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Current Issues Faced by Employers During Pandemic Conditions

Richard C. Rybicki

INTRODUCTION

Employers are faced with a sudden increase in operational and health-related issues as the COVID-19 pandemic takes hold in the United States. This includes a variety of public health appeals and standards, such as suggestions that certain employees should be segregated or businesses closed, without binding governmental authority or changes to the employment laws that apply to such situations.

Businesses throughout the state face substantial risk under anti-discrimination and disability accommodation laws, and wage-and-hour rules, that apply to the most well-intentioned actions.

We have assembled several issues facing employers this week, with links to governmental sites as appropriate. They will be updated as issues evolve.

EMPLOYEE ILLNESS AND EXPOSURE

Obviously Ill Employees:

There is no clear exception to state or federal disability accommodation laws allowing employers to send home all ill employees. While there is a "direct threat" exception under both the federal Americans with Disabilities Act and the state Fair Employment and Housing Act, the laws require an interactive process with employees *before* removing them from work and place the burden of proof on employers.

The federal Equal Opportunity Commission published guidance stating that, once a "pandemic" is declared by the Centers for Disease Control, employers "should rely on the latest CDC and state or public health assessment" to determine whether employees should be sent home. *See* *https://www.eeoc.gov/facts/pandemic_flu.html*. This current guidance *does* provide that "employees who appear to have acute respiratory illness symptoms (i.e. cough, shortness of breath) upon arrival to work or become sick during the day should be separated from other employees and be sent home immediately." *See* *https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html*.

Employers will need to decide whether they are willing to risk claims under state and federal disability accommodation laws, and alleged discrimination based on "perceived" disability, when sending home obviously ill employees. It would be wise to maintain written documentation of an individual's observed symptoms, and discussions with them, in a confidential medical file such as that used to maintain other protected health information.

Workplace Safety and OSHA Requirements:

There are few specific requirements applicable to non-healthcare-industry employers. The chief requirement even during a pandemic is the "general duty" to maintain a safe workplace.

It is likely that even this "general" duty requires employers to plan for known issues in the workplace: including, as of now, the risk of infection. Federal OSHA has prepared a set of guidelines, many of which are common sense, applicable to medium (with substantial public contact) and lower-risk (little public contact) workplaces.
See www.osha.gov/Publications/influenza_pandemic.html

Cal-OSHA has published similar guidelines: *www.dir.ca.gov/dosh/coronavirus/General-Industry.html*. For most employers, Cal-OSHA's basic recommendations include steps such as actively encouraging sick employees to stay home; providing information and training to employees on issues such as cough and sneeze etiquette and hygiene; routine environmental cleaning of shared workplace equipment and furniture; allowing flexible worksite telecommuting and flexible work hours to increase physical distance among employees; other methods of minimizing exposure between employees and the public, and postponing large work-related events. Cal-OSHA also recommends "sending employees with acute respiratory illness symptoms home immediately" – something employers do *not* seem allowed to do automatically under state or federal disability accommodation laws.

EDD Benefit Materials:

All employees who are aid off, leave the workplace to self-quarantine, or miss work due to illness or to care for a family member must receive the Employment Development Department publication, DE-2320. *See* www.edd.ca.gov/pdf_pub_ctr/de2320.pdf.

Sick Leave and Vacation Use:

The language of California's sick leave law does not appear to cover self-quarantine activity where illness or exposure has not been confirmed. Despite this, the Labor Commissioner has taken the position that individuals who self-quarantine are entitled to use sick pay benefits, and to be protected by sick pay laws, so long as the quarantine is "recommended by civil authorities." *See https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm*. Given this, employers probably will need to allow employees to use

paid sick leave benefits during such periods and, due to the law's requirements, they may not request medical certification of the need for leave.

Care for an individual's own COVID-19 illness, or a family member's, certainly is covered by state sick leave rules. Moreover, it will also be covered by the state's Kin-Care rules (Labor Code section 233), which allows use of up to one-half an employee's annual PTO accrual for sick leave purposes as well. So an employee with three days of sick leave and four weeks of vacation each year may be entitled to thirteen days of sick leave under these laws – just about enough to cover a 14-day quarantine period. Importantly, employers may not *require* employees to use sick leave during these absences. Failure to use sick leave could make the absence unexcused unless covered by another law (such as the Family medical Leave Act).

Finally, if employees take FMLA-covered leave, employers may allow but may not require the use of vacation or other paid leave to "coordinate" with state disability benefits. Employees on such leaves are covered by a federal regulation prohibiting mandatory use of paid time off during any "paid" part of the leave – including times when an employee is receiving state disability or even workers' compensation benefits.

LAYOFFS AND SHUTDOWNS

This is an area where employers face huge potential risk. Pubs and wineries have been encouraged to shut down, for example, but the recommendation is neither binding nor protects employers from run-of-the mill laws the Labor Commissioner has promised to enforce. Businesses considering full or partial shutdowns, or even major reductions in hours, should consider the effect of these laws until authorities actually *order* businesses to stop operating.

Final Pay:

Labor Code section 201 requires immediate payment of all wages due, including accrued but unused vacation, at the time of discharge. This applies to most industries. The California Labor Commissioner has long taken the position that layoffs without a definite return date, or layoffs with a return date past the current pay period, are a "discharge" under Section 201.

Accordingly, if employees are laid off or taken off schedule without a definite return date, or with a date past the current pay period, it appears that employers must pay all accrued wages and vacation the same day. Failure to make the final payment on time results in a one-day wage penalty each day the pay is delayed, up to thirty times a worker's average daily pay. *There is no urgency exception to this requirement*.

Reporting Time:

Most employees must receive "reporting time" pay when an individual reports to work but is sent home without working at least half the scheduled shift.

This would apply to an employer who shut down operations one morning, or to an employee who appears ill and is sent home by the employer (but not where an employee chooses to go home on their own). The amount due is half the current day's schedule, at least two and at most four hours, so an eight-hour employee sent home after one hour would be owed four hours total for the day.

The Labor Commissioner has made clear in the past few days that *there is no urgency exception to this requirement* unless local authorities prohibit operation of the business – even during the current crisis. *See https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm*.

Salaried Employees:

Salaried employees must be paid a full week's salary if an employee performs any work during the workweek. So if an employer's workweek starts at midnight on Sunday, and the employee reports to work on Monday morning, the employee must receive a full week's salary.

Even if a shutdown is required, salaried employees almost certainly must receive full pay for the week if they have works at all during the current workweek *unless* they are formally laid off. In such cases, the layoff probably would be considered a termination, requiring immediate final pay (including any unpaid vacation) as discussed above. Salaried employees would then be entitled only to partial-week pay through their last day of employment. *See* 29 C.F.R. § 541.602(b)(6).

It *is* possible that employers could also reduce exempt employees' base salaries temporarily if requiring fewer workdays during the week due to a short-term economic slowdown; this has ben approved by some federal authorities and a 2009 Labor Commissioner opinion letter following the 2008 recession. *See* DLSE Opn. Ltr. 2009.08.19.

The Labor Commissioner has clarified that it will enforce this requirement during the current pandemic. *See https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm*. (Unlike employer-initiated shutdowns, this rule would not apply to an employee who misses work for a full day due to illness or disability, or other unpaid leave, so long as the employer has a sick leave or disability pay plan in place.)

WARN and Mini-WARN Acts:

State and federal laws require sixty days' notice to workers, state authorities, and union representatives (if any) before a mass layoff, relocation, or termination of operations affecting any "covered establishment." Covered establishments include any facility or part thereof that has employed 75 or more people in the prior 12 months, and mass "layoffs" includes those affecting 50 or more employees in any 30-day period.

The penalties for failure to provide advance notice include up to 60 days' pay to every affected employees, the cost of lost benefits, and a per-day civil penalty of up to $30,000 total. An employer can lay off employees when "actively seeking capital or business," which probably would not apply to pandemic-related shutdowns, and (again) *there is no urgency exception to this statute.*

While a shutdown by the *government* would excuse an employer, a voluntary shutdown on the advice of officials (such as Governor Newsom's March 15 pronouncement) would not. Federal law contains a similar WARN requirement that also lacks any pandemic-related exceptions.

CONCLUSION

Employers are being encouraged to "do the right thing" both for their employees and the public. But because they are informal, these requests neither modify existing labor and employment laws nor provide any safe-harbor for businesses. Companies should carefully consider all applicable laws when regulating their employees or modifying their work schedules.

We will continue monitoring developments and update our materials as the pandemic event continues.