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# California-Specific Coronavirus Information and FAQs

## Introduction

This document and the FAQs are intended to provide general California-specific information regarding the practical labor and employment issues associated with the 2019 Novel Coronavirus disease, also known as COVID-19. It does not constitute legal advice.

This document is not intended to be exhaustive and we encourage you to supplement your knowledge by visiting the California Department of Public Health website at https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx or one of the other government websites containing information about the labor and employment issues associated with COVID-19.

The following information is provided based upon currently known information. The progress of this disease is constantly evolving. The foregoing information is subject to change based upon such evolving information.

## TABLE OF CONTENTS

## 1. Employee Restrictions

**(a) Should I consider quarantining employees, or having employees remain off work, who have recently returned from areas heavily affected by Coronavirus?**

You should follow the CDC guidance as adopted by the California Department of Public Health in its March 20, 2020 All Facilities Letter 20-26. For union-represented employees, applicable collective bargaining agreements should be consulted regarding employment terms relevant to such actions.

**(b) Should I consider quarantining employees who have travelled to countries near areas heavily affected by Coronavirus, or who may travelled with individuals from areas heavily affected by Coronavirus on a plane or other carrier?**

You should follow the CDC guidance as adopted by the California Department of Public Health in its March 20, 2020 All Facilities Letter 20-26.

**(c) Can I restrict employees from traveling to areas heavily affected by Coronavirus as determined by the CDC?**

Yes. Employers may consider restricting employee travel to the areas affected by the disease for business purposes.

Employers cannot tell employees that they cannot travel to areas heavily affected by Coronavirus for personal purposes. Employers should remain aware of their obligations under family and other leave laws to allow employees leave to travel to affected areas to care for others who are ill, as well as their obligations to avoid national origin discrimination. Moreover, California (along with some other states) has an off-duty discrimination law that prohibits discrimination against employees who participate in legal activities outside the workplace. An argument can be made that personal travel is considered lawful "off-duty conduct." However, the employer may require a medical note from a health care provider for the employee to return to work, as discussed below.

Employers may also consider requesting that employees inform the employer if they are traveling for personal reasons, so the employer is aware of employees who are going to areas where they potentially may be exposed to the disease.

Employees who travel to areas heavily affected by Coronavirus need to be informed that they may be quarantined upon their return. Employees should also be informed that there may not be adequate medical services available if they travel to areas heavily affected by Coronavirus and become ill.

**(d) Can I prevent an employee from entering the workplace if they refuse to answer our COVID-19 questionnaire?**

Yes. Employers can make answering a COVID-19 questionnaire related to travel and contact with confirmed or exposed individuals a condition of employment. The employer can also ask an employee if they have any of the COVID-19 symptoms designed by WHO and CDC. Do not ask for any other medical information - the employer just needs to know if the employee currently has any COVID-19 symptom(s). In California, an employer should ask generally if the employee is experiencing any of the COVID-19 symptoms but not ask the employee to identify which specific symptoms he or she is experiencing or to give any diagnosis.

If an employee refuses to answer, the employer should explain the reason for the requirement. If the employee still refuses to complete the required disclosure form, he/she should be sent home. See discussion of reporting time pay below.

**(e) Can a healthy employee in a direct patient-care position (e.g. nurse) who is not in a high-risk group refuse to treat COVID-19 patients out of fear of exposure?**

Any employee may refuse to perform a task if all of the following conditions are met:

- Where possible, the employee has asked the employer to eliminate the danger, and the employer failed to do so; and
- The employee refused to work in "good faith." This means that the employee must genuinely believe that an imminent danger exists; and
- A reasonable person would agree that there is a real danger of death or serious injury; and
- There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

While this employee may believe he/she is in imminent danger, objectively, that probably is not the case so long as the employer is following CDC and the most recent Cal/OSHA guidance on protecting healthcare workers from the Coronavirus. Once the employer explains/demonstrates to the employee that its actions comport with those expectations, an ongoing refusal to perform work would be unreasonable and the protected nature of that activity would fall away. In turn, the employer could take an adverse action. Whether the employer should do that in this situation is another question. Each situation should be analyzed on a case-by-case basis. **This is an area that is rapidly changing and a hospital should make sure that it is relying on the latest information prior to taking action.**

The employee may refuse to perform work tasks on account of exposure to COVID-19 and articulate unique risk factors due to a disability. This action would require the employer to engage in the interactive process with the employee and determine whether they should consider

reasonable accommodations, including not interacting with COVID-19 positive patients, unless that is an essential function of the job.

**(f) Can a healthcare employer address an employee's social media postings that would incite fear, miscommunication, harassment, discrimination or the like such as (i) "Don't go to this hospital as it is chaotic and you will probably get COVID", (ii) "The hospital is completely out of supplies" (when not true), or (iii) "The hospital should not allow any more patients from China, Iran and Italy."**

Disciplining the employee for such a posting, which could be viewed by both potential patients and other employees, could potentially violate the NLRA as the employee is likely engaging in concerted activity, raising issues of the hospital being out of supplies and the hospital being unsafe for employees and patients alike. Also, disciplining an employee for a post objecting to unsafe working condition could also violate OSHA or Cal-OSHA or violate Cal. Labor Code Section 1102.5. In addition, to the extent that the hospital is a public entity, disciplining the employee may raise First Amendment Issues.

Depending exactly on the content of the posting, there may be an argument that the post is not protected activity if it is defamatory and expresses bias against individuals based on their national origin and/or suggesting they should not receive treatment. Consideration should be given to contacting the employee directly or the social media platform to object to the post and potentially get it removed, but doing so could lead to drawing more attention to the post and causing further posting. You could also respond directly to the comment on the same social media platform.

**(g) What Other Employee Activity is Protected?**

The National Labor Relations Act protects both represented and un-represented employees who engage in Taft-Hartley Section 502 safety actions, or other concerted activity protected by the Act such as protesting the failure to comply with CDC guidelines or provide appropriate protective equipment. (See Labor-Management Issues For Unionized Facilities for a further discussion regarding safety actions.) Generally, employees cannot be treated adversely for taking such actions, but do not need to be compensated for time when they refuse to work unless it is pursuant to some type of contractual guarantee or vested right.

**(h) As a condition of coming onto the premises, can you ask your vendors, registry employees and other third parties to sign acknowledgments stating that they have not travelled internationally to the regions where there is widespread coronavirus infections, that they have not tested positive, do not exhibit the symptoms associated with infection, and have not come into contact with an infected person?**

Yes. The information sought is the same type of information employers are asking their employees to disclose with a view toward preventing spread of the virus. The EEOC has stated in its recently recirculated guidance document that these types of inquiries do not violate the

ADA. For union-represented employees, unless the ability to require such acknowledgments is covered/addressed through management rights in the applicable collective bargaining agreement (e.g., through the ability to unilaterally implement employment policies), it may be subject to bargaining, although arguably this may be accomplished on an expedited basis.

The DFEH also has issued FAQs, "DFEH Employment Information on COVID-19," which are substantially similar to the EEOC Guidance. The DFEH FAQs can be accessed at https://www.dfeh.ca.gov.

## 2. Leaves & Workers' Compensation

### (a) Do FMLA and CFRA leave apply to employees or to their immediate family members, who may contract Coronavirus?

Yes, assuming that the FMLA and the CFRA apply to the employer, Coronavirus would qualify as a "serious health condition" under the FMLA and the CFRA, allowing an otherwise eligible employee to take FMLA and CFRA leave for his/her own serious health condition or to care for a covered family member (i.e., a parent, child, spouse, or registered domestic partner (CFRA only) who has a serious health condition, if either the employee contracts the disease or a covered immediate family member contracts the disease. The employee would be entitled to job reinstatement as well. For union-represented employees, applicable collective bargaining agreements should be consulted regarding relevant employment terms.

### (b) Is an employee entitled to time off work if his or her child's school or day care closes for reasons related to Coronavirus?

The California Paid Sick Leave Law does not expressly provide that employees may use paid sick leave for school closures or for public health emergencies. However, the California DLSE has taken the position in FAQs that "preventative care" includes day care/school closures due to Coronavirus. Accordingly, a parent may choose to use any available California paid sick leave to be with their child as preventative care. However, the employer may not require the employee to do so.

Additionally, employees who work at worksites with 25 or more employees also are entitled to up to 40 hours of leave per year (8 hours per month) for specific school-related emergencies, such as the closure of a child's school or day care by civil authorities (see California Labor Code Section 230.8). Whether this leave is paid or unpaid depends on the employer's paid leave, vacation or other paid time off policies and if the employee accrues paid time under those policies. Pursuant to Labor Code Section 230.8, an employee is required to use any accrued vacation time or paid time off benefits before they are allowed to take unpaid leave. The DLSE has issued a set of Coronavirus Frequently Asked Questions regarding laws enforced by the California Labor Commissioner's Office. See HTTPS://www.dir.gov/dlse2019-Novel-Coronacirus.htm.

**(c) Would I need to pay employees who go on leave during a quarantine period or because they have contracted Coronavirus?**

Perhaps. The employee may be required to be paid if the employee is subject to a contract or collective bargaining agreement that requires pay when employees go on work-required leave. In the absence of a contract, hourly employees work at-will and are not guaranteed wages or hours. In other words, these employees do not need to be paid.

However, California employees are entitled to use any available California Paid Sick Leave during their absence for this purpose. California Paid Sick Leave can be used for absences due to illness, the diagnosis, care, or treatment of an existing health condition or preventative care for the employee or the employee's family member. The DLSE has opined in FAQs (see link below) that "preventative" care may include self-quarantine as a result of potential exposure to Coronavirus if quarantine is recommended by civil authorities. Additionally, many employers are looking at supplemental paid sick leave or other paid benefits to assist employees during this time. Employees also may be eligible for California state disability insurance (SDI) benefits. For exempt employees, these employees do not have to be paid if they are sent home for an entire workweek. However, if exempt workers work for part of the work week, they would have to be paid for the entire week.

The DLSE has issued a set of Frequently Asked Questions regarding laws enforced by the California Labor Commissioner's Office. See https://www.dir.gov/dlse2019-Novel-Coronacirus.htm

The EDD has also issued information regarding state disability benefits, paid family leave, and unemployment insurance benefits. See https://www.edd.ca.gov/about_edd/coronavirus-2019.htm and https://www.edd.ca.gov/about_edd/coronavirus-2019/faqs.htm

**(d) Would I need to pay workers' compensation for employees who contract Coronavirus?**

Perhaps, if the employee contracted the disease in the course of the employee's employment. Like any toxic chemical condition at work, the employee must prove that the employee's illness from the disease was the direct and proximate cause of the particular work exposure.

First, the employer must determine if the employee's work exposed the employee to persons who are or were infected at the worksite.

If an employee incidentally contracts the disease from a co-worker, then the employee's disease will be regarded as incurred in the course and scope of employment and subject to worker's compensation liability as to the employer.

If there is workers' compensation liability, employers are responsible for covering the costs of reasonable and necessary medical care, temporary total disability (total or partial), and permanent disability if there are any incurable residual conditions that affect work performance. The employer must provide a Claim Form (DWC-1) if exposure occurred. The form must be provided within 24 hours from the time of notice to or from the employee. Employers should

advise the carrier or TPA to engage a competent medical professional, such as an infectious diseases specialist, for advice to determine if the disease is work-related based on the facts of exposure. Concurrently, the employer must provide an Employer's First Report of Injury (LC 5020) to the TPA.

**(e) Is an employee entitled to workers' compensation benefits if they were potentially exposed at work but have not tested positive or exhibit the relevant symptoms?**

No. Workers' compensation benefits do not begin until an employee suffers a work-related injury or illness.

## 3. Compensation

**(a) Should I reimburse my employees for the cost of internet or other costs if they work from home?**

Under California Labor Code section 2802, employers must reimburse employees for reasonable and necessary expenses incurred related to work. For example, California requires employers to reimburse expenses incurred by employees for tools, equipment and the like that are "necessary" to the performance of their job duties. And in *Cochran v. Schwan's Home Serv., Inc.*, (228 Cal. App. 4th 1137, 1144 (2014)), the California Court of Appeal held that, where an employee is required to use his or her personal cell phone for work-related purposes, the employer must reimburse the employee for a "reasonable percentage" of his or her personal cell phone bill, even where the employee did not incur any additional expense as a result of the work-related usage. While the *Cochran* case concerned personal cell phone expenses, there is no reason to believe that the court would treat personal internet expenses any differently. Thus, if employees are required to work from home and, as a result, to use their personal internet services for work-related purposes, we recommend that California employers reimburse employees for a "reasonable percentage" of their personal internet services bill.

On the other hand, if employees are ***not required*** to work remotely (i.e., they requested the ability to work remotely), it may not be necessary to provide the reimbursement. However, a case could be made that, even if the remote work is not necessary, internet usage is necessary to perform even voluntary remote work.

There is also an issue under federal law. The Fair Labor Standards Act (FLSA) does not explicitly require employers to reimburse employees for work-related expenses. The FLSA only mentions reimbursement in the context of "regular rates." The Act states that properly reimbursable work-related expenses incurred by employees need not be considered a part of the "regular rate" of payment for the purposes of calculating overtime. Still, when employees are expected to provide tools necessary for job performance, their employers are required to pay them back "to the extent that the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the [FLSA]." 29 C.F.R. 531.35. Thus, an employer will be in violation of federal law if it fails to reimburse an employee for tools necessary for job performance if the amount of the claimed reimbursement causes the

employee's wages to fall below the federal or California minimum wage. If a decision is made not to reimburse work-related internet expenses, an employer would need to make sure that each employee's total wages less the work-related internet expense he or she incurs is higher than the federal (or California) minimum wage.

For union-represented employees, applicable collective bargaining agreements should be consulted regarding relevant employment terms. If not covered, such provisions likely would need to be bargained with the union.

Thus, we typically advise California employers to provide an across-the-board reasonable reimbursement for things like personal cell phones used for work purposes; internet would be treated the same if the employee works from home.

From a tax perspective, the goal will often be to exclude any reimbursed amounts from employees' taxable income. That requires that the payment be made under an "accountable plan" which typically requires the employee to substantiate the expense (i.e., provide a receipt showing payment of the reimbursed expense), to show that there was a business purpose for the expense (i.e., to allow performance of the employee's duties by telecommuting), and to return any amounts advanced that would exceed the amount substantiated.

The IRS has a policy of permitting reasonable fixed reimbursements for required cell phone use to be made, without documentation (that policy has not specifically been applied to landline telephones or internet access but it seems like a reasonable extension). One option is to adopt a policy calling for a reasonable fixed reimbursement, while requiring participating WFH employees to use their personal cell phones or landlines and internet access while telecommuting, and then it would be appropriate to consider that reimbursement non-taxable without requiring the employees to document each month that they paid a corresponding amount for telephone or internet service. If the employees seek reimbursement for a larger amount or other business expenses, they would be required to provide substantiation and satisfy the other accountable plan requirements.

**(b) Can employees donate paid sick leave to other employees who may not have sufficient time to cover the 14-day quarantine period?**

If permitted by the employer, there is no legal reason why an employee could not donate paid sick leave to other employees. However, unless the employer has a qualified medical emergency leave-sharing plan or a qualified major disaster leave-sharing plan, the donor employee, and not the recipient employee, would be taxed on the amount of donated leave. To have the recipient employee taxed on the donated leave, the leave plan must be a qualified medical emergency leave-sharing plan or a qualified major disaster leave-sharing plan

**Medical Emergency Leave-Sharing Plan:** a medical emergency leave-sharing plan is a plan under which employees donate accrued paid time off (PTO) to be used by other employees who have exhausted all of their PTO and who need more PTO because of a "medical emergency." For this purpose, a "medical emergency" is generally a medical condition of the employee or a member of the employee's family that requires a prolonged absence from work and will result in

a substantial loss of income, or if an employee requires extended time off following the death of the employee's parent, spouse or child. It is currently unclear whether a distribution of donated time to an employee who is quarantined but who is not (and whose family is not) actually infected with the Coronavirus would be a permitted distribution of donated PTO by a medical emergency plan. Although one could argue that being quarantined should constitute a medical emergency, the IRS rulings and guidance regarding qualified leave donation programs define a medical emergency as a medical condition, and simply being quarantined without infection would arguably not be a medical condition. It is hoped that the IRS will issue guidance on this matter.

**Major Disaster Leave-Sharing Plan:** a major disaster leave-sharing plan is a plan that allows employees to donate leave time to assist employees affected by a major disaster as declared by the president under Section 401 of the Stafford Act, so long as the plan satisfies a number of other requirements. An employee is considered to be adversely affected by a major disaster if the disaster has caused severe hardship to the employee or a family member that requires the employee to be absent from work. As of this writing, the president has declared COVID-19 to be a national emergency but he has not declared it to be a major disaster (except, perhaps, in New York), so a leave sharing plan cannot yet qualify as a major disaster plan (except, perhaps, in New York).

**(c) What are the reporting time pay obligations at play?**

Under California's reporting time pay law, an employee who is required to report to work and does report, but is not put to work, or is furnished less than half the employee's usual or scheduled day's work, the employee should be paid for half of the usual; or scheduled day's work, but in no event less than two hours nor more than four hours.

The reporting pay law does not apply to an employee on paid standby status who is called to perform assigned work at a time other than the employee's scheduled reporting time. The reporting pay law also is not applicable if (i) operations cannot commence or continue due to threats to employees or property, or when recommended by civil authorities, (ii) public utilities fail to supply electricity, water, or gas or there is a failure in the public utilities, or sewer system, or (iii) the interruption of work is caused by an Act of God or other cause not within the employer's control. Common sense and practice dictate that the reporting pay law is not applied in instances in which the employee arrives at work but is not ready, willing or able to work.

**(d) What are the final pay obligations at play?**

The California Division of Labor Standards Enforcement (DLSE) has taken the position that unless the employee is provided a specific return to work date within the pay period (and within 10 days), the employee must be paid out final wages at the time of the furlough. Final wages include any unused accrued vacation or paid time off. For each day that the wages/vacation are late, the employee would be entitled to a day of full pay, up to 30 days. This includes all calendar days, including weekends and days the employee would not be scheduled to work. The penalties cut off when the employee receives full final pay or 30 days, whichever is sooner. There is a question concerning whether the DLSE has correctly stated the current law on

the topic. In addition, we are working with the CalChamber to relax this rule, at least during the state of emergency.

## 4. WARN Requirement In the Event of Furloughs, Layoffs, Mass Employment Separations and Facility Closures

Under the Federal and California WARN Acts, an employer may be required to provide advance notice and take other actions in the event of a furlough, layoff, mass employment separations and/or facility closures. The two laws differ from one another in material respects and employers must comply with both in the event of a triggering event covered by the laws. The terms "furlough" and "layoff" mean different things to different people. Some treat the terms as having the same meanings, while others assume that a furlough is a short-term period in which the employee retains their employment status but does not work. Regardless of how the terms are defined, the WARN laws may still apply. These requirements are explained in separate FAQs entitled WARN Requirements In The Event Of Furloughs, Layoffs, Mass Employment Separations And Facility Closures.

## 5. Disability/Discrimination/Privacy/Hiring Implications

### (a) Do the ADA and the FEHA restrict how I interact with my employees due to the Coronavirus?

Yes, the ADA and the FEHA protect qualified employees with disabilities from discrimination. A disability can be a chronic physical condition that limits a major life activity, such as breathing. Employees with a disability may be entitled to a reasonable accommodation such as a leave of absence, a modified work schedule, or being allowed to work remotely from home. Employees who have contracted the virus must be treated the same as non-infected employees, as long as the infected employees can perform their essential job functions (either with or without reasonable accommodation(s)) and are not a direct threat or a danger to themselves or others. However, if the employee poses a health or safety threat to the workforce or is a danger to himself or others by remaining in the workplace, the employer may place the employee on leave.

The EEOC has suggested materials to distribute to the workforce in the event of global health emergency or pandemic. Now that a pandemic has been declared, here is some additional EEOC Guidance employers should be mindful of:

> *May an ADA-covered employer send employees home if they display influenza-like symptoms during a pandemic?*
>
> Yes. The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat.

*During a pandemic, how much information may an ADA-covered employer request from employees who report feeling ill at work or who call in sick?*

ADA-covered employers may ask such employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

If pandemic influenza is like seasonal influenza or spring/summer 2009 H1N1, these inquiries are not disability-related. If pandemic influenza becomes severe, the inquiries, even if disability-related, are justified by a reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat.

*During a pandemic, may an employer require its employees to adopt infection-control practices, such as regular hand washing, at the workplace?*

Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, does not implicate the ADA.

*During a pandemic, may an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection?*

Yes. An employer may require employees to wear personal protective equipment during a pandemic, but must also be compliant with OSHA regulations regarding respirator use if respirators are provided to employees. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

*May an ADA-covered employer require employees who have been away from the workplace during a pandemic to provide a doctor's note certifying fitness to return to work?*

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees.

EEOC recently confirmed that this guidance remains current and applies to Coronavirus: https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.

As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus."

In these situations, we recommend the employee go to an urgent care facility or other accessible outpatient clinic if one is available to at least be screened to determine if the employee may be infected.

If the employee is asymptomatic and has received a negative COVID-19 test result, some employers may use these factors to allow an employee to return to work without requiring a doctor's note.

The DFEH also has issued FAQs, "DFEH Employment Information on COVID-19," which are substantially similar to the EEOC Guidance. The DFEH FAQs can be accessed at https://www.dfeh.ca.gov.

**(b) Can employers take employee temperatures as they arrive for work and send them home if they have a fever?**

Taking an employee's temperature is normally a prohibited medical exam under the ADA and the FEHA unless it is considered job-related and consistent with business necessity. This standard may be met, for example, in the healthcare industry.

However, because the CDC, California and certain local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature as they arrive for work and send them home if they have a fever. Additionally, the EEOC has reissued its Guidance allowing the taking of temperature as set forth in that Guidance in the case of a declared pandemic, as is the current situation. See EEOC's updated guidance at: https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm. The DFEH takes the same position as the EEOC. See "DFEH Employment Information on COVID-19," which can be accessed at https://www.dfeh.ca.gov.

It is important to keep in mind, though, that not all individuals infected with COVID-19 have a fever, or even show any symptoms at all. Thus, employers should have a measured approach deciding to take employees' temperatures. In addition, employers need to be careful to keep the information private and not place the information in the employee's personnel file but keep it, if necessary, in a separate file.

For union-represented employees, unless the ability to require such temperature testing is covered/addressed through management rights in the applicable collective bargaining agreement, it may be subject to bargaining, although arguably this may be accomplished on an expedited basis.

**(c) Is there an obligation to accommodate employees who do not want to work in public facing positions due to risk of infection?**

This is a combination of a reasonable refusal to work (OSHA) and accommodation (ADA/FEHA) question.

As to OSHA, if somebody is in a high-risk health group and comes forward to say they need to be separated from others to avoid contracting Coronavirus, the most reasonable course of action would be to approve the request until there is reliable information suggesting that it is unnecessary. If non-high risk employees make a similar request, each request should be considered on a case-by-case basis based upon the reasonableness of the concern. Employees should not be disciplined for refusing to work if they reasonably believe that there is a risk of infection because an employee making such a complaint may be engaging in protected activity. If the employer can establish that a reasonable person, under the circumstances then confronting the employee, would not conclude that there is a real danger of death or serious injury, the employee does not have to be paid during the time period the employee refuses to work.

On the accommodation issue, under the ADA and FEHA, the employer can require confirmation of need for the accommodation from the person's healthcare provider, and the employer may ask the employee to stay home provisionally while awaiting the accommodation information from the healthcare provider.

**(d) I am considering going cashless to help prevent the spread of COVID-19 by touching paper money. Is this legal?**

According to the Federal Reserve, it is not illegal under federal law for private businesses to refuse cash for the payment of goods and services. However, individual state and local laws may vary. For example, San Francisco, among others, has passed a prohibition on going cashless as being discriminatory.

**(e) How much information can we give other employees about a documented/confirmed case of COVID-19 at one of our locations?**

Employers must be careful not to divulge the identity of the employee with a COVID-19 diagnosis. Employers should simply say: "an employee in this location who we think may have had contact with you has been diagnosed." Employers should feel free to ask the diagnosed employee the names of other employees with whom they had close contact. The employer should also be careful not to confirm the identity of the diagnosed employee if other employees "guess." See "DFEH Employment Information on COVID-19," which can be accessed at https://www.dfeh.ca.gov.

**(f) If an employer is hiring, may it screen applicants for symptoms of COVID-19?**

Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability.

**(g) May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?**

Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.

**(h) May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?**

Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

**(i) May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it?**

Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

## 6. Implications to Benefit Programs

**(a) Is Coronavirus testing and treatment covered under the employer's medical plan?**

The Families First Act requires that all group health plans cover COVID-19 testing and any admission, lab or service fees relating to the testing, at no cost to participants. It appears the testing mandate applies for both network and non-network providers, as well as telehealth services. The Act does not require health plans to waive cost sharing or even provide coverage for medical services and supplies provided relating to a COVID-19 diagnosis (e.g., subsequent hospital admissions, ventilator, etc.).

**(b) What about coverage for medical services under our High Deductible Health Plan?**

A covered person under a High Deductible Health Plan (HDHP) cannot get medical services covered under the plan (other than preventive services, like the flu vaccine) before satisfying his/her deductible. If services are covered before the deductible is met, the plan will fail to be a HDHP, rendering the covered person ineligible to make tax-favored contributions to a Health Savings Account (HSA) for that year. In Notice 2020-15, the Internal Revenue Service has issued relief to individuals who have medical coverage under an HDHP. Until further notice, a medical plan intended to be an HDHP will not fail to be an HDHP if it covers medical costs associated with testing and treating COVID-19 without application of the deductible or otherwise-applicable cost-sharing.

**(c) Can we cover telemedicine under our medical plans?**

Many employers are looking at ways for covered participant to access medical care without having to travel to their doctor's office (and risk infection or spreading infection). Telemedicine may provide answer to this concern, and may generally be covered under a group medical plan. Further, the Families First Act appears to mandate that telehealth be covered and at no cost-sharing, at least for purposes of diagnosing/testing for COVID-19. However, where an HDHP is concerned, telemedicine may not qualify as preventive services. Where the services are related to the coronavirus, such services could be covered without endangering the HDHP status of the plan. However, were other medical services are sought via telemedicine, it does not appear that those services could be covered without first satisfying the participant's deductible and other cost-sharing requirements.

**(d) If expenses are not covered under the group medical plan, can employees get reimbursed for coronavirus related expenses from their Flexible Spending Account?**

Certain supplies, like facemasks and hand-sanitizer, might be covered as an eligible medical expense depending on the circumstances (including whether they're used due to personal illness or the need to treat a family member who has illness). Purchasing surgical masks while healthy and not near people who have contracted the virus (which the CDC has asked the public not to do) would generally not be covered. If in doubt, request a letter of medical necessity

**(e) What about HIPAA - what can I say or disclose?**

**Medical Information**. To the extent employers are getting information about employees who may have been exposed to SARs-CoV-2 or tested positive for COVID-19, that information will generally not be protected by HIPAA privacy where it is not accessed through the group health plan. Much of this information may be either self-reported from employees to their managers or Human Resources, which would not implicate the health plan. Other information may be received as a result of medical exams conducted at the work place, such as taking temperatures, which is discussed above.

**Medical Inquiries.** If workers for your company test positive for COVID-19, your organization may be contacted by public health authorities seeking information about the worker's symptoms, who they may have interacted with in the workforce, and where they may have traveled. Or, companies may seek to obtain verification from a worker returning from an at-risk country that the worker isn't showing any symptoms of coronavirus. It's important to understand that most of these types of inquiries are not governed by HIPAA because the request does not include a request to the health plan (the covered entity) for protected health information (PHI). That said, other employment laws or privacy laws may come into play (e.g., ADA restrictions on medical exams or inquiries, OSHA concerns, etc.), which have been discussed above.

**Health Plan Disclosures to Public Health Entities.** It is possible that the CDC, HHS or a state agency may directly request information from the group health plan to determine whether other persons have experienced symptoms consistent with COVID-19. HIPAA generally permits a

health plan to disclose PHI to a public health authority to prevent or control the spread of an infectious disease. Such a public health authority can also request that the health plan disclose such PHI to a foreign government agency. If a health plan is unsure whether this permitted use exception applies, it could always seek an authorization from the participant to disclose the information. To be clear, even though an exception would permit a health plan sponsor to disclose PHI without the participant's consent in this context, other HIPAA rules continue to apply, including the minimum necessary rule (limiting the scope of the disclosure) and the record-keeping requirements (tracking such disclosures and making them available upon request).

**HIPAA Policies – Remote Work Planning.** Many health plan HIPAA privacy and security policies limit or prohibit employees within the HIPAA "firewall" from bringing home materials containing PHI or from accessing EPHI or creating paper copies of PHI remotely. Health plan administrators should consider whether to relax this requirement (and amend their policies accordingly) to facilitate remote-working/quarantine-type situations. To ensure proper safety standards exist (and depending on the nature/scope/sensitivity of PHI workers will be accessing), some health plan administrators might determine that it is appropriate to invest in equipment (software, locking file cabinets, etc.) to facilitate this remote-work shift.

### (f) Would I need to pay my employee disability benefits if they contract the Coronavirus?

Yes, if such payments are provided under an employer's short-term disability (STD) benefit plan. Employers should review the limits of coverage in the benefit plan document to ensure they have sufficient resources to administer the program. Also, employees may apply for California State Disability Insurance (SDI) benefits through the California Employment Development Department (EDD).

Additionally, California employees may elect to use any available California Paid Sick Leave when they are absent due to Coronavirus. Further, there are various paid leave or paid sick time laws that may come into effect. You should check the California and local laws in your jurisdiction to ensure you are affording employees all of their paid leave or paid sick time rights. For example, California has a paid sick time law and various California cities have local paid sick time ordinances that may offer more paid sick time to an employee. For union-represented employees, applicable collective bargaining agreements should be consulted regarding relevant employment terms.

Also, if an employee is not eligible for state disability benefits or PFL through the EDD, the employee may be eligible for unemployment insurance benefits.

The EDD has FAQs on line with regard to both disability and unemployment insurance benefits. See https://www.edd.ca.gov/about_edd/coronavirus-2019.htm and https://www.edd.ca.gov/about_edd/coronavirus-2019/faqs.htm

**(g) If an employee's dependent care needs change as a result of the coronavirus outbreak, can they change their dependent care flexible spending account (DC FSA) election outside of the plan's open enrollment period?**

The permitted election change rules for DC FSAs are very broad. For example, mid-year DC FSA election changes are generally permitted if there is a change in the dependent care provider or a loss of or gain in access to free dependent care, provided the requested change is consistent with the reason for the change. For example, if a childcare provider is no longer providing the care (e.g., day care is closed or summer day camp is cancelled) and a parent will be watching the child instead, the DC FSA election can be reduced or eliminated. Before allowing employees to change their DC FSA elections mid-year, it's important to confirm that your cafeteria plan document permits DC FSA election changes consistent with the IRS guidance (most do).

**(h) Are my employees covered by a severance plan if they are laid off due to economic stress to my business as a result of COVID-19?**

Many employers already have a severance plan in place that can include monetary assistance when employees are laid off. Check the terms of eligibility for severance benefits to see if the laid off employees qualify for severance benefits. If they do, follow the terms of the severance plan to award them this income replacement benefit. If no plan is in place, it may be worthwhile to explore establishing a plan to provide for systematic severance payments in the event of layoffs.

**(i) Do employees laid off due to COVID-19 still need to receive COBRA notices?**

Yes. Employers who provide group health coverage generally are required to provide notice to terminating employees of their right to continue coverage at their own expense, assuming active coverage is terminating pursuant to the layoff/furlough. (We're aware of many employers that are bridging active coverage for populations impacted by a COVID-19-related furlough). Severance plans may provide healthcare continuation for a month or longer after work ends, especially for people with families. There is no requirement for the amount of benefits under a voluntary severance plan. Employers may provide severance pay of 1-3 months and a lump sum to pay for COBRA coverage for the same period. Regardless of whether an employer is subsidizing its laid off employees for COBRA, it is particularly important during this pandemic that employers provide COBRA notices and the ERISA required opportunity to apply for COBRA continuation coverage. If the COBRA subsidy is not already in the severance plan, employers may also consider amending their severance plans to include a lump sum payment for these unanticipated monthly COBRA premiums to ease the health care cost burden to these laid off employees.

## 7. Impact on Retirement Plans

### (a) What should employees with 401(k) plan balances do in a volatile market due to the Coronavirus?

The spread of SARS-CoV-2 has caused the market to lose quite a bit of value in a short time-frame, resulting in corresponding drops in value of retirement accounts. Employers should not be giving investment advice to their 401(k) plan participants, although employers can expect jittery employees looking for reassurance that their retirement plan balances will weather the storm. If employers want to do something, they could remind participants that the 401(k) is a long term savings vehicle and that participants should be investing with a long-term view and not having a knee-jerk reaction to volatile markets. If the 401(k) plan has investment advice or managed accounts available through the plan, plan participants can be reminded of this professional help that is available to them.

### (b) Can employees access their 401(k) balances to help cover expenses as a result of this crisis?

While active employees cannot generally take an in-service distribution from a 401(k) plan, there are a few ways that funds could be accessed. Many 401(k) plans offer loans, which are paid back from payroll deductions. Other 401(k) plans allow in-service distributions for those who are over 59 1/2. Finally, many 401(k) plans allow for withdrawals in the case of unreimbursed medical expenses which cause a financial hardship to the participant. While active employees cannot generally take an in-service distribution from a 401(k) plan, there are a few ways that funds could be accessed. Many 401(k) plans offer loans, which are paid back from payroll deductions. Other 401(k) plans allow in-service distributions for those who are over 59 1/2. Finally, many 401(k) plans allow for withdrawals in the case of unreimbursed medical expenses or to prevent the eviction of the participant from the participant's principal residence or foreclosure on the mortgage of the residence, which cause a financial hardship to the participant.

### (c) Does an employee on furlough have to pay off a 401(k) loan?

Generally, a participant must pay off a plan loan in substantially equal installments over a period of time not more than five years (longer in the case of primary residence loans). If s/he does not, the loan goes into default and is taxed as a deemed distribution. However, if the participant is on an unpaid leave (or a paid leave, but the level of pay will not cover the loan), the loan repayments may be suspended for up to one year. When the participant returns from the leave, the loan will be re-amortized and the loan payments will resume. We are seeing proposals for further relief for loans in the bills in front of the House and Senate.

**(d) Can employers reduce or suspend employer matching contributions under their 401(k) plan as a result of the economic impact of the coronavirus outbreak?**

Employers with 401(k) plans that do not rely on a safe harbor plan design (i.e., to pass nondiscrimination testing) can reduce or suspend matching contributions on a prospective basis at any time, through a corresponding plan amendment.

Employers with 401(k) plans that rely on a safe harbor plan design can reduce or suspend safe harbor matching contributions as of the first day of any plan year (e.g., January 1 for a calendar year plan); however, if the employer wants to reduce or suspend safe harbor matching contributions *during* a plan year, the employer must satisfy one of the following alternatives:

1. The employer must be "operating at an economic loss" for the plan year; or

2. The employer must have included a statement about the possibility of reducing or suspending safe harbor contributions mid-year in its safe harbor notice (regardless of the employer's financial condition).

Under either alternative, the employer must also provide a supplemental notice to participants at least 30 days in advance of the effective date of the mid-year reduction/suspension and must give impacted participants a reasonable opportunity to change their deferral elections. A corresponding plan amendment is also required, and must provide that the plan will pass the applicable nondiscrimination tests for the entire plan year, using the current-year testing method. Participants still must receive all safe harbor matching contributions through the effective date of the amendment but the plan will lose its safe harbor status for the entire plan year (thus requiring that it pass the ADP and/or ACP tests for the year) and may also lose any exemption to the top-heavy rules for the plan year.

If an employer has updated its 401(k) plan safe harbor notice (which is required to be provided to participants when they first become eligible for the plan and annually thereafter) to incorporate the statement referenced above, that employer would avoid the issue of having to prove it is "operating at an economic loss" if it wishes to reduce or suspend safe harbor matching contributions mid-year.

**(e) How will the crisis impact defined benefit pension plans?**

Coronavirus could significantly impact the funding levels of defined benefit pension plans for two reasons. First, broadly put, future benefit liabilities are determined based on mortality and interest rate assumptions. The lower the interest rate assumption, the higher the projected liabilities will be. Because the Federal Reserve continues to lower interest rates in response to the crisis, the projected defined benefit plan liabilities will also increase. Second, for purposes of determining plan funding requirements, projected future liabilities are measured against plan assets. The coronavirus has significantly reduced plan assets as a result of the recent market crash. As a result, the coronavirus crisis is both increasing the projected future liabilities while simultaneously reducing the assets available to pay such liabilities.

**(f) How will the crisis impact incentive compensation arrangements?**

Most incentive compensation arrangements are tied to the underlying performance of the employer offering the incentive. Most programs were set based on performance metrics that no longer correlate to the current economic environment (e.g., performance stock units will be well below target and threshold measures, stock options will be underwater and restricted stock units will payout a fraction of what they would have two weeks ago). Additionally, and for purposes of new incentive compensation grants, compensation committees are faced with defining performance metrics (often for the next three years) and choosing the grant levels based on short-term devaluation that may be resolved soon or have a lasting impact on the employer's core business objectives. Employers should consider creating added flexibility to their future awards and consider adjusting existing awards to account for the dramatic change in award values.

As a final point on incentive compensation, we're anticipating less shareholder challenges to the current proxy solicitations on executive pay (i.e., solicitations for proxies occurring between April and June) based on the nature of the crisis and the practical problems in carrying through with such a challenge. We would, however, anticipate future challenges to increase once a new normal for establishing incentive compensation forms.

**(g) What about tax filing and related deadlines - any relief there?**

While the IRS mulls an extension of the income tax filing deadline, there are a number of upcoming benefit plan-related deadlines to keep in mind. Below are a few of them:

- ***End of Initial Remedial Amendment Period for 403(b) Plans.*** Tax-exempt employers have until March 31, 2020 to adopt an IRS pre-approved 403(b) plan document or adopt a custom plan document to fix any plan document errors retroactively to 2010. This is a one-time "free-pass" so to speak. After that deadline passes, any document errors will need to be corrected under the IRS's Voluntary Correction Program, which requires payment of a fee and possible other sanctions.

- ***Close of IRS Determination Letter Program Window for Hybrid Plans.*** Last year, the IRS issued guidance re-opening its determination letter program to hybrid plans (e.g., cash balance plans and pension equity plans) for a limited 12-month period. That period is set to expire on August 31, 2020.

- ***SECURE Act Guidance.*** The SECURE Act contains a number of provisions impacting employer-sponsored retirement plans, many of which are already in effect. There are many unanswered questions about how to actually administer the changes and incorporate them into existing employer-sponsored retirement plans, and additional guidance is needed. Our understanding is that Treasury is working on guidance. However, it is unclear at this point what, if any, impact the coronavirus outbreak will have on this process, as potential government office closures loom and resources are shifted to focus on more immediate virus-related relief.

- ***Retirement Plan Periodic Notice and Filing Requirements.*** Retirement plans are subject to numerous notice and filing requirements, including annual fee notices and annual Form 5500 filing requirements. While some of the deadlines for sending such notices or making such filings are a ways down the road, if offices are to close or business operations otherwise disrupted, it would be a good idea for the IRS and DOL to extend notice and filing deadlines well in advance. For example, if the commencement of the annual independent audit for qualified retirement plans is delayed, it could impact whether reports be ready for filing with the annual Form 5500.

- ***Qualified Disaster Relief*.** In the past, the IRS has provided disaster relief for victims of certain hurricanes, wildfires and other natural disasters which have manifested themselves as a physical scorch on the earth. This relief has generally included an increased limit for plan loans, as well as the availability of qualified distributions up to a certain amount without the 10% early withdrawal penalty (and the ability to recontribute such distributions for a period of time after the distribution). It is unclear whether IRS will issue similar disaster relief for those impacted by the coronavirus.

**(h) What if my plan is currently under audit?**

If your retirement plan is currently under an IRS or DOL audit, your ability to meet the agency's response deadline may be adversely impacted. The first thing that you should do is to write to the agent working on your case to request an extension. Follow up any phone calls by documenting such a communication in writing. We are fairly confident that neither the IRS nor DOL agent you are working with will strictly enforce any response deadlines in this current environment.

## 8. Immigration

**(a) In light of the COVID-19 pandemic have there been any changes to the Form I-9 and E-Verify related rules?**

Currently, the Department of Homeland Security has not announced any divergence from the existing requirements to complete a Form I-9 for new hires and reverify existing employees whose work authorization is expiring within the specified time frame. It appears the rules continue to be in effect even if employees are working remotely. We expect that US Citizenship and Immigration Services (USCIS) will be reasonable regarding E-Verify delays and other challenges. We hope for the same understanding from Immigration and Customs Enforcement.

**(b) Can you share insight on options other than completing a Form I-9 in person, and how other companies are thinking about the I-9 process, in light of almost overnight remote working and office closures?**

Companies are looking at three options during the COVID-19 state of emergency (however only the first option is currently allowed by the government):

1. Authorize a third party (service vendor or "friends and family" option) to act as an Authorized Agent to complete, or update, the Form I-9.

2. Suspend Form I-9 completions (and Reverifications of expiring work authorization).

3. Complete Form I-9 and Reverifications virtually via skype, zoom, FaceTime, etc.

**(c) What should companies be considering if they choose to utilize one of the above alternatives to having HR complete the Form I-9, in person?**

In each of the three scenarios, we recommend having processes in place to update the Forms after the pandemic is over and business operations return to normal. We also suggest the following:

- Making copies/scans of all identity and work authorization documents and retaining them with the Form I-9;
- Implementing a tracking system identifying all Form I-9s (and related E-Verify cases) not completed in-person, to ensure that:
    - Forms are reviewed for accuracy;
    - necessary reverifications are tracked as well as receipts and other deadlines; and
    - all "suspended I-9s" are eventually completed with an in-person document review.
- Placing a "note" (electronically or by hand) on any Form I-9s completed virtually, stating the "documents were examined virtually, not physically, in-person"; and
- For any requests made to third party, remote completers, including friends and family, serving as Authorized Representatives, directions should include reminders to take care when conducting the review, to follow government safety guidelines and to delay in-person meetings if either party is feeling ill. Companies should work with experienced counsel when appointing "Authorized Representatives" to ensure the process is not only compliant, but also user friendly. The third party process should consider a host of issues including:
    - How to safeguard PII (i.e. should the completer be allowed to copy the identity /work authorization documents);
    - The logistics of timing and the specific SOP to receive the scan of the Form I-9 (i.e. email, shared site) should be detailed for the employee;

- Identifying how the Forms will be reviewed for completion and accuracy, and how necessary corrections will be addressed where mistakes were made;

- Directives regarding where the original I-9s will be sent (i.e. centralized location, a specific site) should be detailed in the instructions to the employee.

- Finally, in cases where the company uses an electronic I-9 system, there is another whole set of issues to consider.

- Where the I-9 cannot be completed during the crisis and will be completed late, companies should consider attaching a memo to the Form I-9, explaining the special circumstances surrounding the delay, including the remote work arrangement and the suspension of normal business operations during the COVID-19 crisis.

**(d) Is this an area we should anticipate greater flexibility on from the government in the near term?**

We are working closely with DHS leadership to reconsider the current stance of "business as usual" for Immigration and Customs Enforcement and provide greater flexibility regarding I-9 completion. We have pointed out the growing safety concerns, the strain on much-needed HR resources during this unprecedented crisis and the enormous economic impact forcing companies to choose between compliance or delaying onboarding. In light of the National Emergency and the growing global crisis, we are still hopeful reasonable guidance will be issued.

**(e) Is it true that Immigration and Customs Enforcement issued I-9 Notice of Inspection audit notices this week?**

Yes, it is true that ICE continues to audit the I-9s of US companies. The directives to Homeland Security Investigations was "business as usual," and accordingly, they are continuing to conduct non-criminal, administrative reviews of companies, even those facing unprecedented challenges during this national health emergency.

*The foregoing information is provided based upon currently known information. The progress of this disease is constantly evolving. The foregoing information is subject to change based upon such evolving information. These FAQs do not constitute legal advice and you should contact legal counsel prior to taking action.*