



A NIGHTMARE ON COVID STREET

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Remember:

- ▶ Be compassionate with employees during a crisis
- ▶ Remember that what you provide to one may have to be provided to all.
- ▶ Watch for legal compliance issues, even in crisis
- ▶ Nothing is more important than health and safety – and better safe than sorry!

Furloughs and Layoffs

- ▶ Furlough
 - ▶ Written notice to employees of business reasons
 - ▶ Month-to-month
 - ▶ Avoid penalties by paying out vacation accrual
- ▶ Layoff
 - ▶ Written notice to employees
 - ▶ Business reason for layoff and employee selection
 - ▶ Not a substitute for a weak termination

Remote Work Issues

- ▶ Documentation (temporary vs. ongoing)
 - ▶ Equipment & expenses (reimbursement)
 - ▶ Obligations
 - ▶ Ability to work (child care, caretaking)
 - ▶ Safe workspace
 - ▶ Courtesy (revocable)

My Employee Was Exposed to COVID-19

- ▶ Quarantine the employee for 14 days
- ▶ Quarantine those in direct contact for 14 days
- ▶ Notify workplace of employee exposure (no names)
- ▶ Remind employees of your sanitation procedures

My Employee Tested Positive for COVID-19

- ▶ Quarantine for 10 days after onset of symptoms
- ▶ Quarantine those in direct contact for 14 days
- ▶ Notify workplace of positive test result (no names)
- ▶ Remind employees of your sanitation procedures
- ▶ Consider a deep clean of the workplace

Reporting A Positive Test To The Worker's Compensation Carrier (SB 1159)

- ▶ Effective September 17, 2020; applies to employers with five or more employees
- ▶ Must report positive COVID-19 test to the employer's worker's compensation carrier within three days after receipt of notice
- ▶ Retroactive: positive tests between July 6 and September 17 had to be reported by October 17

Reporting A Positive Test To The Worker's Compensation Carrier (SB 1159)

- ▶ Must report:
 - ▶ Date of the positive test (without the employee name)
 - ▶ Address of the employee's work location during a 14-day period before the test
 - ▶ Highest number of employees at work at that location within 45 days prior to employee's last day of work
- ▶ Penalties of \$10,000 for failure to comply

Providing Notice of A Positive Test (AB 685)

- ▶ Effective January 1, 2021
- ▶ Must provide notice of potential exposure to COVID-19 within one business day to all employees (and others) who were at the worksite with the COVID-19 person within the infectious period
- ▶ Notice of the potential exposure must include:
 - ▶ Available COVID-19 benefits
 - ▶ Information about anti-retaliation and anti-discrimination protections
 - ▶ Employer's disinfection and safety plan

Can I Test My Employees? Can I Require A Negative Test Before My Employee Returns?

- ▶ Testing is permitted but may have limited value
 - ▶ May be negative today, positive tomorrow
 - ▶ May be positive long after contagion has ended
 - ▶ Use time frames, not testing
- ▶ Employer must pay for required tests but not for voluntary tests

My Employee Doesn't Want To Come Back

- ▶ Be compassionate toward employees who are reluctant to return
 - ▶ Discuss their reasons for concern (interactive discussion process)
 - ▶ Remind employee of safety and sanitation procedures implemented
 - ▶ Ask for employee input on any other steps to be taken
 - ▶ Consider any applicable leaves/benefits
 - ▶ Consider additional personal (unpaid) leave

My Employee Is Just “Uncomfortable”

- ▶ Interactive discussion/reasonable accommodation analysis
- ▶ Refusal to work without legally-protected basis is a resignation
- ▶ Advance notice/time to consider options
- ▶ Documentation

My Employee Is Making More Money on Unemployment

- ▶ Document the employment offer in writing
- ▶ Remind employees that you will report the refusal to work to the EDD
- ▶ Remind employees that a refusal to work without valid reason constitutes a resignation and they will be replaced.
- ▶ Give the employee time to consider the options

My Employee Went To A Party/Event

- ▶ Investigate, including discussion with the employee
- ▶ Preserve the evidence (photos, social media posts)
- ▶ Quarantine for 14 days for unsafe behavior

My Employee Is Traveling Out Of The State/Country

- ▶ Discuss the need for quarantine before approving the vacation (or deny the vacation)
- ▶ Investigate, including discussion with the employee
- ▶ Preserve the evidence (photos, social media posts)
- ▶ Quarantine for 14 days for unsafe behavior

Do I Pay My Employee During The Employer-Imposed Quarantine?

- ▶ Exposed or positive for COVID-19 at work: open a worker's compensation claim
- ▶ Exposed or positive for COVID-19 outside of work:
 - ▶ FFCRA/CSPSL benefits?
 - ▶ If not, the quarantine time is unpaid
 - ▶ Allow the employee to use any available vacation/PTO

Families First Coronavirus Response Act ("FFCRA")

- ▶ Applies to businesses with less than 500 employees
- ▶ Effective April 1, 2020 – December 31, 2020
- ▶ Emergency Paid Sick Leave ("EPSL") and
Extended Family Medical Leave Act ("EFMLA"]

FFCRA: Emergency Paid Sick Leave

▶ When the employee:

- (1) Is subject to a federal, state or local quarantine or isolation order
- (2) Has been advised by a health care professional to self-quarantine
- (3) Is experiencing COVID-19 symptoms and seeking a medical diagnosis

▶ The employee receives:

- ▶ 100% of pay for up to 80 hours
- ▶ Capped at \$511 daily and \$5110 in total

FFCRA: Emergency Paid Sick Leave

- ▶ When the employee is:

- (4) Caring for an individual who qualifies under (1) and (2) above

- (5) Caring for a son or daughter where the school has been closed or the child care provider is unavailable for COVID-19 reasons

The employee receives:

- ▶ 2/3 of pay for up to 80 hours

- ▶ Capped at \$200 daily and \$2000 in total

FFCRA: Extended Family Medical Leave

- ▶ When the employee (who has already worked for the employer for at least 30 days) is:
 - (5) Caring for a son or daughter where the school has been closed or the child care provider is unavailable for COVID-19 reasons
- ▶ The employee receives:
 - ▶ 12 weeks of total leave (first two weeks unpaid; may overlap with EPSL)
 - ▶ 2/3 of pay for 10 weeks
 - ▶ Capped at \$200 daily and \$12,000 in total

FFCRA: Schedule Issues

- ▶ Benefits are based upon what the employee would typically work during two weeks of work, but no more than 80 hours in total (employee could use 50 hours in one week and 30 hours in the next week)
- ▶ Part-time employees (less than 40 hours of work) receive a prorated benefit (no more than 80 hours in total) based upon their normally-scheduled hours of work over a two-week period

FFCRA: Benefits Issues

- ▶ Health insurance benefits continue during FFCRA, with the employer paying its usual portion of the premiums (employees are required to pay their portion as well)
- ▶ Employer-sponsored benefits (vacation, PTO) do not continue to accrue during FFCRA leave
- ▶ FFCRA emergency sick leave does not count against California state or city sick leave; FFCRA expanded FMLA leave does count against available FMLA leave for other purposes

FFCRA: DOL Notice and Guidance

- ▶ Employers must post or distribute the DOL Model Notice:
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
- ▶ Create a policy (but not in the handbook)
- ▶ Tax credits and relief available: <https://www.irs.gov/coronavirus>
- ▶ DOL FFCRA Questions and Answers (continuously updated):
<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

FFCRA: DOL Guidance on Child Care

- ▶ Child care provider/school leave is available only to care for a son or daughter under 18 years of age (including legal wards, or adult disabled children who are 18 or more years of age)
- ▶ “Child care providers” include professionals, neighbors, relatives (paid or unpaid)
- ▶ Child care provider/school leave applies only if the unavailability is due to COVID-19 (closure for summer break/business conditions doesn't apply).

My Employee Wants To Stay Home to Monitor A Child's Online Schooling Activity

- ▶ DOL confirmed that a “school closure” includes supervision of online schooling (but not tutoring/assisting)
- ▶ Can the employee work remotely (full-time or part-time)?
- ▶ FFCRA benefits apply for up to 12 weeks
- ▶ Consider reasonable accommodation
- ▶ If accommodation would cause an undue hardship, provide advance notice of the need to fill the position and let employee decide how to proceed.

COVID-19 Supplemental Paid Sick Leave (CSPSL)

- ▶ Applies to employers with 500+ employees and certain health care providers/food sector workers not subject to FFCRA
- ▶ Available when the employee is:
 - ▶ Subject to a federal, state or local quarantine or isolation order due to COVID-19
 - ▶ Advised by a health care provider to self-quarantine/isolate for COVID-19
 - ▶ Prohibited from working by the employer for health concerns related to COVID-19

COVID-19 Supplemental Paid Sick Leave (CSPSL)

- ▶ Full-time employees (as designated by the employer or worked 40 hours per week on average in prior two weeks) receive 80 hours
- ▶ Part-time employees receive two weeks of sick leave based upon:
 - ▶ their usual hours worked in a two-week period
 - ▶ 14 times their average daily hours over the past six months
 - ▶ Number of hours worked in two weeks if employed for two weeks or less
- ▶ Amount of pay: highest of the regular rate of pay, state minimum wage, or local minimum wage (capped at \$511 per day; \$5,100 total)

COVID-19 Supplemental Paid Sick Leave (CSPSL)

- ▶ Employers must post the model notice:
 - ▶ Food sector workers: <https://www.dir.ca.gov/dlse/COVID-19-Food-Sector-Workers-poster.pdf>
 - ▶ Non-food sector workers: <https://www.dir.ca.gov/dlse/COVID-19-Non-Food-Sector-Employees-poster.pdf>
- ▶ Labor Commission FAQs: <https://www.dir.ca.gov/dlse/FAQ-for-PSL.html>

Keeping the Workplace Safe

- ▶ Implement a site-specific protection plan
- ▶ Implement individual control measures and screenings (temperature checks, symptom questionnaires)
- ▶ Implement disinfecting protocols
- ▶ Implement physical distancing guidelines
- ▶ Train employees on how to limit the spread of COVID-19, including how to screen themselves for symptoms and to stay home if they have them

Keeping the Workplace Safe

- ▶ Maintain ongoing sanitation of all common space
- ▶ Keep all appropriate areas disinfected during the workday
- ▶ Maintain social distancing
- ▶ Provide any necessary PPE (masks, gloves, etc.)
- ▶ Provide sanitation supplies for employee use

Keeping the Workplace Safe

- ▶ Comply with COVID-19 occupancy limitations in all rooms
- ▶ Maintain COVID-19 safety practices for deliveries, customer access, etc.
- ▶ Post information regarding PPE and social distancing requirements at entrances for customers and guests
- ▶ Manage staggered use of common areas and equipment
- ▶ Designate a COVID-19 safety officer to monitor compliance with procedures, audit availability of supplies and address complaints

Keeping the Workplace Safe

- ▶ Consider staggered schedules and locations
- ▶ Consider allowing remote work whenever possible
- ▶ Make contact as early as possible with furloughed or laid off employees that you will bring back so they can address any issues
- ▶ Post notices of employee rights and benefits and employee resources

Monitoring Employee Behavior

- ▶ Monitor employee and third-party behavior to ensure compliance with these standards
- ▶ Ensure ongoing compliance with safety and sanitation procedures
- ▶ Strict disciplinary action for employees who do not comply

Can I Make My Employees Wear Masks?

- ▶ Masks are currently required in the workplace in all common areas and whenever employees cannot maintain six feet of social distance
- ▶ Surgical masks and masks with filters are most effective
- ▶ Cloth masks are somewhat less effective; bandanas and neck gaiters purportedly provide very little protection

Can I Make My Employees Wear Masks?

- ▶ Employees are required by law to comply at all times with all lawful employer policies, including mask requirements
- ▶ Discipline for non-compliance by sending employees home without pay or terminating employment after warning
- ▶ When employees cannot wear masks for medical reasons, consider reasonable accommodation (which may include face shields, remote work or unpaid disability leave)

Handling Employee Complaints

- ▶ Provide employees with names/titles/contact information of management personnel to whom they can complain or raise questions
- ▶ Complaints about safety and work conditions may be protected by the federal National Labor Relations Act as “concerted activity” and/or may form the basis of a retaliation complaint
- ▶ Investigate and promptly address any complaints

For More Information...

- ▶ Join LightGabler's mailing list to receive legal updates via email (email kgabler@lightgablerlaw.com or sign up on our website at www.lightgablerlaw.com)
- ▶ Review LightGabler's website to find our firm's COVID-19 updates (among others):
<https://www.lightgablerlaw.com/legal-updates/>