

What to do With Your Law Firm Amidst the Pandemic

Employment and Operational Concerns

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Moderated by Erin Joyce '90

Legal Considerations in the Workplace

In the COVID-19 Era

Code 1: 3050



Presented by Cindy Elkins
Elkins Employment Law

Furloughs, Layoffs and Terminations

- Furlough
 - Intended to be a brief interruption in employment
 - DLSE – if duration goes beyond next payroll period it is deemed a “termination” requiring payout of “final” wages
- Layoff
 - “Temporary” with an intention for recall
 - “Permanent” without intention to recall to return to work
 - Requires payout of final wages
- Terminations
 - Separation of employment without intention to recall
 - Requires payout of final wages

Rehire, Reinstatement, or New Hire

- Determine if employees are being “recalled” “rehired” or a new hire
- If recall, maintain seniority (though check with benefit plans on this)
- If rehired, then the same as a “new hire” and all new hire forms must be completed
 - Dept of Homeland Security has issued guidance on completing the I-9 during COVID-19 for employers hiring workers remotely; if onsite normal I-9 rules apply

FFRCA – Emergency Paid Sick Leave

- The employer must provide two weeks (up to 80 hours) of paid sick leave.
- Paid at 100% of regular rate of pay up to \$511 per day if the employee:
 - Is unable to work because the employee is quarantined or isolated based on a shelter-in-place order;
 - Is unable to work because the employee is self-quarantined based on advice from a medical professional; or
 - Is unable to work because the employee is experiencing COVID-19 symptoms and is seeking a diagnosis from a medical professional.

Emergency Paid Sick Leave – cont.

- The employer must provide two weeks (up to 80 hours) of paid sick leave.
 - Paid at two-thirds of regular rate of pay up to \$200 per day if the employee:
 - Needs to care for someone else:
 - who is quarantined or isolated based on a shelter-in-place order; or
 - who is quarantined based on advice from a medical professional.
 - Needs to care for a child whose school is closed, or whose childcare provider is unavailable for reasons related to COVID-19.

Expanded Family & Medical Leave

- Additional 10 weeks of paid leave at $\frac{2}{3}$ the regular rate up to \$200 per day if an employee needs to care for a child whose school is closed or whose childcare provider is unavailable for reasons related to COVID-19.
 - Employee must have worked for employer for at least 30 days.
- Small Business Exception to FFCRA— very limited in application
 - Businesses with less than 50 employee
 - Exempt from Expanded Paid Sick Leave & Extended Family Leave IF
 - Time off is requested because of child care or school closure
 - Must meet 3 criteria

Small Business Exemption Criteria

- An “authorized officer” of the business must determine:
 - The requested leave would result in the business’ expenses and financial obligations exceeding business’ revenues AND cause the business to cease operating at a minimal capacity;
 - The absence of the employee requesting the leave would entail a substantial risk to the financial health or operational capabilities of the business because of his or her specialized skill, knowledge of the business, or responsibilities; or
 - There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting leave and these labor or services are needed for the small business to operate at a minimal capacity.

Return to Work Issues & Information Requirements

- The Families First Coronavirus Response Act Notice must be displayed in the workplace in a conspicuous place.
- Many local public health agencies have their own posters that are required to be displayed in the workplace.
 - The Los Angeles County Department of Public Health's Notice to Consumers should also be displayed in the workplace.
 - <http://publichealth.lacounty.gov/media/Coronavirus/NoticeToCustomers.pdf>
- California's COVID-19 Employer Playbook for a Safe Reopening
 - <https://files.covid19.ca.gov/pdf/employer-playbook-for-safe-reopening--en.pdf>

First Steps to Return to Work: Establish and Implement Safety Protocol

- Social Distancing
 - Modify Workspace & modify meeting protocol
 - Adjust schedules to stagger shifts, workdays, work hours
- Facial Coverings – Employer can require employees to wear
 - Reasonable Accommodation – Medical concerns/Americans with Disabilities Act
 - Religious reasons
 - Engage in interactive process
- Personal Hygiene – Employer must provide appropriate PPE for employees
- Cleaning and Disinfecting –
 - Limit use of common areas – e.g. lunch rooms, conference rooms
 - High touch surfaces
 - Follow CDC Guidelines for specific business/industry

Employees Refusing to Return to Work

- Two reasons
 - Making more money on EDD/Federal Supplement
 - Advise employee, in writing that work is available, necessary safety precautions have been implemented and refusal to return to work may jeopardize EDD payments
 - EDD: Benefits may continue if offer to return to work is “suitable” and refusal is based on “good cause”
 - Fear of Becoming Infected
 - Advise employees of the safety steps taken
 - Offer a personal leave of absence – unpaid – for a period of time
 - This may also impact their EDD benefits – see above
 - Terminate for refusal to report to work
 - NOT recommended – potential for litigation

Persons at Higher Risk – CDC – July 30

- People of any age with certain underlying medical conditions are at increased risk for severe illness from COVID-19
- People of any age with the following conditions are at increased risk of severe illness from COVID-19:
 - Cancer
 - Chronic kidney disease
 - COPD (chronic obstructive pulmonary disease)
 - Immunocompromised state (weakened immune system) from solid organ transplant
 - Obesity (body mass index [BMI] of 30 or higher)
 - Serious heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies
 - Sickle cell disease
 - Type 2 diabetes mellitus

Persons Who Might Be at Higher Risk

- Asthma (moderate-to-severe)
- Cerebrovascular disease (affects blood vessels and blood supply to the brain)
- Cystic fibrosis
- Hypertension or high blood pressure
- Immunocompromised state (weakened immune system) from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines
- Neurologic conditions, such as dementia
- Liver disease
- Pregnancy
- Pulmonary fibrosis (having damaged or scarred lung tissues)
- Smoking
- Thalassemia (a type of blood disorder)
- Type 1 diabetes mellitus

Reasonable Accommodations

- ADA & FEHA require accommodations for individuals with disabilities
 - https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ_ENG.pdf
- Guidance encourages employers to provide reasonable accommodations to those at increased risk of severe illness from COVID-19 and those unable to distance from household members at increased risk
- Request doctor's note as with any disability condition
- Reasonable accommodations include:
 - Remote Work
 - Leave of Absence
 - Determine on case by case basis

Responding to Positive or Suspected COVID-19 case

- Follow CDC and Local guidelines on self-isolation
 - LA County Dept of Public Health (7/24/20): Responding to Covid-19 In the workplace
 - <http://publichealth.lacounty.gov/media/coronavirus/docs/business/GuidanceWorkplaceResponse.pdf>
 - A person is considered infectious from 2 days before their symptoms first appeared until they are no longer required to be isolated (as described in Home Isolation Instructions for People with COVID-19).
 - A person with a positive COVID-19 test but no symptoms is considered to be infectious from 2 days before their test was taken until 10 days after their test.

When Does Home Isolation End

- If you had symptoms, you must stay home until:
 - At least 10 days* have passed since your symptoms first started and
 - You have had no fever for at least 24 hours (without the use of medicine that reduces fevers) and
 - Your symptoms have improved (for example, cough or shortness of breath)
- If you tested positive for COVID-19 but never had any symptoms:
 - You must stay home for 10 days after the test was taken, **but**
 - if you develop symptoms, you need to follow the instructions above

*If you have a condition that severely weakens your immune system you might need to stay home for longer than 10 days. Talk to your healthcare provider for more information.

<http://publichealth.lacounty.gov/acd/ncorona2019/covidisolation/#IsolationDuration>

Contact Tracing

- Notify co-workers or any client/customer who was in “close contact”
- Identity of the employee who is COVID-19 positive is confidential and cannot be disclosed
 - Scenario: Physical Therapy office; patient arrives for 8 a.m. appointment on Tuesday; calls the P.T. office on Thursday to advise patient tested positive
 - Notify therapist treating the patient – send home for self isolation for 10 days even if asymptomatic and until receives a “negative” test result
 - Notify co-workers but identify those in “close contact”

Employees	Minimum Criteria for Return to Work	CDC Reference Page
	<i>(As of June 7, 2020)</i>	<i>(The most recent CDC guidance should be consulted prior to allowing the employee to return to work)</i>
Symptomatic Positive Employees with symptoms who are laboratory confirmed to have COVID-19	At least 3 days (72 hours) have passed since recovery, defined as resolution of fever without the use of fever-reducing medications and improvement in respiratory symptoms (e.g., cough, shortness of breath); and, at least 10 days have passed since symptoms first appeared.	<ul style="list-style-type: none"> • For employee cases who did not require hospitalization • For employee cases who required hospitalization
Asymptomatic Positive Employees who never had symptoms and are laboratory confirmed to have COVID-19	A minimum of 10 days have passed since the date of their first positive COVID-19 test. If they develop symptoms, then the criteria for laboratory confirmed cases with symptoms apply.	
Symptomatic Negative Employees who had symptoms of COVID-19 but test result returned negative	Use the same criteria for return to work as laboratory confirmed cases.	
Asymptomatic Negative Employees who never had symptoms but were tested due to close contact with a laboratory-confirmed case patient and were negative	Employees should quarantine at home for 14 days after the last known close contact with the case patient. Symptoms can develop even after testing negative within 14 days after exposure. The LHD may consider allowing earlier return to work only for an employee in a critical infrastructure industry in which the essential operations of the workplace would be compromised by quarantine of the employee and no alternate staff can perform the same role.* Testing is highly recommended. If the employee cannot be tested, use the same criteria for return to work as laboratory confirmed cases.	
Symptomatic Untested Employees who had symptoms of COVID-19 but were not tested		
Asymptomatic Untested Employees who had close contact to a laboratory-confirmed case patient at work, home, or in the community and do not have symptoms.	Employees should be quarantined at home for 14 days after the last known close contact with the case patient. Testing is highly recommended; if testing has not occurred, the LHD may consider allowing an employee who had close contact to a confirmed case to continue to work only in a critical infrastructure industry in which the essential operations of the workplace would be compromised by quarantine of the employee and no alternate staff can perform the same role.*	
OR		<ul style="list-style-type: none"> • For employee cases who did not require hospitalization • Critical workers implementing safety practices
Employees who refuse or are unable to be tested after close contact with a laboratory-confirmed case, despite recommendation for testing from LHD or healthcare provider, and do not have symptoms.	Employees who develop symptoms of COVID-19 while in quarantine should contact their healthcare provider. Even if they are not tested, the same criteria for return to work should be used as laboratory-confirmed cases.	

Workers Compensation Claims for COVID-19

- Executive Order –
 - Benefit may be available for diagnosed workers working outside their homes
 - Rebuttal presumption workers contracted the virus at work if they tested positive or were diagnosed with COVID-19 and confirmed by a positive test within 14 days of performing
 - Applicable from March 19th to July 5th
 - <https://www.gov.ca.gov/2020/05/06/governor-newsom-announces-workers-compensation-benefits-for-workers-who-contract-covid-19-during-stay-at-home-order/>
 - <https://www.dir.ca.gov/dwc/Covid-19/>

Potential Legal Claims

- FLSA Violation: Failure to provide EPSL
- FMLA Violation: Failure to provide EFMLA
- Retaliation: Selection for layoff, termination, reduction in hours due to health and safety complaints
- Wrongful Termination
- Discrimination: Disability, Age, National Origin
- Harassment

Potential Legal Claims – cont.

- Wage & Hour Claims:
 - Failure to pay wages – off the clock work
 - Failure to timely pay final wages
 - Termination: Payment is due at time of termination/layoff
 - Resignation: Payment is due within 72 (consecutive) hours of notice of resignation
 - Failure to Reimburse Expenses
 - e.g. cell phones, computers, internet, supplies, etc.
 - Exempt Employees: Improper reduction in pay
- Breach of Employment Contract

Practical and Financial Considerations

In the COVID-19 Era

Code 2: 6750



Presented by Hillary Booth

Booth LLP

Practical Considerations

In the COVID-19 Era

Return to Work Considerations

- Establish job-related criteria to determine who and when employees will be returned to work
- Review operational needs – remote work vs. onsite
- Monitor Federal, State, and Local regulations and guidelines for reopening protocol.
 - LA County Dept. of Public Health
 - <http://www.publichealth.lacounty.gov/media/Coronavirus/>
- Appoint a COVID-19 coordinator
- Communicate regarding what is being implemented and what is expected

Medical Screening of Applicants & Employees

- Establish protocol for screening employees, applicants and visitors coming into the business
- EEOC – Relaxed regulations due to COVID-19
 - Employers may take employees' temperatures, with proper procedures
 - Consider Confidentiality and privacy issues – Cannot identify COVID positive employees by name
 - Need to compensate for time spent
- Employees calling in sick or unable to come to work
 - Question on symptoms or other reasons
 - Testing (advised by health care provider or employee choice)
- Self Certification Health Forms

No Doctor's Note Required

- Employers should not require sick employees to provide a COVID-19 test result or healthcare provider's note to validate their illness, qualify for sick leave, or return to work.
- Healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely manner.
- However, testing has become more available and most test results are provided within 24-72 hours
- If an employee has been tested you can ask for the results, but should not require the employee to provide you with a copy.

Office Layout and Use Accommodations

- OSHA has issued specific guidance for employers preparing workplaces in light of the COVID-19 pandemic. See <https://www.osha.gov/Publications/OSHA3990.pdf>.
 - This guidance does not create new legal obligations
 - Prudent for employers to adhere to this guidance where applicable.
 - Employers have a general affirmative duty under OSHA to provide a workplace free from recognized hazards likely to cause death or serious physical harm

Protocols for Common Areas

- Masks must be worn, and physical distancing observed
- Cleaning schedules should be set and maintained
- Supplies must be made available for use by all
 - Hand sanitizer
 - Masks
 - Cleaning supplies
 - Touchless tools
- Mark 6' foot spaces – Kitchens, conference rooms, printer and supply areas
 - Specific protocols depend on office layout

Protocols for Specific Office Areas

- Legal Assistant and Other Open Desks
 - Only the desk occupant should use or touch the computer or supplies
 - Provide additional barriers where practical
 - Provide markers for 6 feet distances from the desk
 - Require others to stay at least 6 feet away when speaking to the desk occupant
 - For paper passing, set the paper down on the corner of the desk, and move back

Protocols for Specific Office Areas

- Private Offices

- Masks need not be required when working in one's own private office
- When speaking to an occupant of any office, wear a mask and stay in the doorway, unless needed to briefly pass something
- When talking to another person in an office, the office occupant should also wear a mask
- Only the office occupant should use the computer or supplies in the office, or touch anything

Financial Considerations

In the COVID-19 Era

Reductions to Compensation

- Salary
 - Employer may reduce wages going forward, but not retroactively for time already worked.
 - Cannot reduce if the wages are set by contract or bargaining agreement
 - Minimum wage and exempt status rules need to be considered to maintain compliance
- Bonus
 - Discretionary bonus may be withheld or terminated
 - Bonus earned pursuant to contract or bargaining agreement must be paid
- Draws and Distributions
 - Payments may be deferred, as most depend upon certain levels of profit
 - Cannot eliminate unless permitted in the relevant contract

Work Sharing

- A program available to employers who reduce employee wages and hours as an alternative to layoffs.
- EDD Unemployment Insurance program that allows for the payment of benefits when wages and hours are reduced.
- This program is considered a temporary and a practical alternative to layoffs.
- Allows an employer to retain employees and speed recovery when conditions improve


Work Sharing Requirements

- Employer must apply and be approved by the EDD to become part of the program
- Employees must:
 - Be part of the permanent, regular workforce and not leased, intermittent, temporary, or seasonal
 - Have qualifying wages in the base quarters used to establish a regular California Unemployment Insurance (UI) claim
 - Have completed a normal work week before participating in Work Sharing.
- The reduction in hours and wages must be at least 10% but no more than 60%
- [https://edd.ca.gov/Unemployment/FAQ -
Work Sharing Information For Employees.htm](https://edd.ca.gov/Unemployment/FAQ_-_Work_Sharing_Information_For_Employees.htm)

SBA Paycheck Protection Program

- The PPP provides loans to employers, designed to provide a direct incentive for small businesses to keep their workers on the payroll
 - Any small business meeting SBA's size standards
 - Sole proprietors, independent contractors, and self-employed persons
- Applications processed by existing SBA lenders, federally insured depository institution, federally insured credit union, or Farm Credit System
- No collateral or personal guarantees are required
- No fees may be charged
- Loan amount = 2.5 times average monthly payroll
 - Using maximum annual salary of \$100,000 per employee

As of July 30, 2020:

- Loans Approved - 5,063,985
 - Dollars Approved - \$520,874,912,675
 - Average size loan - \$102,859
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PPP Loan Forgiveness – A Changing Landscape

- Original CARES Act dated March 27th, revised June 5th, and again July 4th
 - <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program>
- Payroll requirements:
 - Originally, borrower needed to spend at least 75% on payroll, and the remaining 25% on rent, utilities, and mortgage interest
 - Under the new Act, borrower needs to spend only 60% of the loan on payroll, and the remaining 40% on mortgage interest, rent, and utilities
- Forgiveness Period
 - The time period to spend the PPP funds has been extended from 8 weeks to 24 weeks, or December 31, 2020, which comes first
 - Applies to all loans, including retroactively

PPP Loan Forgiveness – A Changing Landscape

- Rehiring Exemptions
 - The deadline for employers to rehire employees who were laid off between February 15 and April 26, or restore employee wages that were reduced between February 15 and April 26, is extended from June 30 to December 31, 2020
- Repayment Deferral
 - Employers have up to 10 months after the covered period (24 weeks or December 31, 2020) to apply for forgiveness
 - Repayment is not required until the forgiveness application has been completed

PPP Loan Forgiveness – A Changing Landscape

- Loan Extension
 - PPP loans approved on or after June 5th will automatically have a loan length of 5 years
 - Interest remains at an annual rate of 1% for all loans
 - Loans approved prior to June 5th can be extended from 2 years to 5 years, if the lender agrees
- Payroll Tax
 - Originally, upon forgiveness, payroll taxes would have been immediately due
 - Now, employer payroll taxes will remain deferred until December 31, 2020

COVID-19 Resources

- COVID-19 Toolkits for different industries
 - http://www.publichealth.lacounty.gov/media/Coronavirus/docs/toolkits/WarehouseManufacturing_Toolkit.pdf
 - http://www.publichealth.lacounty.gov/media/Coronavirus/docs/toolkits/WarehouseManufacturing_Toolkit.pdf
- OSHA: guidance on Preparing Workplaces for COVID-19
 - <https://www.osha.gov/Publications/OSHA3990.pdf>
- CDC Resuming Business Toolkit
 - <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/Resuming-Business-Toolkit.pdf>

COVID-19 Resources

- Los Angeles County Business toolkit
 - <https://corona-virus.la/Business>
- Los Angeles County Public Health Dept – Health Orders & Roadmap
 - <http://publichealth.lacounty.gov/media/Coronavirus/guidances.htm>
- California Dept of Public Health – Employers Playbook (7/24/2020)
- <https://files.covid19.ca.gov/pdf/employer-playbook-for-safe-reopening--en.pdf>

Q & A

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