LBAEE

January 2021 News

COVID-19 Continues to Transform the Workplace

Happy New Year! Although 2020 is now (thankfully) clearly in the rearview mirror, COVID-19 will continue to affect the workplace well into the new year. A late fall surge in COVID-19 cases dominated the news headlines recently, but there are reasons to be hopeful. Pharmaceutical companies successfully developed vaccines that are now being distributed to critical health care workers, with broader distribution to the public scheduled for later this spring and summer. The State has passed new laws and regulations – such as workplace exposure notifications and enhanced workers' compensation benefits – that are effective through 2023. This month, we look at a few of the ways that COVID-19 continues to transform the workplace.

What If I Am Exposed to COVID-19 at Work? The Federal Families First Coronavirus Response Act (FFCRA) and related State laws (AB 1867 and AB 1945) that provided for up to 80 hours of emergency sick leave for workers exposed to COVID-19 expired on December 31, 2020. But new Federal or State laws may *reauthorize* a similar paid leave benefit for employees who have been exposed. It is also possible for agencies to adopt their own policy that provides for a comparable leave benefit in the absence of any Federal or State action. Agencies should encourage employees to disclose possible exposures and to quarantine rather than risk exposing others. A separate paid leave benefit for those who must isolate due to possible exposure would help accomplish that.

In the absence of a separate COVID-19 leave benefit, know that recently adopted Cal/OSHA regulations require employers to *pay* employees who are directed to isolate due either to (1) a positive COVID-19 test or (2) possible workplace exposure. The regulations do allow employers to charge an employee's sick leave accruals to cover the absence (in other words, the regulations do not require a separate leave entitlement), but they do require the employer to pay employees if they are out of sick leave.

State law – SB 1159 – also presumes that a worker is eligible for workers' compensation benefits if there is an "outbreak" on the job site. An outbreak is defined as four or more workers (or 4% of the workforce if workplaces have more than 100 employees) who contract the virus within 14-days of one another, or when a specific worksite is closed by the government due to an outbreak. An employee with an approved workers' compensation claim may have their leave time restored once the claim is accepted, but the employee may first have to wait 45 days for the claim to be accepted. If the employee remains off work (*e.g.*, with severe symptoms), he or she may be eligible for total temporary disability payments equal to two-thirds of his or her regular pay, as well as permanent disability benefits.

Another state law – AB 685 – took effect on January 1, 2021, and now requires specific reporting and notifying of positive COVID-19 cases that occur at the worksite. Employers who receive notice of a potential exposure must provide written notice to employees and their employee organization, which helps workers take necessary precautions, such as getting tested, seeking medical treatment, or complying with quarantine directives. The notice *must* identify any COVID-19-related benefits that employees are entitled, including paid leave, workers' compensation, and anti-retaliation and anti-discrimination protections. The notice must also identify the employer's disinfection and safety plan.

According to the Centers for Disease Control (CDC), and other local public health guidelines (which can be more restrictive), you are considered "exposed to COVID-19" if you come into close contact – physically six feet apart or closer – for a prolonged period – a total of fifteen minutes or more over the course of the day – with a person who is known to have or is suspected of having the virus. You are still considered exposed even if masks are worn, the contact occurred outdoors in fresh air, and/or you were further than six feet apart but in an enclosed room for more than fifteen minutes. After exposure, you need to quarantine for ten days even if you never develop any symptoms.

The new Cal/OSHA regulations define a "standard outbreak" as three or more COVID-19 cases in a workplace in a 14-day period. An employer must provide testing to every one of their employees who worked at the worksite during those two-weeks, and at least twice a week for a "major outbreak" – *i.e.,* 20 or more positive cases in a 30-day period. These requirements continue to apply until the worksite goes 14 days without new COVID-19 cases. Employees should remain off the worksite until the quarantine ends. Employers must also identify and rectify COVID-19 hazards and require physical distancing, enforce mask wearing, improve ventilation, and maximize outdoor air at work.

Can My Agency Mandate that I Get the Vaccine? The short answer is yes, but subject to the following limitations. First, requiring an employee to get the vaccine is a change to terms and conditions of employment. Therefore, the Agency must give the employee organization notice and an opportunity to bargain over the impact of the change, if requested. Second, the Agency may have to provide a reasonable accommodation to certain employees who have a valid medical or religious concern with taking the vaccine. Employees who meet this exception may be able to refuse the vaccine, but the Agency can still legally exclude those employees from entering the workplace, due to the potential imminent hazard of infecting others, at least according to recent guidance from the Federal Equal Employment Opportunity Commission (EEOC). Third, the Federal Food & Drug Administration (FDA) has approved the vaccine under an "emergency use authorization." The EEOC has not said that this limited authorization in any way prevents employers from requiring the vaccine as a condition of employment. But clearly once it receives full FDA approval, employers will be able to mandate it. Flu shots, for example, have full FDA licensure. Employers can already require employees to take that vaccine.

The EEOC also announced last month that the administration of a COVID-19 vaccine is not a "medical examination" under the federal Americans with Disabilities Act (ADA). In other words, simply administering the vaccine does not have to be "job-related and consistent with business necessity or necessitated by a direct threat." Any medical questions that may be asked before, during, or after the administration of the vaccine could constitute a "medical exam," but the EEOC recognizes that COVID-19 can satisfy this test. Regardless, any employee medical information must still be kept confidential.

Practically speaking, agencies may *encourage* – by making it available at no cost – rather than *require* employees to take the COVID-19 vaccine, at least initially. The demand for it will probably exceed the available supply for the first several months of 2021. Per public health guidance, healthcare and nursing home workers and long-term care residents will be offered the vaccine first, followed by other essential workers. For example, front-line workers and others who work directly with the community will probably get top priority. Others may have to wait. Eventually, the vaccine will be available to anyone who wants it. That may be when employers decide to begin requiring it.

Can My Agency Share My Medical Information? No. At least not without your consent. Many people assume that the Federal Health Insurance Portability and Accountability Act (HIPAA) restricts an employer from disclosing medical information. But HIPAA only applies to specific "covered entities" such as health plans, healthcare providers, and other third-party administrators. Most public agencies do not qualify. But under State law –

the Confidentiality in Medical Information Act (CMIA) – an employer may not disclose your medical information, absent your written consent, unless a limited exception applies. In fact, the Agency is only entitled to know if you can perform the essential functions of the job. The Agency cannot inquire as to the medical cause of your inability to perform the job. If you require a reasonable accommodation, the Agency can only ask about your functional limitations related to your ability to perform the job and must keep any medical information confidential and in separate files. They must also instruct employees who handle confidential medical information about any procedures that are in place to help ensure confidentiality. The CMIA also restricts an employer from disclosing your medical information to third parties.

When it comes to COVID-19, your Agency may require that you disclose the result if they have reason to think you were exposed. Your Agency must keep the diagnosis and any written test results confidential or they risk violating the CMIA. Your Agency can disclose your identity and the fact that you tested positive for COVID-19 to public health authorities (for purposes of contact tracing) but they should not disclose this information to your co-workers. If you were at work while you were potentially contagious, your Agency can disclose to others the potential that they were exposed, but they should do so without revealing any self-identifying information (such as your name) and should do so through the least intrusive means possible. For example, a mass notification that identifies your diagnosis to employees outside your regular work area is inappropriate.

Can My Agency Restrict What I Do During Non-Work Time? No. But they can require you to quarantine consistent with public health guidelines due to your activity away from work. For example, at the onset of the pandemic, public health guidelines (the original "shelter in place") restricted travel outside your geographic area. As summer approached, travel restrictions were gradually loosened. But the late fall surge of cases (especially beginning around Thanksgiving) revived those restrictions and required physical distancing from anyone not in the immediate household. As a result, many agencies adopted or revived policies on travel during non-work time. These policies – or changes to existing policies – are negotiable because they affect terms and conditions of employment. Common requirements include notifying the Agency of any travel, and to telecommute or quarantine when you return. In other words, you can do what you want during your non-work time, but the Agency may restrict you from returning to the worksite consistent with any public health guidelines. If that happens, you may need to use your own accrued leaves if you want to be paid while quarantining due to travel.

How Can We Ensure Restrictions are Followed at Work? Speaking of which, it is typically best to memorialize any COVID-19 related benefits, rules, or protocols in a specific COVID policy that everyone can access and understand. These policies are negotiable. It should be tailored to local public health guidelines, which can change. For example, some (but by no means all) agencies, which had re-opened to the public in the late spring, summer, or early fall, began shutting down operations to the public again last month. A COVID-19 policy can be written in a way that evolves consistent with these constantly changing public health guidelines. If not, know that you may need to revisit specific aspects of the policy from time to time to ensure it is still applicable given the current conditions.

One provision to consider is an enforcement mechanism. Who is responsible for enforcing violations of the policy? What is the procedure to raise a violation? For example, a co-worker or resident may not be complying with the rules concerning facemasks. Whose responsibility is it to confront that person about complying with the rules? Too often, these issues are not addressed in a written policy. Practically speaking, the responsibility may fall to those who work the public counters or are on the front lines interacting with employees, residents, and businesses. If you are uncertain about what to do, raise the concern with your direct supervision, and consider informing Human Resources too. If the Agency fails to take the proper corrective action, contact your employee organization, and consider filing a formal grievance.

Conclusion: Although the future would appear brighter, COVID-19 will continue to transform the workplace in the months ahead. These challenges can be resolved mostly through voluntary cooperation, empathy for others, and a little common sense. But know that your employee organization can step in to assist in resolving the constantly evolving workplace issues surrounding COVID-19 in the months ahead.

News Release - CPI Increases!

The U.S. Department of Labor, Bureau of Labor Statistics, publishes monthly consumer price index figures that look back over a rolling 12-month period to measure inflation.

1.2% - CPI for All Urban Consumers (CPI-U) Nationally

1.4% - CPI-U for the West Region

1.0% - CPI-U for the Los Angeles Area

1.1% - CPI-U for San Francisco Bay Area (from October)

1.7% - CPI-U for the Riverside Area

1.6% - CPI-U for San Diego Area

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to your professional staff.

Question: HR just sent a form titled "Notice of Outside Employment." They said they sent this to all employees as a reminder that the City requires notification and approval for other employment (for instance, self-employed or part-time with another employer). I was directed to complete the form. It says there is a section in our personnel rules that lists "Incompatible Activities." I must submit it first to my Director, and then to the City Manager, for approval/denial. It is 1-page, but requires the name, location, hours, days, and nature of the outside employment, as well as contact info (name, title, and phone) for someone who can verify it. I must also attest that the City Manager will determine whether this activity is compatible with my City employment based on the criteria stated in Gov't Code Section 1126, and approval expires one year after the date of issuance and it is my responsibility to submit a renewal request. Can they make me complete this form? I have my own catering business that I do in my spare time (holidays, graduations, *etc.*). It does not interfere with my work. I do not think the City has the right to know what I do on my own time. If I disclose this, can they deny me the right to work a second job? I thought California was "at-will".

Answer: Yes, they can require you to complete the form. California Government Code 1126 states: "Each appointing power may determine, subject to approval of the local agency, and consistent with the provisions of Section 1128 where applicable, those outside activities which, for employees under its jurisdiction, are inconsistent with, incompatible to, or in conflict with their duties as local agency officers or employees." Your City can request that you disclose that work to determine if you are performing outside duties incompatible with your duties at the City. Though your work as a caterer is not likely going to conflict with your duties as a City employee, other jobs could conflict with City employment. For example, a Public Works Director who consults with

a construction firm that bids on public works projects at that City. You can choose who and where you work for, but the City can require that it not interfere with your role as a City employee.

Question: I recently became a new father this month and I want to know what my rights are regarding time off to bond with my new child. I used my own accrued leave to cover my absences for the delivery and shortly thereafter. I am heading back to work this week (virtually) and my preference would be to take intermittent leave for bonding because I currently telecommute, I have enough work to do for the foreseeable future, and I am not interested in taking the full 12 weeks off consecutively right now. But I would like to take some time off. I would like to propose alternating one-week on and one-week off, but before I do, I want to know if I am on solid legal ground for making this request. Also, how much notice do I need to provide? Do I have to use my own leave concurrently or can I save some or all of it for after I have used all my bonding time? Please advise.

Answer: Congratulations on becoming a new dad! Most public employees are eligible for up to twelve weeks of *unpaid* baby-bonding leave under the California Family Rights Act (CFRA). Employers are not required to provide intermittent leave for baby bonding under the Federal Family Medical Leave Act (FMLA), but it is allowed under the CFRA. The regulations say that "[t]he basic minimum duration of the leave shall be two weeks. However, an employer shall grant a request for a CFRA leave of less than two weeks' duration on any two occasions and may grant requests for additional occasions of leave lasting less than two weeks." 2 CCR §11090(d). You should request the leave as soon as practicable.

You have the right to use, and your employer may require you to use, any available accrued leave concurrently (vacation, compensation time, *etc*.). But you may be able to reserve your sick leave for when you return. Because your leave is not for your own serious health condition, your employer cannot require that your sick leave run concurrently, absent your agreement. 2 CCR §11092(b)(2). You may (but are not required) to use one-half of your sick leave accrual for the illness of your child. Labor Code §233. But check your MOU and your Agency's Personnel Policy Manual, especially any sections related to taking leave time. If you have any questions or concerns, contact your professional staff.

Do they take SDI out of your paycheck? If so, you are one of the lucky dads who is eligible for eight weeks of Paid Family Leave (PFL), which includes baby-bonding. If you are paying into SDI you can file a claim with EDD to get PFL. The leave is up to eight weeks and will cover

up to 60% to 70% of your wages depending on your income. This leave can also be taken intermittently on an hourly, daily, or weekly basis as needed. An employer may not require an employee who is receiving PFL to use paid time off, sick leave, or vacation concurrently. 2 CCR §11092(b)(2-3). But they may allow you to supplement your wages with accrued leave.

Question: I am currently telecommuting because I tested positive for COVID. My Agency has a nurse who calls me every day to ask about my symptoms and medical condition and when I think I will be well enough to return to work physically. I have already provided a doctor's note and told the nurse I do not feel comfortable discussing my medical condition with my employer. Are they allowed to do this? Do I have to answer the questions? How can I get this to stop? There are public health guidelines about when it is ok to return to work after a positive test. I do not feel like they are respecting that or my privacy.

Answer: If you are telecommuting, your Agency *can* contact you during work hours. They *may* be able to ask you to self-report if you have any current COVID-19 symptoms that would preclude you from returning to a worksite. They *cannot* ask you to disclose confidential medical information, such as an underlying condition or treatment.

Recent EEOC guidance allows employers to ask employees who physically enter the workplace if they have been diagnosed with or tested for COVID-19, and to exclude from the workplace those with COVID-19 or with symptoms associated with COVID-19. The EEOC says that, for those employees who are teleworking and not physically interacting with coworkers or others, the employer generally cannot ask these questions. Since you are teleworking *because* you tested positive, they *probably* can ask if you still have COVID-19 symptoms to assess if you can physically return to the worksite.

The situation might be different if you were on an approved medical leave of absence or using your sick leave. In that case, if your employer has questions about your estimated return or your ability to perform the job, they can ask your doctor to provide clarification. They may be able to hold an interactive process meeting or request a fitness for duty upon your return.

Still, as you stated, there are public health guidelines on how long someone must quarantine after a positive test. You have also provided a note from your doctor with an expected return date. Asking you to report daily on the status of your symptoms while you are teleworking and not posing a direct threat to the workplace seems unnecessary. Consider asking Human

Resources or Management if you can simply let them know if your situation improves before your estimated return, in lieu of self-reporting symptoms daily.

Question: Can my Agency refuse to pay for job-related trainings due to a claimed budget shortfall? Every year, for the last twenty years, they have paid for my safety training. It is a requirement to maintain my certification, which also happens to be a minimum job requirement in my Inspector job description. My Department issued a notice saying they will not reimburse for it this year, claiming lack of funds in our Department budget. Although this year the trainings were in a webinar format, it still costs about $200 per training. I do not feel it is fair that I now must pay the cost because they did not budget for it. What can I do to get this reversed?

Answer: They may need to continue to pay for the training if you can establish an enforceable past practice of them doing so. A fiscal emergency may relieve them of this obligation temporarily, but your employee organization should request to meet and confer over it if that is the case. The fact that it is a requirement of the position may be helpful in persuading the Agency to continue to pay for it.

There are a couple of ways to go about getting this fixed. First, contact your professional staff, who can confirm with the Agency that this is indeed their new policy. It may be that the Department is exploring cost savings and does not fully understand the implications of making this change. Second, if they do intend to stop paying for the training, consider filing a grievance. You might be able to establish an enforceable past practice of paying for the training. It also could violate the Meyers-Milias-Brown Act, which is the law governing labor relations for most California public employees. Making a unilateral change in a benefit, such as paying for your training, without providing notice and an opportunity to bargain could be an unfair labor practice. Your employee organization can file a Charge with the Public Employment Relations Board, which enforces violations of state bargaining laws. Consult with professional staff about the best approach to having your safety training paid for once again.

Question: Due to a medical condition, I recently underwent the interactive process with my Agency to identify a reasonable accommodation that would allow me to perform the essential functions of my job or be reassigned to a different job. A week or two after the interactive process meeting, my HR sent me a document from the Agency's outside consulting company. The document summarizes, from the Agency's point of view, what they believe are the essential functions of my

job, the scope of my work limitations, and the accommodations that are available. They are asking me to sign the document. I do not feel like the document is 100% accurate. Although I feel like I am being reasonably accommodated, at least for now, I am concerned about whether signing could limit my options later if my condition worsens. Do I have to sign it?

Answer: These are often written to benefit management, to show they engaged in the interactive process and offered reasonable accommodation for your disability. The report may also try to capture the scope of your functional limitations, which can be hard to identify precisely and can change over time. The essential functions listed in the report may even conflict with your job description. These are a few of the spots to look out for.

You do not have to sign it, but consider offering revisions, first. Your Agency may realize they made a mistake, or that a specific finding requires more explanation. If it is a misunderstanding, it may be in your best interest to identify that now, rather than later. If you feel uncomfortable signing, consider writing: "My signature shows receipt of the report only and does not imply agreement with the findings." But even if you do not sign, the report can still be evidence of what occurred during the interactive process. This may impact future accommodation discussions, so the more accurate it is now, the better.