

Returning to Work in the Midst of COVID-19: *Legal, Regulatory, Practical, and Policy Considerations*

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Presented to:



Presented By:

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Patricia S. Eyres (Patti) is a Phi Beta Kappa graduate of Stanford University (B.A. with Distinction 1974). She earned her law degree from Loyola Law School (J.D. cum laude 1977). Patti calls herself a “recovering litigator,” who knows first-hand the value of paying attention to prevention. After spending 18 years devoted exclusively to defending companies in the courtroom, she resolved to help business leaders recognize potential legal landmines **before** they explode into lawsuits. She brings a unique and practical perspective to the critical legal issues impacting the workplace.

Patti also supervises the firm’s ELG- PRISM (EIA) hotline. She is the author of ***Managing Multiple Leaves of Absence for Public Entity Employers (2nd Edition 2020) the Interactive Process Manual for Public Entity Employers (5th Edition coming in June, 2020)***

As CEO/Publisher of Proactive Law Press, LLC, which is headquartered Arizona, Eyres supervises the production and publication of books, training materials educational products for business owners, public school administrators, front-line leaders, HR and Risk Managers.

Eyres Law Group, LLP

The firm offers a specialized law practice focusing exclusively on helping employers to proactively manage their employment practices in an increasingly regulated and risky environment. Eyres Law Group advises clients in all aspects of employment law from recruiting and hiring through performance management, discipline and termination decisions. In addition to drafting enforceable policies and procedures, guiding employers through their personnel practices and developing defensible documentation, the firm provides an array of specialized training programs and other resources for executives, front line leaders, HR specialists and risk management professionals. Despite your very best efforts, in today’s legal climate, some claims are unavoidable. To maximize your successful defense, we support your organization by conducting lawful investigations of internal discrimination or harassment complaints and then guide you through appropriate corrective action.

The firm’s specialized Education law practice, guiding public school districts through in a wide range of employment-related actions involving return-to-work, reasonable accommodation and leave of absence requirements. We work extensively with K-12 public school districts to assure their compliance with the Education Code and overlapping Federal and State law.

This material is intended to provide descriptive and illustrative material on general legal concepts. While the information in this handout is accurate and up to date, it is not intended to, and does not, constitute legal advice on any particular case, whether in litigation or merely anticipated. For specific advice on particular matters, consult the Eyres Law Group—Legal Hotline at peyres@eyreslaw.com or 602-448-4051

Returning to Workplaces Amidst COVID 19: Proactive Planning and Best Practices for Recreation and Park Districts



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Proactive Planning, Preparation, Policy and Protocols: Key information from public health authorities at the CDC and NIH; federal, state, and county executive orders for phased return to work amidst COVID 19

Law, Regulation, and Policy: Compliance with federal and state laws, regulations, and emergency executive orders; Employment and Safety/Health Laws: State and Federal statutes, regulations, and emergency orders for leaves, accommodations, ongoing wages, telework, health and safety, travel restrictions, and more

Additional Topics, Resources and
ELG-PRISM hotline program

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Implementing Transition to Return to Work with Appropriate Attention to Health and Safety



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Role of Local County Government as CA. Starts to Re-open

- The transition to stage 2 must occur through a statewide modification to the stay at home order. During Stage 2: counties may relax stricter local orders at their own pace.
- Following Stage 2, once a statewide COVID-19 surveillance system is made possible through testing, further regional variations could be supported.
- Counties must create and submit a readiness plan which the state will make publicly available.
- State will consult and collaborate closely with local governments;
- Businesses seeking to reopen should ensure compliance with both state and local requirements.

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Stage 2 Guidance for Employers to Facilitate Safe Re-opening

1. Prepare to comply with guidelines issued by state and counties, CDC, county public health departments and OSHA;
2. Perform a detailed risk assessment;
3. Implement a site-specific protection plan;
4. Make radical changes within the workplace;
5. Train employees on how to limit the spread of COVID-19;
6. Train employees on how to screen themselves for symptoms and to stay home if they have symptoms, or a member of the home has symptoms;

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Stage 2 Guidance for Employers to Facilitate Safe Re-opening - 2

7. Implement individual control measures and screenings;
8. Implement protocols to address and approve leaves and accommodation requests, where appropriate to ensure safety of employee and co-workers;
9. Implement disinfecting protocols for all public spaces and shared work surfaces, equipment, tools, vehicles, and high touch areas;
10. Implement physical distancing guidelines;
11. Make physical changes to the workplace as necessary for distancing;
12. Help educate citizens accessing entity programs and facilities.

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Elements of a Worksite Specific Plan for Each Facility - 1

1. Establish a written, worksite-specific COVID-19 prevention plan at every office location, perform a comprehensive risk assessment of all work areas, and designate a person at each office workspace to implement the plan.
2. Identify contact information for the local health department where the facility is located for communicating information about COVID-19 outbreaks among employees.
3. Train and communicate with employees and employee representatives on the plan.
4. Regularly evaluate the office workspace for compliance with the plan and document and correct deficiencies identified.

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Elements of a Worksite Specific Plan for Each Facility - 2

5. Adhere to the federal CDC and state guidelines published and as updated. Failure to do so could result in workplace illnesses that may cause operations to be temporarily closed or limited.
6. Investigate any COVID-19 illness and determine if any work-related factors could have contributed to risk of infection. Update the plan as needed to prevent further cases.
7. Identify close contacts (within six feet for 15 minutes or more) of an infected employee and take steps to isolate COVID-19 positive employee(s) and close contacts.
8. Establish protocols for communicating with individuals who may have been exposed.

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Employee Training Related to COVID 19 and Safety Protocols with Legal Implications

1. How to prevent spread of COVID 19.
2. Underlying health conditions may make individuals more susceptible to contracting the virus. CDC updates this list frequently.
3. Self-screening at home, including temperature and/or symptom checks using CDC guidelines, and why some screenings may be implemented at the workplace.
4. To seek medical attention if their symptoms become severe, including persistent pain or pressure in the chest, confusion, or bluish lips or face. CDC updates symptom list regularly.
5. Importance of consistent compliance with workplace physical distancing requirements.

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Important Employee Training Requirements

6. The importance of frequent handwashing with soap and water, including scrubbing with soap for 20 seconds (or using hand sanitizer with at least 60% ethanol or 70% isopropanol when employees cannot get to a sink or handwashing station, per CDC guidelines)
7. How to enforce requirements for face coverings, proper use, washing and sanitizing after each shift.
8. Properly train subs or temps on prevention policies and have necessary PPE. Discuss these responsibilities ahead of time with organizations supplying temporary and/or contract workers.
9. Information on all available leaves of absence – both statutory and employer sponsored.

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OSHA and CDC Guidance for Employers

Infection Disease Preparedness and Response Plans

- Implement infection control measures and enforce consistently
- Develop, implement, & communicate about workplace protections
- Hierarchy of Controls: Engineering, Administrative Safe Practices, PPE

OSHA Recordkeeping and Reporting for COVID-19 Cases

- The case is a confirmed case of COVID-19;
- The case is work related; and
- The case results in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness.

Factors Cal-OSHA Will Consider in Determining Employer Work-Related Determination

- Reasonableness of employer's investigation into work-relatedness

It would be reasonable for an employer, upon learning of an employee's COVID-19 illness, to ask the employee how he or she believes he contracted the virus, to discuss with the employee activities at work and outside of work that may have led to the illness, and to review the employee's work environment for potential exposure.

- The evidence available to the employer.

At the time it made the decision about work-relatedness and whether it learned additional information.

The evidence that a COVID-19 illness was contracted at work.

New Cal OSHA Guidance Updated May 21, 2020 Criteria for Recordable COVID -19 Illness

Likely Work-Related	Likely Not Work-Related
Several cases develop among workers who work closely together and there is no alternative explanation.	The employee is the only worker who contracts COVID-19 within their vicinity and the employee's job duties do not involve frequent contact with the general public, regardless of the rate of community spread.
The employee's illness is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation.	Outside of the workplace, the employee closely and frequently associates with someone (e.g., a family member, significant other, or close friend) who (1) has COVID-19; (2) is not a coworker, and (3) exposes the employee during the period in which the individual is likely infectious.
The employee's job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.	

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Impact of COVID 19 on Injury & Illness Prevention Program

New 5/21/20 guidance states that "for most California workplaces, adopting changes to their IIPP **is mandatory** since COVID-19 is widespread in all communities.

OSHA and Cal/OSHA require employers to provide a workplace free from "recognized hazards causing or likely to cause death or serious physical harm" Employers must establish, implement and maintain an effective injury and illness prevention program (IIPP). It requires employers to:

- Identify and correct workplace hazards;
- Communicate known and foreseeable hazards to employees;
- Ensure that employees comply with the policy;
- Investigate injuries and illnesses; and
- Provide hazard communication training when necessary.

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Broad Requirements Set forth Regarding Content and Scope of IIPP Mirrors much of the CDC Guidelines

- Stay home when sick;
- Specific conditions for return from positive test or symptoms;
- Telework whenever possible;
- Provide PPEs, including cloth face coverings and require their use;
- Social distancing with many concrete measures for virtual meetings;
- Rigorous disinfecting of high touch surfaces;
- Hand washing, cough/sneeze etiquette, etc.;
- Robust hazard communication training;

** Details available through ELG hotline program, ELG and JPA resources and Cal-OSHA website

Employee Rights to Raise Concerns about RTW Due Good Faith Safety Concerns or Request for Accommodation

- Safety Reporting Retaliation Protection: Employees can refuse to come to work if they believe they are in imminent danger. Imminent danger is defined as "...any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act."
- ADA-FEHA Reasonable Accommodation Requests: Employees who have disabilities or conditions that make them susceptible to serious complications from Covid-19 can request reasonable accommodations before returning to work. These can include telework, additional PPE, changes to their work schedule, etc. **FEHA prohibits retaliation, whether or not the accommodation is approved or denied on legitimate basis.**

Prevent Risky Responses to Complaints & Address Negative Conduct Immediately

- Don't ignore or be dismissive of employee's complaints
- Don't prevent employees from discussing safety concerns with co-workers
- Encourage prompt reporting of safety concerns
- Immediately respond to reports of PPE shortages
- Promptly address concerns raised about unenforced distancing protocols
- **Conduct an interactive process for every requested accommodation**

- Prevent harassment, bullying, abusive commentary about face masks
- Never, never allow retaliation for safety complaints
- Investigate complaints of bullying and take immediate corrective action
- Handle complaints by employees about age, disability, national origin issues
- **Proactively prevent retaliation for any employee requesting an accommodation.**

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Recreation and Park Districts: Specific Criteria for Resuming On-Site Operations

HEALTH+
SAFETY
ATWORK

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Aquatics Facilities Covered by CDC Guidelines

- Public pools, hot tubs and water playgrounds.
- Encourage all staff, patrons and swimmers to wash their hands often
- Educate all staff, patrons and swimmers in proper cough and sneeze etiquette
- Encourage cloth face coverings as feasible (County rules differ).
- Face covers are most essential in times when physical distancing is difficult. Advise users NOT to wear cloth face coverings in the water, as they can be difficult to breathe through when they are wet

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Aquatics Facilities Best Practices for Health and Safety - 1

- Maintain adequate supplies at the facilities, including soap and water for handwashing, hand sanitizer with at least 60% alcohol, paper towels, tissues, and no touch trash cans
- Post signs about how to stop the spread of COVID-19 in highly visible locations (i.e. at deck entrances and sinks)
- Broadcast regular announcements about safe behaviors and hygiene
- Include message about healthy and safe behavior in emails, on facility websites and on the facility's social media accounts
- Require patrons to bring their own towels

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Aquatics Facilities Best Practices for Health and Safety - 2

- Maintain proper disinfectant levels in swimming pools. 1-10 parts per million free chlorine or 3-8 ppm bromine and ph 7.2-8.
- Clean and disinfect frequently touched surfaces frequently including handrails, slides and structures for climbing or playing, lounge chairs, tabletops, pool noodles and kickboards
- Set up a system so that furniture and items that need to be cleaned and disinfected are kept separately from the ones that have already been cleaned and disinfected
- Door handles and surfaces of restrooms, handwashing stations, diaper changing stations and showers

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Aquatics Facilities Best Practices for Health and Safety - 3

- Change deck layouts to ensure that in the standing and seating areas, individuals can remain at least 6 feet apart from non-family unit.
- Provide physical cues or guides and visual cues and signs to ensure that staff, patrons and swimmers stay at least 6 feet apart from those they don't live with, both in and out of the water. i.e. lane lines in the water, tape on the deck, floors or sidewalks
- Implement a policy of staggered use of communal spaces
- Discourage patrons from sharing items that are difficult to clean, sanitize or disinfect or that are meant to come in contact with the face (i.e. goggles, nose clips and snorkels) or from sharing food.

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Aquatics Facilities Best Practices for Health and Safety - 4

- Discourage patrons from sharing food, equipment, toys and supplies
- Ensure adequate equipment for patrons and swimmers, i.e. kickboards and pool noodles, to minimize sharing or limit use of equipment to one family unit at a time and clean and disinfect between use.

Protect Vulnerable staff (those at high risk)

- Telework where it is an option
- Modified job responsibilities to reduce infection
- Limit aquatic venue to use only by staff, patrons, and swimmers
- Prohibit large gatherings of people both in and out of the water
- Have lifeguards and others who can't telework monitor daily for symptoms or exposures

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What to Do if You Learn of a Positive COVID 19 Case at your Facility

- Isolate and transport those who are sick to their home or a healthcare provider. Immediately separate staff, patrons, or swimmers with COVID-19 symptoms (fever, cough, or shortness of breath).
- Establish procedures for safely transporting anyone sick to their home or to a healthcare provider.
- Notify health officials and close contacts.
- Immediately notify local county health officials, staff, patrons, and swimmers of any case – **follow your specific county procedures**
- Close off areas used by a sick person and not using the areas until after cleaning and disinfecting them. Wait more than 24 hours before cleaning and disinfecting these areas.

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What to Do about Restrooms at your Recreation and park Areas

- Restrooms should remain open if the facility is open. If restrooms will be closed, notify visitors ahead of time so that they can prepare.
- Ensure that open restrooms are operational with functional toilets.
- Clean and disinfect facility restrooms regularly. Focus on high-touch surfaces such as faucets, toilets, doorknobs, and light switches. Use EPA-registered household disinfectants and correct application of disinfectants and keep products away from children.
- Keep restrooms regularly stocked with supplies for handwashing, including soap, and materials for drying hands, or hand sanitizer with at least 60% alcohol.
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Youth Sports Activities Follow County Directives

- Lowest Risk: Performing skill-building drills or conditioning at home, alone or with family members.
- Increasing Risk: Team-based practice.
- More Risk: Within-team competition.
- Even More Risk: Full competition between teams from the same local geographic area.
- Highest Risk: Full competition between teams from different geographic areas.
- Follow your county directives on best practices for limited contact, sanitizing, etc.

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Day Camps Should be Considered Child Care Child Care Risk Hierarchy

- As with school site, the more people a child or staff member interact with and the length of the interaction will determine the risk of spread.
- Lowest Risk: Children and teachers engage in virtual-only classes, activities, and events.
- More Risk: Small, in-person classes, activities, and events. Groups of children stay together and with the same provider and groups do not mix. Children remain at least 6 feet apart and do not share objects.
- Highest Risk: Full sized, in-person classes, activities, and events. Children are not spaced apart, share classroom materials or supplies, and mix between activities.

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Identify and Provide Significant Precautions for High Risk Camp Staff

- Offer options for staff at higher risk of severe illness (including older adults and people of all ages with certain underlying medical conditions) that limit their exposure risk (e.g., telework, modified job responsibilities that limit exposure risk).
- Consistent with applicable law, put in place policies to protect the privacy of people at higher risk regarding underlying medical conditions.
- Always consider an interactive process and reasonable accommodations to keep employees at work, where modifications can keep them safe.
- Alternative accommodations: provide flexibility with leave, or telework.

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Policies and Procedures Prevention, Planning, Processes Implementation and Enforcement



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Sound Planning and Policy for Re-Configuration of Physical Workplace - 1

- Consider public areas, such as hallways, restrooms, and elevators
- Floor plans and 6 ft markings
- Plexiglas barriers
- Remove seating in conference rooms, break or lunch rooms
- Restroom access limitations
- Hand sanitizer stations
- Deliveries for offices to central location, possible disinfection techniques
- One way pedestrian traffic in hallways and corridors
- No sharing of kitchen utensils – lunchroom re-configuration
- No sharing of tools or equipment when feasible; otherwise regular disinfecting
- Consider ventilation, HVAC and air systems (filters if possible)
- Limit time spent in meetings or gatherings to minimal increments as longer exposure is more problematic

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Sound Policies for Risk Management Legal Compliance and Defenses - 2

New policies to enact and enforce

- Physical distancing
- Daily or alternating day temp checks and monitoring symptoms
- Handwashing, cleaning and disinfecting – allocation of responsibilities
- Limiting meetings and gatherings
- Return to work after COVID related infection or self-isolation for exposure (implicates accommodations and leaves)

Temperature checks and monitoring

- Required by some local and county orders
- Protect the screener with PPE and barriers
- Proper training and confidentiality issues
- Screening out of view, safe distance from other workers,
- Handling results: sick leave and privacy in reporting results

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Sound Policies for Risk Management Legal Compliance and Defenses - 3

Queries to employees about health

- Do you have fever, chills (list symptoms)?
- Do you require a reasonable accommodation?
- What modifications or adjustments do you require to assist you in performing your essential job functions? (individualized interactive process)

- Do you have an underlying condition that puts you at greater risk of serious complication if you become infected with COVID -19?

- These questions appropriate when job related or due to business necessity. Teleworkers aren't asked these questions unless they will periodically be at the workplace or required to travel for business.

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Employee Refusal to RTW Due to Fear of COVID but without Grounds for LOA or Reasonable Accommodation

- OSHA Retaliation Protection: Employees can refuse to come to work if they believe they are in imminent danger. Imminent danger is defined as “...any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.”
- ADA Reasonable Accommodation Requests: Employees who have disabilities or conditions that make them susceptible to serious complications from Covid-19 can request reasonable accommodations before returning to work. These can include telework, additional PPE, changes to their work schedule, etc.

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Hazard Pay Options

- Additional Pay for Dangerous or Physically Taxing Work.
- The Dept of Labor defines hazardous work as “Work duty that causes extreme physical discomfort and distress which is not adequately alleviated by protective devices [and] is deemed to impose a physical hardship.” Hazard Pay is not currently legally required.
- If Hazard Pay has been provided, there must be careful consideration regarding when it will end.
- Best practice is to provide it for a specified period, with notice that it will end at a certain point, to avoid state-mandated notice requirements, which vary.

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Who Should be Encouraged to Stay Home from Work?

High risk categories: (CAVEAT: be careful about some forms of discrimination)

- Age 65 or over
- Heart disease or severe hypertension
- Diabetes, sleep apnea, severe morbid obesity (over 40 BMI)
- chronic inflammatory conditions – gastric, rheumatoid arthritis
- Respiratory conditions – asthma, COPE
- Liver or kidney disease
- Current or recent pregnancy

Current CDE symptom list: cough, shortness of breath, fever, chills, severe chills with shaking, muscle pain, sore throat, loss of taste and/or smell

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Establish Policy and Procedure for When and How to Implement Screening

- Temperature and/or symptom screenings for all workers at the beginning of their shift and any vendors, contractors, or other workers entering the facility.
- Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening. Establish confidentiality standards.
- If requiring self-screening at home, ensure that screening was performed prior to the worker leaving the home for their shift and follows CDC guidelines or county requirements.
- ***Require workers who are sick or exhibiting symptoms of COVID-19 to stay home.***

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Legal Principles for Medical Testing in the Public Sector Workplace

- All legal principles continue to apply, i.e. ADA/FEHA, pregnancy discrimination, leave laws and obtaining medical verification for leaves and accommodations.
- ADA/FEHA generally prohibits employers from making disability-related inquiries and requiring medical examinations.

Exceptions

Employee's ability to perform essential job functions will be impaired by a medical condition; or

Employee will pose a direct threat due to a medical condition.

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Acceptable Testing Procedures

- Body temperature tests;
- Sending employees with COVID-19 symptoms home;
- Asking employees who report feeling sick about symptoms of COVID-19;
- Questions about travel to at-risk areas
- Pre-employment testing? (yes, post offer)

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Employee May Not Refuse to Consent to Testing and Monitoring

- The ADA and FEHA permit your entity to prohibit an employee from physical presence in the workplace after refusal to answer questions about symptoms associated with COVID-19, or has been tested for COVID-19.
- May also bar employees who refuse temperature checks or do not comply with apps for home testing and reporting before each shift.
- To help with cooperation: ask the reasons for the employee's refusal. You may be able to reassure employee that these steps are for everyone's safety
- Assure employees the results will be confidential. Assure employees that IF they believe they need an accommodation for certain underlying symptoms related to a disability, they request accommodation and entity for accommodation. **Always conduct a good faith interactive process, to comply with CA FEHA, and avoid retaliation claim.**

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Testing and Questioning All Similarly Situated People is Vital to Avoid Discrimination

- Don't require only certain employees to have regular temperature checks. Example: don't single out those with underlying conditions who do come to physical worksite. Don't test only those over 65.
- May ask an individual employee about symptoms or be tested only if there is a reasonable belief, based on objective evidence, that the employee has COVID 19.
- Example: an employee with a persistent, hacking cough, manger can ask whether the employee has been to a doctor, and whether the employee knows if she has or might have COVID-19. These types of questions are permissible because of direct threat of COVID 19 infection.
- Must be based on objective, first-hand observation and not "rumor" or subjective assumptions about at-risk workers.

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Asking Questions about Family Members who Test Positive or Have Symptoms

- Asking an employee about his contact with family members unnecessarily limits the possible extent of an employee's potential exposure to COVID-19.
- From a public health and workforce management perspective, ask whether an individual has had contact with anyone who the employee knows has been diagnosed with COVID-19, or who may have symptoms associated with the disease.
- From EEOC's perspective, this general question is more legally sound. The Genetic Information Nondiscrimination Act -- GINA for short -- prohibits employers from asking employees medical questions about family members' specific medical conditions or history of disease.

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Maintain Confidentiality During Testing, Monitoring and Throughout Interactive Process

- Train staff who monitor temperatures and all managers to maintain strict privacy over results.
- All medical information about a particular employee be stored separately from the employee's personnel file and limit access to "need to know."
- Per EEOC: An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.
- Entity may disclose the name of an employee to public health agency when you learn an employee has COVID-19. **Essential for quality contact tracing.**

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What Should Individuals Do if they Have COVID-19 Symptoms?

- If coronavirus symptoms suggest the need for medical attention, contact a healthcare provider.
- Call healthcare provider if you have the following symptoms:
 - Difficulty breathing (shortness of breath)
 - Symptoms such as fever and cough are getting worse
 - You are unable to care for symptoms at home
- Those over 65 years old and/or have a compromised immune system or a chronic serious medical condition, should contact your health provider by phone. NOTE: test kits are scarce and providers are ordering stay at home for those who are not in high risk group, even with symptoms
- If need to go to the hospital, call ahead first so they can prepare for arrival. If you call 911, be sure to tell them you are experiencing symptoms of coronavirus.

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Instruct Managers about Reporting about a Worker Positive for COVID 19

- The information that an employee has symptoms of, or a diagnosis of, COVID-19, is medical information. Must be reported to appropriate employer officials so that they can take actions consistent with guidance from the CDC and other public health authorities.
- Whether to report “unnamed” employee or identify individual depends on each workplace and why a specific official needs this information. Employers should make every effort to limit the number of people who get to know the name of the employee.
- A designated representative may interview the employee to get a list of people with whom s/he had possible contact through the workplace, in order to inform those who may have been exposed to monitor their own symptoms or take other precautions for self or family.

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Proper Protocols to Follow With a **Confirmed Case of COVID-19** in the Workplace - 1

1. Ask infected employee who they have had contact with at work and where they have worked within the last 14 days.
2. Recommended: Map locations of where employee worked within location.
3. Recommended: List of all employees who had contact with infected employee.
4. Remove sick employee from worksite.
5. Close areas where sick employee worked (ideally waive 24 hours before cleaning).

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Proper Protocols to Follow With a Confirmed Case of COVID-19 in the Workplace - 2

6. Contact local health department and inform them of confirmed case, ask for any guidance they can provide and inform them of your entity plan.
7. Notify co-workers who were in contact with sick employee (maintain sick employee's privacy and do not disclose identify).
8. Check employees who had community contact for symptoms (fever, cough, shortness of breath, acute respiratory) and take temperatures.
9. Close and clean facility: Follow state or local health department guidance and CDC guidance on cleaning and disinfecting. Post CDC poster: https://www.cdc.gov/coronavirus/2019-ncov/downloads/Essential-Critical-Workers_Dos-and-Donts.pdf
10. Assess whether the infection must be recorded under OSHA

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Other Issues about Reporting Symptoms or COVID 19 Illness

- ADA-FEHA confidentiality does not prevent an employee from communicating to his supervisor about a co-worker's symptoms.
- If entity knows an employee who is teleworking or in self-quarantine because of positive COVID 19 or symptoms supervisor may disclose the information without saying why the employee is teleworking.
- Employee on medical leave: don't disclose reason for leave, just that employee is on authorized leave.
- Supervisor should contact appropriate management officials to report this information and discuss next steps.

Interactive Process, Accommodations and Defensible Documentation



FEHA Definition of Disability is Expansive to Include Much of COVID-19

- Any limitation of a major life activity;
- Limits includes making achievement of the life activity difficult;
- Major life activities include breathing, concentrating, focus, stamina;
- Treatments or mitigating measures that limit life activity are also covered;
- Working is a major life activity;
- Result: COVID-19 symptoms or positive test are clearly covered disabilities. Self-isolation from exposure is also likely a covered disability.

- Underlying health conditions that place someone at increased risk of serious illness from exposure are also likely covered. This includes COPD, asthma, immune disorders, treatment for cancer or other conditions, are all a basis for employee to request a reasonable accommodation for modified schedule, work from home, or leave.

- *Failure to engage in an interactive process is itself unlawful.*

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California FEHA Regulations “Major Life Activity” and “Limits” a Major Life Activity

- Physical, mental, and social activities, ***“especially those life activities that affect employability or otherwise present a barrier to employment or advancement.”***

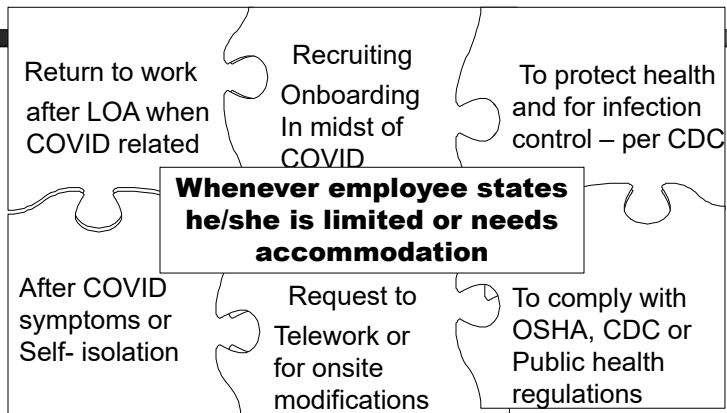
- “Limits” a major life activity means it makes achievement of the life activity difficult. Whether achievement is difficult is an individualized assessment considering:
 - what most people in the population can perform with little or no difficulty,
 - what members of the individual’s peer group can perform
 - What the individual would be able to perform with little or no difficulty, if not for the disability.

- ***Working is a major life activity***

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Triggers for the Duty to Engage in Interactive Process



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Interactive Processes Still Required with Requests for Accommodation

- If not feasible in person due to social distancing, consider telephone or online meeting.
- Evaluate all forms of reasonable accommodation – modified schedule, work from home, extended leave, alternative duties.
- This applies even to employees providing essential services.
- Also applies to individuals working remotely, who later request an accommodation at the worksite.
- Be practical: it is very difficult to get health care providers to generate certifications, work restrictions, or even notes in this climate.

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Interaction: The Heart of the Process For Both Industrial Injuries and Non Industrial Conditions

Always an Individual assessment

- How the employee is “limited” in relation to others
- Employee functional abilities and restrictions
- Essential job functions, as currently performed
- County’s business needs in the window of time the decision is being made

- Flexible not rigid
- Continuous not impetuous
- Trustworthy results
- Capable of being utilized across departments & facilities
- Process has integrity

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Specific Considerations for Accommodation Plan Evaluate Effective Modifications vs. Undue Hardship or Direct / Threat to Safety of Self or Others

1. Start with modifications to the manner of performing essential functions in employee’s current position.
2. Address necessary protocols for response to foreseeable medical incidents.
3. Consider appropriate adjustments to environmental conditions.
4. Implement protective measures for the employee, other staff or visitors.
5. If no accommodation is effective in the employee’s current position, or would result in undue hardship, evaluate reassignment to vacant position that minimizes or mitigates the risk.
6. **Last resort: leave to recover or self-isolate within finite and reasonable period of time**

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Additional Examples of Potential Reasonable Accommodations without Undue Burden

1. Additional or enhanced protective gowns.
2. PPE: Masks, gloves, or other gear beyond those generally provided.
3. Erecting a barrier that provides separation from co-workers.
4. Increasing space between employee and others in meetings.
5. Relaxation of essential travel requirements for employees at high risk.
6. Elimination or substitution of specific “marginal” functions
7. Temporary modified work schedules onsite.
8. Requiring co-workers in department to wear face coverings.
9. Daily temperature checks for all co-workers with unavoidable proximity.
10. Adjusting times certain essential tasks are done – for staggered shifts.
11. Moving the location of employee’s workstation from open cubicle to private office on a temporary basis.

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Additional Principles for Compliance with Interactive and Accommodation Requirements

- Don’t forego discussion of request for accommodation that won’t be needed until the employee returns to work, after telework ends.
- An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship. The employer may discuss with the employee whether the same or a different disability is the basis for this new request and why an additional or altered accommodation is needed.
- NOTE: expect requests for accommodations due to infection control and PPE issues: allergies to latex gloves, breathing problems with face coverings, allergies or chemical sensitivities to disinfectants with strong scents or other manifestations. Always trigger an interactive process; don’t just say “infection control is paramount.”

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Employer Cannot Force Employee to Use Leave Prematurely or Unnecessarily if Reasonable Accommodations are Available

- If employee can work intermittently, employer can't mandate that the leave be taken in a block of time (whether paid or unpaid)
- Can't mandate that leave begin sooner than the employee's health care provider specifies, nor extend beyond the provider's release to return to work
- Can't mandate that employee use FMLA-CFRA leave for multiple consecutive days of sick leave unless it qualifies as 'serious health condition'
- Can't mandate that employee use leave as part of a 'light duty' or 'modified duty' assignment under workers' compensation program
- Can't require use of a job-protected leave day if it would have been a non-duty day for the employee had s/he not been on leave (consider furlough day issues)

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Factors to Consider when a Continuous Process is Required

- Is the modification or adjustment working as anticipated?
- Has the disability/limitation changed? (**e.g., improved or declined**)
- Have there been unanticipated risks to health and safety?
- Have new hazards been introduced that alter safety risks?
- Has there been a fundamental alteration in business operations?
- Have costs and/or disruption stabilized or increased?
- Is proposed discipline for reasons that may be disability-related?
- Are there objective reasons to conduct a neutral fitness for duty evaluation?
- Is the supervisor managing the employee appropriately?
- Is the supervisor managing other employees' workloads appropriately?
- Do co-workers need training or support to mitigate risks?
- Periodically re-evaluate the accommodation plan to assure that it is effective, or re-engage to make necessary changes.

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Factors to Consider in Documenting a Defensible Dialogue and Decision

1. Conduct an individualized analysis for the employee's limitations.
2. Don't assume all people with same disability (high risk underlying health condition) are similarly limited for complications for COVID 19 exposure.
3. Don't speculate about risks; stick to verified information.
4. Identify and implement necessary protocols for physical worksite: distancing, PPE, regular sanitizing of surfaces and temperature taking.
5. Appropriately address any concerns or "fears" for employee and staff.
6. Carefully work with leaders on "do's and don'ts" for communications.

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Is Undue Hardship Even a Feasible Defense for Vulnerable Workers Given Extreme Health Risks from COVID 19?

- EEOC: *"An employer does not have to provide a particular reasonable accommodation if it poses an 'undue hardship,' which means 'significant difficulty or expense.' In some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now."*
- "If a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems
- More difficult to hire temp workers for temporary positions

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Factors to Consider in Establishing Direct Threat Defense

1. Duration of the risk. Example: an employee with TB may pose a risk to health and may be contagious.
2. Nature and severity of the potential harm. Example: An employee in safety-sensitive job who has seizure disorder and who may briefly lose consciousness puts self and others at risk. However, don't make assumptions without medical verification.
3. Likelihood that potential harm will occur. Rely upon the most relevant and up to date medical verification, rather than generalized fear; particularly with mental health limitations and certain chronic health conditions.
4. Potential harm must be "imminent." Example: degenerative conditions that are not currently limiting or restrictive is a "future risk," that isn't disqualifying.

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Further Considerations for "Significant Expense or Difficulty" to Invoke Undue Hardship

- It may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking.
- It may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions.
- Interactive dialogue should be mutual good faith exploration to determine if there may be an alternative that could be provided that does not pose such problems.

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Individualized Assessment for Evaluating Undue Hardship and Direct Threat

Undue Hardship Evaluation IS

- Individualized
- Fact-based
- Comprehensive
- Determination
- Confirmed functions
- Fundamental disruption
- Consistent

Undue Hardship Evaluation is NOT:

- Generalized
- Conjecture-based
- Apprehensive
- Speculation
- Unconfirmed assumptions
- Incremental dysfunction
- Resistant

Direct Threat / Imminent Risk IS

- Objective
- Risk is current (“what is”)
- Educated

Direct Threat / Imminent Risk is NOT

- Subjective
- Risk is future (“what might be”)
- Exaggerated

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Considerations for Telework as a Reasonable Accommodation

- Employers must not single out employees either to telework or to continue reporting to the workplace on the basis of race, sex, national origin, religion, sexual preference, disability or veteran’s status.
- Restrictions that were not reasonably accommodated in the past (e.g., driving restrictions) should be re-visited, and undue hardship defenses will be more difficult to establish for individuals in vulnerable populations at high risk of serious COVID 19 complications from exposure or infection on site.
- Telework accommodations with COVID 19 are different because the restriction is from exposure onsite- not necessarily physical performance of essential functions.

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What Should the Telework Interactive Process Address

- Medical verification of limitation on working at physical worksites.
- Obtain concrete restrictions on how much onsite exposure would be acceptable and consider options for staggered shifts, other physical distancing modifications to office settings.
- Consider modified schedule, with medical verification, so that employee works part of the week remotely and reports to physical worksite only periodically and under very concrete defined terms for modification of facilities, co-worker face coverings, additional sanitizing, etc.
- Consider telework as an interim arrangement with a very specific accommodation plan that sets a time limit and opportunity for ongoing evaluation of effectiveness for productivity and performance

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Craft a Written Accommodation Plan that is Clear, Specific, Meaningful and Measurable

- Specify performance expectations, standards of conduct when interacting with peers or stakeholders online, requirements for following operating procedures.
- Timekeeping is critical for both wage and hour and managing work outflow. Face to face communications via Zoom, Skype or video calls can keep employees on track. Maintain flexibility due to the stressful conditions.
- Configuration of at-home workstation for both security and safety.
- Encourage a private, dedicated space for at-home workspace.

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What Should Written Telework Accommodation Plan Include?

- Specific medical restrictions, modifications for partial onsite or prohibition of any onsite work. Address anticipated time frame to re-address effectiveness, scope of accommodation, and any modifications.
- Any modifications to work station at home or in the physical facility for periodic on-site work.
- Expectations for operational security, continuity of key operations, records management for CPRA, backups, performance expectations, and terms for extending, suspending, or ending telework accommodation.
- Requirements for availability at all times during working hours, or will remote meetings and appointments be scheduled ahead of time. Remote meetings over phone or on camera?

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Leave as a “Last Resort” Reasonable Accommodation EEOC Emphasizes Flexibility

- The FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with COVID-19 where complications arise, or who are needed to care for covered family members who are incapacitated by a serious health condition. Leave taken by an employee for the purpose of avoiding exposure to the flu would not be protected under the FMLA.
- Mysophobia (fear of germs) is a recognized disability. If an employee indicates the disability of mysophobia, the correct employer’s response would be to allow telework as a reasonable accommodation.
- Such an employee would NOT be entitled to FMLA leave because they would not have a serious health condition, but may well be entitled to leave as a reasonable accommodation, particularly with known risk factors.

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Documenting your Process for Addressing Accommodation Requests for COVID 19

- Accommodate individuals with disabilities who are at higher risk for developing complications from COVID-19 to greatest extent possible –
- Establish a projected date to re-evaluate ongoing accommodations (like an ERTW transitional assignment). Consider: amend, suspend or end.
- Maintain complete documentation on accommodation/leave requests
- Plan for increased accommodation and leave requests
- Have strategies to limit risk of exposure to all employees
- Follow state and local orders and CDC guidance on ways to keep employees working and safe during this pandemic
- When in doubt use the ELG-PRISM hotline

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Considerations for a Variety of Leaves of Absence



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Pending Legislation would Expand Some Leave Laws

- AB 3216: Provides unlimited job protected leave for all employers of any size for family and medical leave due to COVID 19. This is in addition to the federal FFCRA and local LOA requirements.
- AB 2992: expands three separate LOAs, including relating to domestic violence (anecdotal incidents of abuse during shutdown).
- AB 2999: Imposes up to 10 days of bereavement leave for death of spouse, child, parent, sibling, grandparent, grandchild, or domestic partner, with no lengthy of service requirement. Imposes new private right of action for violations of statute.
- AB 196 and AB 664: establish versions of “conclusive presumption” of industrial injury for COVID 19 (also SB 893 presumption for public and private hospitals).

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Key Leaves and Benefits to Protect Employees

- FFCRA – FMLA Expansion and Emergency Sick Leave through 12/31/20
- FFCRA- Emergency Child Care Leave through 12/31/20
- FMLA/CFRA Leave – full 12 weeks with concurrent paid accruals
- California Labor Code leave for child care emergencies
- Disability Benefits – SDI through EDD
- Paid Family Leave Benefits – through EDD
- Unemployment Insurance Benefits – federal CARES Act
- Reasonable Accommodations – extended leave
- Employer policy or MOU leave accruals
- Employer discretionary paid administrative leave
- Regular and customary leaves unrelated to Covid-19 remain status quo

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If Employee is Unable to Telework Public Entity Must Provide Sick Leave or Expanded FMLA

- If the public entity permits or requires teleworking—and the employee is unable to perform those tasks or work the required hours because of one of the qualifying reasons for paid sick leave, then the employee is entitled to take paid sick leave.
- If the employee is unable to perform those teleworking tasks or work the required teleworking hours because he or she needs to care for a child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, then the employee is entitled to take expanded family and medical leave.

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Paid Sick Leave or Expanded FMLA Leave Intermittently While Teleworking

- If the public entity allows it and if the employee is unable to telework the normal schedule of hours due to one of the qualifying reasons in the Emergency Paid Sick Leave Act. In that situation, the employee and the employer may agree that the employee may take paid sick leave intermittently while teleworking.
- Similarly, if the employee is prevented from teleworking the normal schedule of hours because he or she needs to care for a child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, the employee and employer may agree that he or she take expanded family medical leave intermittently while teleworking.

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Employee Working at Usual Worksite May Take Sick Leave for COVID-19 Events

The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;

The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

The employee is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine;

The employee is experiencing any other substantially similar condition.

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“Regular” FMLA/CFRA for Public Entity Employees who Qualify

- Employees who qualify for full 12 weeks may use it, with concurrent leave accruals for self or close family member with serious health condition. NOTE: qualifying factors are broader in HR 2601.
- Family member preventative care is broader under both PFL and Kin Care than traditional FMLA
- DFEH guidance on CFRA – may employer send employees home if they display symptoms of COVID-19 Yes, per CDC. Employers may ask employees who exhibit symptoms of COVID-19 to go home and stay home until they have been symptom free for 14 days. Employers must provide sick leave and compensate the employee under all applicable sick leave laws. If sick leave is exhausted, employees may be entitled to other paid leave or job protected unpaid leave.

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Paid Sick Leave to Self-Quarantine

- Can an employee use paid sick leave if they need to take off to self-quarantine because they have been exposed to COVID-19 or because they have travelled to a high-risk country, even if they are not showing symptoms and do not have the virus?
- Yes. Paid sick leave can be used for preventative care for the employee or the employee's family member. Preventive care includes self-quarantine as a result of potential exposures if such quarantine has been recommended by public health authorities or federal, state, or local governments, which it has.
- Employees at high risk due to age or medical conditions should err on side of self-isolation.

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DFEH Guidance on CFRA in Context of COVID-19

- Employees entitled to 12 weeks of job-protected unpaid leave under CFRA if they cannot work because they are ill because of COVID-19 or because they must care for a family member who is ill because of COVID-19. (separate child bonding leaves unrelated to COVID-19 may continue)
- In light of the COVID-19 pandemic, it's not practical or prudent to require employees to obtain a medical certification from a health care provider within 15 days of an employee's request for CFRA leave, which is what is normally required. The health care system is overloaded and may not be able to respond to such requests and the need for leave is immediate. Employers should use their judgment and waive certification requirements when granting such leave requests.
- **HIPAA exception for disclosure of PHI to prevent a serious and imminent threat to health and safety.**

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Other Potential Leaves Requiring following LOA Processes and Designations

- It is likely that health care providers will certify COVID-19 symptoms or underlying conditions as serious health conditions. More leave requests are likely from employees who have a variety of personal illnesses – both COVID related and other illness.
- Anticipate many more “close family caregiver” leave requests under FMLA-CFRA and entity policies. CA. Kin Care and PFL (for employees who pay into SDI) cover grandparents, while FMLA-CFRA do not.
- As the schools re-open, some students may not be able to resume in person classes due to their own illness or underlying health conditions. Those specialized situations will fall under child care emergencies, but also always consider FMLA-CFRA requirements which may apply for serious health condition.

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Other Paid Leave Benefits Provided by California Law

- SDI/PFL: EDD has expanded SDI and PFL benefits for COVID-19. This means employees who contract or are quarantined due to COVID-19 may apply for SDI benefits, and similarly, employees who need to take time off to care for a family member who has contracted or is quarantined due to COVID-19 may apply for PFL benefits. The state is coordinating with the Center for Disease Control (CDC). .
- Paid Sick Leave Law for self and expanded family members – illness and preventative care. Preventative care may include self-isolation due to “at risk” category by age or chronic health condition.
- Kin Care: broader family members include spouse, domestic partner, child, parent, parent in law, sibling, grandparent or grandchild.

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What about other Leaves in Progress Unrelated to COVID-19?

- Employees on pregnancy-disability (PDL) leave before the stay-at-home order should remain on their designated leave, with appropriate paid accruals that otherwise apply.
- For employees who have not yet started their PDL, but may need reasonable accommodation due to high-risk of contracting COVID-19, use interactive process and provide accommodations as appropriate. If exposure to COVID-19 keeps them off, other leave may apply or PDL may begin – depending upon stage of pregnancy.
- When the PDL is concluded, parental child bonding leave (for CFRA eligible employees) may begin, in accordance with law or policy.
- Employees returning to work from PDL or bonding leave will use applicable COVID-19 leaves, IF the prior leave is over.

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Employers are Free to Provide other Paid Leave – Administrative or Discretionary

- May consider taking certain proactive steps when establishing a temporary policy to address absences resulting from the COVID-19 pandemic. Employers should provide employees with written notice that explains the expansion of permitted pick leave uses, the reason for the change and the circumstances, *i.e.*, that it is one-time exception for the COVID-19 coronavirus.
- Also may want to limit an employee's use for self-quarantine to 14-days (from the last known possible contact. The policy should make clear that the change is temporary and that the public entity reserves the right to discontinue the policy change at its sole discretion.
- Policies and MOUs will govern, and public entities may choose to temporarily modify their policies.

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Strong Non-Discrimination and Retaliation Provisions of California Law

- Retaliation protection applies for taking or requesting available leave or inquiring about options under every California law.
 - Applying for SDI, PFL, other Labor Code leaves, unemployment insurance.
 - Rebuttable presumption of retaliation if threats or adverse action occur shortly after protected activity.
 - Requesting a reasonable accommodation, regardless of whether it is granted..
 - Complaining about discrimination or harassment due to disability or national origin.
 - Other forms of discrimination and harassment -
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Beware All Forms of Discrimination and Harassment

- National origin: The EEOC and DFEH are receiving many complaints about discrimination, harassment and bullying against individuals of Asian descent, Review and remind employees about the CA. stringent National Origin Regulations.
- Age alone: Don't exclude applicants or employees based on age alone, unless they request accommodation or leave. The ADEA and FEHA prohibit employment discrimination against workers aged 40 and over. Don't require them to telework, or to place them on involuntary leave.
- Pregnancy/childbirth: Although the CDC has identified pregnant women as being a higher risk for severe illness if they contract COVID-19, pregnant employees are protected under Title VII of the Civil Rights Act. Employment actions based on pregnancy are employment actions based on sex, so decisions about layoffs or furloughs should not be based on pregnancy.

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A Word About this Material

This handout accompanies a presentation for CAPRI Recreation and Park Districts. While the information is accurate and up to date, it is not intended to, and does not constitute, legal advice on a specific matter.

You can reach the ELG-PRISM Hotline for questions on specific matters.