
Business Implications

The current pandemic implicates numerous laws and regulations, including those which have been on the books for decades and some which were passed in response to COVID-19. Nobody can predict all the ways these laws will impact your business but this document is intended to alert you to some of the issues which are likely to impact your California business.

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COVID-19

. . . and your business

Note that most businesses in California are subject to the authority of (a) the federal government, (b) the state of California, (c) the county in which they are located and (d) agencies and departments of each. That is a complex system of rules. Be aware that you are likely required to comply with the strictest rule/law which applies - unless the federal government is less strict than another option and it is determined that the federal law in question was intended to pre-empt all other laws. Sound easy to navigate? It's not.



[Nothing in this document is a substitute for legal advice provided to you, based on your specific circumstances.](#)

Who can keep working?

The State of California issued a “stay at home” order on March 19, 2020, which became immediately effective and remains in place until further notice. According to the order, those who work in the 16 Critical Infrastructure Sectors can keep working. How do you know if your business is in one of those sectors? There are subsectors to each which can provide some insight but some businesses fall within a sector even if not specified in any of the subsectors. Suffice it to say this is not going to be a black and white issue. Further complicating the issues is that, even if a business *does* work in a critical sector, it is not clear whether that permits the entire business to operate or if it may only operate with as much resources as necessary to carry out the critical sector functions.

What about keeping my workplace safe?

If your employees can work from home, that yields many benefits. Be aware that employers are required to reimburse employees for certain expenses incurred to enable them to work from home, like the cost of internet and phone - and possibly the cost for a laptop or other equipment. For employees not working from home . . .

Employers are required, by OSHA regulations among others, to maintain a safe work environment. To promote a safe environment, you should undertake reasonable efforts to sanitize items and surfaces and to enforce social distancing. OSHA has numerous resources related to [dealing with COVID concerns in the workplace](#). Also, if you have (or had) an employee or other person on your business premises who was diagnosed with COVID-19 (or exhibits its [symptoms](#)), you are probably required to warn other employees of the heightened risk of becoming infected with the virus. However, you should stop short of identifying any specific person who has been diagnosed with COVID-19 because doing so could violate the privacy rights of that person, including their rights under the ADA (whereas rights under HIPAA are only implicated if the employer learns of the infection from a health insurance carrier).

[Tags: OSHA, CAL-OSHA, ADA]

Can I require someone to come to work?

This is a common question but it is better phrased as, “Can I fire someone who won’t come to work?” The answer would have been “it depends.” However, in light of the Families First Coronavirus Response Act, the answer is probably no. The word “probably” is used because we cannot anticipate what factors may be present in every situation or at every stage of this nightmare.

Can I fire or lay off employees because my business has declined or is likely to decline?

Strictly speaking, yes - subject to certain exceptions. If you fire someone or lay them off simply because you need to reduce your workforce and your overhead, that is likely legal. However, if you fire or lay someone off because he/she is sick or caring for someone who is sick, that likely violates the law. [Always remember this: it doesn't matter why you fire someone. What matters is why a judge, jury or arbitrator believes you fired someone.](#) The truth only matters if you can prove it . . . and even if you can prove it, it might cost you \$200,000 to do so.

California employers are always at risk of being sued when they fire someone - even when they do it lawfully. The COVID-19 issues, including the new legislation (some discussed below), make this complicated field that much more complicated. You can fire someone as a reduction in force but the attorney for the person you fire may argue that you were actually motivated by some other - unlawful - reason. Providing severance pay and securing a written release of claims is often the best practice for terminating an employee and it is equally advisable under current circumstances.

What if my employee contracts COVID-19 at work?

Without getting into possible exceptions, injuries suffered in the workplace are covered by the worker's compensation system.

Must I pay those who stay home?

The US Government passed a law ([Families First Coronavirus Response Act](#)) which provides up to 80 hours of paid sick leave to many full-time workers who are unable to work (including unable to 'telework') because of any of these reasons:

1. they are subject to a government quarantine or isolation order related to COVID-19
2. they were told by a health care provider to quarantine due to COVID-19 concerns
3. they are experiencing symptoms of COVID-19 and seeking diagnosis
4. they are caring for someone who fits category 1 or 2, above
5. they are caring for their son or daughter if the child's school or child care facility is closed due to COVID-19
6. they are experiencing other conditions which certain other governmental agencies have deemed sufficient to trigger this right to sick pay

NOTES

- No. 1 from the list above covers a large number of California employees in light of the "stay at home" order issued by Gavin Newsom on March 19, 2020.
- This act (FFCRA) becomes effective on April 2, 2020 and expires on December 31, 2020.
- The amount of the payment can vary. It caps at \$511 per day for full-time workers. The amounts owed under (4), (5) and (6) above are capped at \$200 per day. The benefits mandated by this act are *in addition* to others which are otherwise owed.

- Most employers who have less than 500 employees are subject to the act. The Secretary of Labor may issue exemptions for certain businesses with less than 50 employees. These are expected to include businesses which would suffer a hardship by making required payments.
- This act makes it unlawful to fire, discharge or discipline anyone for taking the leave it provides.
- The money paid out under this program will be reimbursed to employers in the form of a payroll tax credit. That's great - but only if you can afford to front the money and wait several months to realize the credit.
- Employers must post a printed version of the act at the workplace. An official form notice will be made available by the Department of Labor by March 27, 2020.

If an employee is gone for an extended period of time, must I keep his or her job open?

There is a related but separate category of benefits included in the act, called the Emergency FMLA Leave Expansion Act

For those who cannot work or telework because they need to care for a son or daughter under 18 years of age because the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency, 12 weeks of leave may be taken. The first 10 days are not paid (under this section but they are likely paid under the section discussed above) but the remainder (another TEN WEEKS!) is to be paid at 2/3 of what the employee would have earned if working, not to exceed \$200 per day.

An employer must allow the employee to return to work after taking leave under this provision. However, there is an exception for employers with fewer than 25 employees.

A payroll tax credit is available to recapture 100% of money paid under this FMLA expansion.

PLEASE KEEP IN MIND THAT THE RELEVANT LAWS - ALONG WITH THEIR INTERRELATION AND OUR UNDERSTANDING - ARE EVOLVING. DO NOT BASE DECISIONS SOLELY ON ANYTHING CONTAINED IN THIS GENERIC DOCUMENT.