

Managing in the Age of COVID-19: A Practical Approach

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Essential workers trying
to process the 35th policy
change in the last 3 weeks

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“What to do when bringing back employees” was initially identified as the topic for the seminar

- A few weeks ago, that was the topic on the mind of everyone
- “How can we compete against the \$1000+ weekly Unemployment Benefits” was the consistent refrain

But somehow that feels like ages ago

- Additional flexibility in the PPP forgiveness has dropped that down the ladder of importance
- Or is it that continued viral surge has just overtaken it?

We don't have the time to cover everything

One idea was to focus on the various agencies to whose drumbeat we are required to march

- Federal Government
- State Government
- County Officials
- City or even neighborhood requirements
- Maybe even a Landlord?

One non-exhaustive list of agencies and some of their concerns:

- DFEH and EEOC
 - Civil Rights — Harassment and Retaliation — no “Kung Flu” references
 - Disability and Privacy protections
- Labor Commissioner and FLSA
 - Furlough Issues
 - Wage Reductions
- EDD
 - Unemployment Benefits
 - Disability Payments

Roadmap for this Evening



- WCAB
 - Presumption of Work-Related Condition
- DOL
 - Paid Sick Leave
 - FMLA and EFMLEA
- IRS
 - Tax Credits for Paid Leave
- SBA
 - PPP Loan Worthiness
 - PPP Loan Forgiveness

That's about where I lost hope . . .

What Do We Care About Today?



We'll focus our attention on what people are really asking about

- Fine, Boggs & Perkins lawyers are buried in advice calls, as doubtless other lawyers are, too

The focus may change, but there are a handful of common themes

- Symptoms and Symptom Checking
- Leaves of Absence
- Returning to Work

CDC Regularly Updates the List:

- Fever or chills
- Cough
- Shortness of breath or difficulty breathing
- Fatigue
- Muscle or body aches
- Headache
- New loss of taste or smell
- Sore throat
- Congestion or runny nose
- Nausea or vomiting
- Diarrhea

Symptoms and Symptom Checking



- Itching
- Dry skin
- Hair loss
- Redness
- Bumps or bites
- Scabs or flakes
- Irritation or inflammation
- Thickened skin
- Lesions
- Crusts
- Skin discoloration
- Paw problems????



How do we keep up?

- Keep our eye on the updates from the CDC?
- Use the HR Hotlink Symptom Tracker
 - Designed to keep track of the changing parameters
 - Helps us document compliance
- Training resources, too



Symptoms and Symptom Checking

- Symptom screenings and/or temperature checks.
- Time must be treated as hours worked for compensation purposes for each day separately.
- Use a symptom check list- available through HR Hotlink, Fine, Boggs & Perkins LLP and CNCDA



Symptoms Checks—It Is Not All Or Nothing



In making this decision, the employer should use the rule of reason.

- This means that if, for example, the employee indicates he/she has body aches one day, and upon inquiry it is discovered that the employee frequently experiences body aches (even prior to the COVID-19 pandemic), then the decision may be to return the employee to work immediately.
- The same can be said for an employee who has trouble breathing one day and upon inquiry it is determined that the employee has chronic asthma and experiences this frequently.

Symptoms Checks—It Is Not All Or Nothing



- Again, applying a reasonable approach, the employer may determine that the employee's symptoms are not likely associated with COVID-19 and may instruct the employee to return to work. In these circumstances, it may also be prudent to instruct the employee to take extra precautions such as wearing a mask in the workplace, staying away from others and not sharing workspaces or equipment until it is determined whether other symptoms occur.
- If an employee reports more than one symptom, greater precautions should be taken to prevent the employee from returning to work, especially where the employee has had no history of such symptoms.

Employee exposure to COVID-19 can come from many sources

- Co-workers, Customers, Family and/or third parties.

Exposure can be presumed if:

- There has been actual physical contact with an infected individual;
- Employee shared work stations/equipment with infected individual;
- There has been “close contact” with an infected individual (*i.e.*, within 6 ft. or in a closed space for more than 10 minutes within 72 hours prior to onset of symptoms of the infected individual).

May Continue Working, if:

- Employee does not have any COVID-19 symptoms and has not tested positive for COVID-19.
- Employee must wear a mask or face covering while at work.
- Employee must do daily temperature checks.

May Continue Working, if:

- Employee must self-monitor using symptom checker every day.
- Employee should not share work station or equipment with others.
- Employee must abide by social distancing guidelines while at work and follow the dealership's cleaning procedures.
- Employee should be told to consult with their own health care provider.

Exposed Individuals



If the employer feels uncomfortable with allowing the exposed individual to work under the CDC guidelines, the employee may be required to self-quarantine until they test negative or 14 days pass

Employer must:

- The infected employee should not return to work and must self-isolate immediately.
- Employee should be informed that they should speak with their health care provider.
- Employee should be provided a copy of the COVID-19 Leave Request Form and instructed to complete and return the form as soon as possible to consider whether FFCRA paid leave is required.

Symptoms or Positive Tests



- Identify and Inform fellow employees and possibly customers of potential exposure if they were in close contact with the infected employee.
 - Close contact occurs where an individual came in actual physical contact with the infected employee, shared a workstation or equipment with employee, and/or has been within six feet or in an enclosed space with infected employee for more than ten minutes.
 - Potential exposure should be evaluated based on a window extending back 72 hours before the onset of symptoms of the infected employee. The infected employee should be questioned as to whom the employee believes meets the above requirements. Employers must maintain confidentiality as required by the Americans with Disabilities Act (ADA) and California law and must not give out the name of the infected employee.

Symptoms or Positive Tests



- As set forth above, those with Potential Exposures but showing no symptoms should guidelines above for exposures without symptoms.
- Dealership should disinfect and clean workspaces of infected employees.
- Dealership should clean and disinfect all areas such as offices, bathrooms, common areas, shared electronic equipment routinely, especially in the departments where the infected employee worked.
- Any employee that tests positive or becomes symptomatic may not return to the worksite until one of the two “Return to Work” protocols have been satisfied (*see below*).

Symptoms or Positive Tests



- Report to Worker's Compensation as a claim.
 - There is a presumption at the present time in California that any employee who becomes ill with COVID after working is covered by Worker's Compensation. Because of the short timeline for denying a COVID claim, it is highly recommended that the dealership report the claim to Worker's Compensation so that the dealership does not lose its right to contest the claim later.

■ Report to OSHA authorities.

- ❑ If there is no indication that the infection was contracted at work or work-related, there is no duty to report to OSHA. Of course, multiple infections in the workplace (or department) may be a compelling indication that the infection was work-related. As a result, where there are multiple persons that are positive in the workplace, it is recommended to notify OSHA.
- ❑ OSHA Reports are required when the following three elements are each present:
 - Confirmed Case of COVID-19;
 - Employee had to seek medical care or be absent from work; and
 - COVID-19 was contracted by employee at work (work-related).

Symptoms or Positive Tests



- *Note:* Your local (City or County) Health Department may have additional requirements. For example, Los Angeles County instituted a requirement that public health officials be notified if three or more employees test positive within a fourteen-day period.

Symptoms or Positive Tests



- Consider whether to close facility or department. In most cases, you do not need to shut down your facility.
 - If it has been less than 7 days since the sick employee has been in the facility, close off any areas used for prolonged periods of time by the sick person and:
 - Wait 24 hours before cleaning and disinfecting to minimize potential for other employees being exposed to respiratory droplets. If waiting 24 hours is not feasible, wait as long as possible.

Symptoms or Positive Tests



- ❑ During this waiting period, open outside doors and windows to increase air circulation in these areas.
- ❑ If it has been 7 days or more since the sick employee used the facility, additional cleaning and disinfection is not necessary. Continue routinely cleaning and disinfecting all high-touch surfaces in the facility.
- **If you feel there is an outbreak (multiple cases that appear to be contracted at work), then it may be a good idea to have all non-symptomatic employees not work until they get the results of a COVID test that is negative.**
 - ❑ Again, all symptomatic employees may not return to work must satisfy the Return to Work Protocol described below.

There are two parallel protocols approved by the CDC to enable essential employees to return to work (or discontinue isolation) following symptoms or diagnosis of COVID-19. They include the time-based protocol (or symptom timing protocol) and the testing protocol.

The Symptom Timing Protocol

- Requires the employee to self-isolate for at least 10 days after the onset of symptoms but also for at least 3 days after the fever has abated (without the assistance of fever-reducing medications) and other symptoms are reduced
- By way of example, an employee who first showed symptoms on July 1 would be required to continue self-isolation until July 11 at the earliest (*e.g.*, if the fever was gone and other symptoms were milder by July 7). But if the fever did not abate (or other symptoms lessen) until July 9, then the earliest the individual could discontinue self-isolation and return to work would be July 13.

The Testing Protocol requires an employee to test negative on two consecutive COVID-19 tests sampled more than 24 hours apart.

- CDC Guidelines specifically reference molecular assay testing of respiratory specimens in connection with this return-to-work protocol. Thus antibody or other serology testing will not be sufficient to authorize discontinuance of self-isolation and a return to work.



What do we do if we believe or are informed that an employee is particularly susceptible to COVID-19 complications?

- Employees with pre-existing conditions may be entitled to reasonable accommodations such as time off or additional distancing in the workplace.
- Handle like any other disability accommodation- interactive process.

Additional Questions and Answers



- Handle discreetly to protect privacy.
- Don't force them unilaterally to go home and not work.
- Follow their health care provider's advice.

How Do We Get People to Return to Work?



People are making on the average almost \$1000 per week to be home, free of risk from COVID-19, to do nothing

- The job search requirement has been all but obliterated.
- People are afraid of coming back to work because they have their own health risks due to conditions that make them more susceptible to COVID-19: e.g., heart conditions, lung conditions, diabetes, age, mental issues (panic attacks, fear, depression) etc.
- People just don't want to be at risk or use it as an excuse to not return even though they have no risk factors based on their age or health.

How Do We Get People to Return to Work?



- People who turn down a new job — or their old one — because of coronavirus concerns may be able to continue collecting unemployment insurance, according to new guidelines from the California Employment Development Department.
 - Normally people who turn down a job offer are denied unemployment benefits, unless the position is not “comparable suitable” employment.
 - The EDD says a job could be deemed unsuitable if the workplace has not met state or county requirements for reopening.
 - A job offer could be deemed unsuitable if the employee is older than 65, has a weakened immune system or has a chronic health condition that means COVID-19, the coronavirus disease, poses more of a threat.
- The job being offered on recall could also be deemed unsuitable if it pays significantly less than previously.

How Do We Get People to Return to Work?



Put the recall in writing. Give a deadline to report for work.

- Inform them that they have the same or substantially similar job, pay and benefits.
 - Doing so may give you a cure to PPP “head count” failures.
- Inform them that they may lose their right to unemployment if they turn down the job.
 - The PPP provisions REQUIRE employers to inform the State Unemployment authorities within 30 days of any rejected offer to return to work.

How Do We Get People to Return to Work?



- Inform them that you are following all the rules regarding Reopening Protocol and Social Distancing and have a written plan in place.
- Inform them that they will no longer be considered eligible for recall if they turn down the job and unemployment only lasts until July 31, 2020 and at that time there will be a lot of people seeking any open positions.
- Instruct them that if they don't come back and wish to remain subject to recall they must put their reasons in writing to you and they need to let you know if any health care provider has indicated that they should not return or if they have any condition which prohibits them from returning.

How Do We Get People to Return to Work?



- This gives you the information you need to know if an “interactive discussion” is required to consider any “reasonable accommodation” for a medical condition.
- A sample recall letter is available also available at <https://www.employerlawyers.com/legal-updates/>.
- Send EDD Notification that employee refused reinstatement (sample notice available at Fine, Boggs & Perkins LLP, HR Hotlink and CNCDA).

How Do We Get People to Return to Work?



“I Can’t Come to Work Because A Family Member May Catch COVID-19.”

- EEOC updated their guidance on June 11, 2020.
- Is an employee entitled a reasonable accommodation (e.g., extended leave) to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition? No.

How Do We Get People to Return to Work?



- The ADA does not require an employer to accommodate an employee without a disability due to the family member's disability. No California state law discussion of this at this point.
- This is much different than a care-giver requests (e.g., FMLA/CFRA)
- An employee is not entitled under the ADA to telework as an accommodation to protect a family member with a disability. An employer, however, may choose to do so voluntarily.
- But don't pick and choose between employees.



EEOC says this is a request for reasonable accommodation.

- Hold an interactive discussion with employee.
- See what can be done to accommodate.
- Let them know that results are not kept and are confidential.
 - ▣ Let them conduct the screening themselves
- Accommodate for disability (including pregnancy) and/or religious reasons.

Protective Masks/Face Coverings



Updated guidance has shifted from discouragement, to neutral, to recommended, and now in many cases to mandatory.



Protective Masks/Face Coverings

- The new Industry-Specific Guidance includes broad language “strongly recommending” masks when employees are in the vicinity of others, and directing their use while at work; in offices, showrooms, or other locations; and while in vehicles.
- Most local jurisdictions go further in requiring masks
- Set an Example



Or reach out to me later

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