- Laundry and dry cleaning
- Rental car companies
- Schools, daycare, and colleges and universities (for distance learning only)

Are you allowed to operate your business?

“Critical Infrastructure Sectors” (continued):

- Manufacturing of materials and products for medical supply chains, transportation, energy, communications, food and agriculture, chemicals, nuclear facilities and the defense industrial base
- Banking, financial and insurance services

If an employee has COVID-19 or has been exposed

If diagnosed with COVID-19:

- Remove employee from the workplace.
- Notify employees and other persons with whom the employee worked in close proximity over the last 14 days; require those employees to self-quarantine for 14 days.
- Have employee's work area deep cleaned and disinfected.
- Notify county health department for direction regarding whether whole business must be closed.

If exposed to COVID-19:

- Send employee home for 14 day quarantine.
- Recommend testing.

Dealing with employees who come to work sick

- Employees who come to work sick should be sent home, especially if they have fever, cough or other flu-like symptoms.
- You may not require employees to seek medical attention.
- Do not attempt to take employees' temperatures.
- Consider waiving requirement that employees absent for illness lasting a certain period (e.g., more than 3 days) bring a doctor's note.

Must you pay employees if you require them to go home?

- Non-exempt employees sent home prior to working half of a scheduled shift must be paid for half the shift or time actually worked, whichever is greater.
- Otherwise, non-exempt employees need not be paid if they are not working but may use paid sick leave or PTO days (and possibly federal paid sick leave).
- Exempt employees may be required to use paid sick leave or PTO days if they are not working, but they must be paid their regular salary if they perform any work such as answering business e-mails or text messages or participating in business phone calls.

May employees refuse to come to work out of fear of contracting the Coronavirus?

- Generally, no.
- OSHA law permits employees to refuse to work where there is an imminent threat of death or serious injury.
- While this standard might be met if health care employees were required to work without adequate protective gear, it would not justify other employees in refusing to come to work out of fear of contracting COVID-19.
- Employees over age 60 or with serious health conditions might meet this standard, particularly if they must interact with members of the public (e.g., health care or hospitality).

Must you allow and can you require employees to work from home?

- No and yes.
- You need not allow employees to work from home, especially if their job does not lend itself to remote work.
- You may require employees to work from home to increase social distancing or to carry on operations if the workplace is closed.
- You should establish a Remote Work Policy and require non-exempt employees who work from home to sign and follow it.

What your remote work policy should say

- Employees must keep an accurate record of time worked.
- No overtime unless expressly approved in advance.
- Employees must take compliant meal and rest breaks.
- If data security is important, employees should be issued company computers and not allowed to work remotely on personal computers.
- Employees should be required to work a prescribed schedule and should not be distracted by child- or elder-care issues while working.
- Employees must create a specific work space (and send photos); injuries occurring away from that work space are not the employer's responsibility.

What your remote work policy should say

- Employees may be required to come to their usual workplace as needed (if feasible).
- Employees must follow all usual work policies and procedures in the Employee Handbook, including policy against harassment, IT policy, etc.
- Employees unable to work remotely due to illness or family-care obligations must notify supervisor as required for a workplace absence.
- Employees provided with employer-owned equipment must return it at the conclusion of the remote work period.
- Employees who use their personal cell phones and internet must be given a stipend for business use.

Layoffs and the federal and state WARN Acts

Federal WARN Act:

- Applies to employers of 100 or more full-time employees.
- Requires 60 days advance notice of any layoffs of 500 or more employees, or of 50 or more employees at a site of employment where at least 33% of full-time employees are affected within 30 days.
- 90 day rule: If the 50+/33%+ test is met over 90 days in layoffs for the same reason, 60 days of advance notice is required.
- “Unforeseen business circumstances” exception; it would most likely apply here.

Layoffs and the federal and state WARN Acts

California WARN Act:

- Applies to “covered establishments” employing 75 or more persons (including turnover) within the last year.
- Requires 60 days advance notice of any “mass layoff” of 50 or more employees (no exception for part-time employees) at a “covered establishment.”
- There is no “unforeseen business circumstances” exception under California law. There is only an exception for a “physical calamity,” and it is not clear whether this exception would apply to COVID-19.

Layoffs and the federal and state WARN Acts

Governor Has ***Suspended*** California WARN Act, provided:

- As much notice is given as is practicable.
- WARN notices are given or sent to:
 - Each affected employee
 - Any union representing the employees
 - The EDD
 - Local Workforce Investment Board
 - Chief elected official of the county and city in which the layoff occurs

Layoffs and the federal and state WARN Acts

Governor Has ***Suspended*** California WARN Act, provided:

- WARN notices to employees state:
 - The effective date of the layoff or shutdown and the expected date when the employee will be separated.
 - Whether the planned action will be temporary or permanent, and if the entire plant is to be closed, a statement to that effect.
 - An indication of whether bumping rights exist.
 - Name and telephone number of a company official to contact for more information.
 - A statement of the basis for giving less than 60 days notice.

Layoffs and the federal and state WARN Acts

Governor Has ***Suspended*** California WARN Act, provided:

- WARN notices to employees state:
 - That the layoff is caused by “COVID-19-related business circumstances that were not reasonably foreseeable as of the time notice would have been required.”
 - “If you have lost your job or been laid off temporarily, you may be eligible for unemployment insurance (UI) More information on UI and other resources available for workers is available at labor.ca.gov/coronavirus2019.”

Layoffs and the federal and state WARN Acts

Governor Has *Suspended* California WARN Act, provided:

- WARN notices to state and local government entities state:
 - Name and address of employment site where layoff will occur and name and telephone number of company official to contact for further information.
 - Whether the planned action will be temporary or permanent, and if the entire plant is to be closed, a statement to that effect.
 - The expected date for the first separation and the anticipated schedule for making separations.
 - Job titles of positions to be affected and number of employees in each position.

Layoffs and the federal and state WARN Acts

Governor Has *Suspended* California WARN Act, provided:

- WARN notices to state and local government entities state:
 - An indication of whether bumping rights exist.
 - The name of each union representing affected employees and the name and address of the chief elected officer of each such union.
 - A statement of the basis for giving less than 60 days advance notice.
 - That the layoff is caused by “COVID-19-related business circumstances that were not reasonably foreseeable as of the time notice would have been required.”

Partial furloughs of exempt employees

- Partial-week reductions in salary with a corresponding reduction in hours are permitted; for example you could reduce an exempt employee's workweek by one day and reduce his or her salary by 20%.
- You cannot reduce the salary below the minimum salary threshold, however (\$54,080 in California).
- You have to be consistent with a reduced workweek. You can announce a reduced workweek for a discrete period (say, until May 1) or "until further notice" but you cannot go back and forth from week to week.

Partial furloughs of exempt employees

- Employees should not be allowed to use accrued vacation to cover the fifth day of the workweek, but they may use vacation to cover one or more of the four assigned days in a workweek.
- Employees must be prohibited from performing any work while on any off-day. This includes sending or answering work-related e-mails or text messages or making or answering work-related phone calls.

The new federal paid sick leave legislation

Four employment-related aspects:

- Temporary paid sick leave for COVID-19 and related reasons for employees of employers with fewer than 500 employees.
- Paid FMLA temporarily for care for children whose school or daycare facility is closed.
- Employer tax credits for employers that provide COVID-19-related federal paid sick leave and paid FMLA leave.
- Increased support for unemployment insurance benefits (in California, seven-day waiting period for unemployment and state disability benefits has been eliminated).

The new federal paid sick leave legislation

Paid sick leave:

Up to 80 hours of paid sick leave at employee's "regular rate" for:

- Employee who must comply with a requirement or recommendation to quarantine due to exposure to, or symptoms of, coronavirus.
- Employee who must self-isolate because the employee is diagnosed with coronavirus.
- Employee who obtains a diagnosis or requires care because the employee is exhibiting symptoms.

The new federal paid sick leave legislation

Paid sick leave:

Up to 80 hours of paid sick leave at **2/3** of employee's "regular rate" for:

- Employee who must care for or assist an at-risk family member who is self-isolating due to a diagnosis, who is exhibiting symptoms of coronavirus and needs to obtain medical care, or who is adhering to requirement or recommendation to quarantine due to a exposure to, or symptoms of, coronavirus.
- Employee who must take care of the employee's child if the child's school or place of care has been closed due to the COVID-19 coronavirus (including if the childcare provider is unavailable).

The new federal paid sick leave legislation

Paid sick leave:

- Does not carry over to next year.
- Federal paid sick leave is in addition to paid sick leave under employer policy and employer may not amend its paid sick leave policy.

Temporary expansion of FMLA

- For coronavirus purposes, all employers with fewer than 500 employees are covered.
- Employee must have only worked for employer for 30 days prior to taking leave.
- Eligible employees may take up to 12 weeks of paid, job-protected leave to care for the employee's child if the child's school or daycare provider has been closed due to a public emergency.

Temporary expansion of FMLA

- First 14 days are unpaid but employee can use accrued leave including PTO, vacation or sick leave.
- Leave is paid at 2/3 of employee's regular rate.
- Definition of "parent" is expanded to parents-in-law, parents of a domestic partner, and parents who served as a legal guardian of the employee.
- Secretary of Labor may exempt employers of fewer than 50 employees where the viability of the business as a going concern is jeopardized, and to exclude certain healthcare providers and emergency responders from the list of those employees eligible for leave.

Both paid sick leave and temporary expansion of FMLA:

- Become effective 15 days after the President signs the legislation.
- Carry payroll tax credits for employers for paid sick leave provided.
- Both are job-protected.
- Both sunset on December 31, 2020.

Questions?

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