COVID-19 FAQs for California Employers

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Contents

The worldwide COVID-19 pandemic has had, and will continue to have, a substantial impact on the U.S. workplace. Below is a series of FAQs we have compiled based on some of the more common questions that clients with California-based employees have posed to us over roughly the past six weeks.

These FAQs are general and high-level in nature, and should not be used as a substitute for speaking with a Reed Smith employment lawyer. This is true especially because the COVID-19 situation is a fluid, rapidly evolving one, and there are many considerations that are unique to particular circumstances, industries, and jurisdictions (for example, California has numerous state and local rules and regulations that far exceed the requirements of federal workplace law).

To that end, the information contained in this memorandum is current as of **May 1, 2020.** Federal, state, and local agencies continue to issue regular updates and implement new laws, regulations, and guidance in response to COVID-19 that may impact these FAQs in the future.

Please note that this is not legal advice. To speak with a Reed Smith employment lawyer concerning any issue related to COVID-19, please contact us at rsCoronavirusEmploymentTeam@ReedSmith.com.

Equal Employment Opportunity/Privacy

1 During the COVID-19 pandemic, how much information may an employer request from employees who report feeling ill at work? [Answer updated as of May 1, 2020]

According to guidance from California's Department of Fair Employment and Housing (DFEH), employers may ask employees if they are experiencing symptoms consistent with COVID-19 (cough, fever, or shortness of breath). Any medical information obtained from employees must be kept confidential as a medical record and separately from the employee's personnel file.

2 May employers require employees to report a diagnosis of COVID-19?[Answer updated as of May 1, 2020]

Likely yes. While the DFEH has not explicitly approved asking for this information and employers should typically avoid asking questions about an employee's health condition, in light of the exigent circumstances and the highly contagious nature of COVID-19, employers may be able to require employees to report if they test positive for COVID-19, or if the employee has been in close contact with someone who has tested positive for COVID-19.

3 May an employer conduct COVID-19 testing on its employees before permitting employees to enter the workplace? [Answer updated as of May 1, 2020]

The EEOC guidance has explicitly approved COVID-19 testing by employers. However, the DFEH has not yet issued guidance addressing the same issue. If an employer is planning on testing its California employees, employers should ensure that the tests are accurate and reliable based on guidance from the FDA, CDC, or other public health authorities. Any information from COVID-19 testing should be kept confidential and separate from an employee's personnel file to limit access to the medical information.

Employers should also keep in mind that a test reveals only whether the virus is present at the time of the test and is not indicative of whether the employee will contract the virus later. Even if testing is implemented, employers should continue to require infection control practices consistent with guidance from public health officials to prevent the transmission of COVID-19.

4 May employers in California take employees' temperatures to determine whether they have a fever? [Answer updated as of May 1, 2020]

Yes. According to recent guidance from the DFEH, while taking an employee's temperature is typically a medical examination that should only be conducted in limited circumstances, based on guidance from the CDC and local public health information and guidance, employers may measure employees' body temperature for the limited purpose of evaluating the risk of that employee's presence in the workplace may pose to others as a result of the COVID-19 pandemic.

5 May employers in California take job applicants' temperatures to determine whether they have a fever? [Answer updated as of May 1, 2020]

Most likely yes once an offer of employment has been made. California's Fair Employment and Housing Act (FEHA) allows employers to require a medical examination or make a medical inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment as long as: 1) the examination or inquiry is job related and consistent with business necessity; and 2) all entering employees in the same job classification are subject to the same examination or inquiry. While the DFEH's guidance is not specific to pre-employment temperature checks, the same reasoning (preventing the spread of COVID-19 based on CDC guidance) applies to pre-employment temperature checks.

6 What information may an employer provide to other employees if an employee is quarantined, receives a COVID-19 diagnosis, or has come in contact with someone who has tested positive for COVID-19? [Answer updated as of May 1, 2020]

Employers should not reveal the name of such employee, but should notify other employees in a way that does not reveal the personal health-related information or identity of the sick employee. Not only does the FEHA prohibit the unauthorized disclosure of an employee's medical condition, but California's Constitution provides all individuals with a right to medical privacy not found in federal law. Employers can consider providing the worksite/office location and the date of the positive diagnosis/when the sick employee first started experiencing symptoms to help other employees determine if they have been potentially exposed.

Employers should advise the sick employee to follow the most current local, state, or federal public health recommendations. Employers should also follow the direction of local public health departments that may include closing the worksite, deep cleaning, and permitting or requiring employees to work from home.

7 What medical documentation should employees provide to support a request for reasonable accommodation (for example, to work remotely or take leave) because they are disabled by COVID-19? [Answer updated as of May 1, 2020]

While employers may generally require an employee to provide medical documentation confirming the existence of a disability and the need for reasonable accommodation, such documentation may be difficult to obtain due to hospitals and medical providers being impacted by the COVID-19 pandemic. To the extent employers typically require medical documentation in order to grant reasonable accommodations, the DFEH has recommended waiving such requirements until such time the employee can reasonably obtain the documentation.

Furthermore, some local ordinances, like San Francisco's, have explicitly prohibited requiring a doctor's note or other documentation in order to take leave associated with COVID-19.

8 What medical documentation can California employers require employees to present in order to return to work after a leave of absence due to COVID-19? [Answer updated as of May 1, 2020]

Generally, employers can require an employee to provide a doctor's note certifying fitness for duty before allowing the employee to return to work after being sick with COVID-19. However, because the pandemic has impacted health care providers, it may not be realistic to require a return-to-work note. Instead, employers should follow the CDC guidance on return-to-work issues. In addition, some local ordinances may prohibit requiring any documentation in order to return to work, and employers should check local guidance before requiring employees to provide a doctor's note to return to work.

Paid Sick Leave

9 Does California law require that employers not covered by the Families First Coronavirus Response Act (FFCRA) provide paid sick leave? [Answer updated as of May 1, 2020]

Yes. Subject to limited exceptions, California law requires that employers provide all employees with at least 3 days (or 24 hours) of paid sick leave a year. Some cities, such as Berkeley, Emeryville, Los Angeles, Oakland, San Diego, San Francisco and Santa Monica require that employers provide more than three sick days. In addition, several cities, including Long Beach, San Jose, San Francisco, and Los Angeles, have passed local ordinances that mirror the requirements of the FFCRA, but for employers with more than 500 employees. Click here for more information about the San Jose and San Francisco ordinances and here for more information about the Los Angeles ordinance.

Furthermore, on April 16, 2020, Governor Newsom signed an Executive Order (COVID19 Supplemental Paid Sick Leave) requiring that employers of food sector workers provide up to 80 hours of paid sick leave. "Food sector worker" is defined to include workers from the canning, freezing, preserving industries; industries handling products after harvest; industries preparing agricultural products for market, on the farm; food facilities (an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption at the retail level); and workers who deliver food from a food facility.

This Executive Order is effective immediately and is meant to supplement the requirements of the FFCRA. Employers who have paid sick leave policies that are the same or more generous than the requirements of the Executive Order are exempt. For more details about the Executive Order, click here.

10 Is an employer obligated to pay out accrued, but unused sick leave in the event of terminations as a result of COVID-19? [Answer updated as of May 1, 2020]

No, unlike with accrued vacation time or PTO, California law does not require that employers pay out accrued paid sick leave time when an employee is terminated for any reason.

11 If an employee takes leave under the local ordinances providing emergency coronavirus-related leave, is the employee entitled to return to the same position? [Answer updated as of May 1, 2020]

Generally, yes. As of May 1, 2020, employees who take paid sick leave under either the San Jose, San Francisco, or Los Angeles paid sick leave ordinances are entitled to job-protected leave. The text of the Long Beach ordinance has not yet been released as of May 1, 2020, but we expect it to contain the same prohibitions against retaliation from taking leave. However, employees are not protected from employment actions that would have affected them regardless of whether they took leave. This means an employer can, for instance, terminate or furlough employees while on leave under the local ordinances (for example, as part of eliminating an entire department) as long as the employer would have taken such action even if the employee had not taken leave.

12 Can an employer require an employee to use available paid sick leave for a COVID-19 related absence? [Answer updated as of May 1, 2020]

No. Based on guidance from California's Labor Commissioner's Office (DLSE), the choice to utilize paid sick leave is the employee's decision. If an employee chooses to use sick leave, however, the employer may require the employee to take paid sick leave in at least 2 hour increments. However, the amount of leave to take is ultimately up to the employee.

13 Can an employer require an employee to use available vacation time for a COVID-19 related absence? [Answer updated as of May 1, 2020]

It depends. Based on guidance from the U.S. Department of Labor, employers that are required to provide paid sick leave under the FFCRA may not require employees to first use available vacation time for a COVID-19 related absence. Similarly, Governor Newsom's April 16, 2020 Executive Order requiring that employers provide paid sick leave to Food Sector Workers explicitly prohibits employers from requiring such workers to use any accrued paid time off or vacation time before using the supplemental paid sick leave or in lieu of.

If a California employer is not covered by either the FFCRA or the April 16, 2020 Executive Order regarding COVID-19 Supplemental Paid Sick Leave, then local ordinances will govern. Local laws, however, can vary. For example, San Francisco's Public Health Emergency Leave Ordinance prohibits employers from first requiring employees to exhaust accrued paid time off first, while San Jose's COVID-19 Paid Sick Leave Ordinance is silent on the issue.

14 Are employees entitled to any paid leave benefits to care for a sick family member? [Answer updated as of May 1, 2020]

Yes. In addition to the paid sick leave provided by the FFCRA, if an employee is unable to work because he or she is caring for an ill or quarantined family member (defined as child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or registered domestic partner) with COVID-19, he or she may also file a California Paid Family Leave (PFL) claim. PFL provides up to six weeks of benefit payments (eight weeks starting July 1, 2020) to eligible workers who have a full or partial loss of wages because, among other things, they need time off work to care for a seriously ill family member.

Wage and Hour

15 Can I reduce my employees' pay during this national emergency? [Answer updated as of May 1, 2020]

For non-exempt employees, an employer can reduce an employee's pay as long as notice is provided before the employee works under the new pay rate. It is strongly recommended that the notice be in writing. The change in pay rate should be displayed in the employee's next paystub for hours worked under this new rate. State and local minimum wage laws also need to be considered.

For exempt employees, this is more complicated. If an exempt employee works at all within the workweek, they are generally entitled to their full salary for the entire workweek. Accordingly, once notice is given of the change in salary, the change should not go into effect until the following workweek. Moreover, the new salary must meet the minimum salary threshold for an employee to remain exempt (for the administrative, executive, and professional exemptions, this is currently $49,920 for employers with 25 or fewer employees and $54,080 for employers with 26 or more employees. For exempt computer professionals, the current threshold is $96,968.33 per year).

Finally, if the salary is being reduced alongside an expected hours reduction, this may create some concerns regarding an employee's exempt status, as a salary should not be subject to deductions due to less hours being worked. The U.S. Department of Labor has issued guidance allowing for such reductions. However, because of the legal difficulties associated with this approach, especially in California, employers who are considering taking such action should consult with legal counsel.

16 Must I reimburse employees for materials (such as masks) they are required to use at work due to a state or local ordinance? [Answer updated as of May 1, 2020]

Although California generally has not mandated masks at work yet, some localities have (including the City of Los Angeles and several L.A. County cities and some Bay Area counties). Under these ordinances, masks as well as other items (such as sanitary supplies) generally must be provided to working employees by their employer. If an employee must buy his or her own mask, the employer likely must reimburse the employee for the cost, under both this ordinance and California's general statutory requirement to reimburse all reasonable and necessary business expenses.

17 Are employees who are sent home early due to work being slow, or due to a concern related to COVID-19, entitled to compensation? [Answer updated as of May 1, 2020]

Yes. You must pay an employee for all hours worked. Further, as noted above, for exempt employees, if they work at all within the workweek, they likely are entitled to their full salary for the workweek.

For non-exempt employees, not only does an employer have to pay for time the employee actually worked before being sent home, but an employer also must consider reporting time requirements under California law. Generally, reporting time requirements require an employee that reports to work, and is thereafter sent home, to be paid at least half their scheduled shift wages (subject to a minimum of two and maximum of four hours of reporting time pay).

In addition, depending on the reason that the employee is sent home, the employee may be entitled to pay under the California sick leave law, the FFCRA (if the employer is covered), local paid sick leave laws, or other employer provided paid time off policies.

18 Are there any wage and hour concerns an employer that requires its employees to undergo additional checks, such as temperature checks, upon entering and exiting the worksite, must consider? [Answer updated as of May 1, 2020]

California law treats all time the employee is under the employer's control as working time. Therefore, time spent waiting in line or undergoing these additional checks (such as temperature checks or required COVID-19 testing) must be tracked and paid for non-exempt employees. Under California law, even checks that take small amounts of time likely are not considered de minimis and can therefore result in significant wage and hour liability.

19 Our employees are furloughed and not working, should we shut off their e-mail and intranet access? [Answer updated as of May 1, 2020]

All time worked must be paid for both non-exempt and exempt employees. If an employee is furloughed, but they still continue to access and respond to e-mails and texts from clients or otherwise complete even small amounts of work, the employee is likely entitled to compensation for this time worked. Exempt employees may be entitled to their full salary for that workweek. Accordingly, it may be prudent to shut off access to Company communication systems and otherwise notify employees they should not work and must contact the Company immediately if any work is completed or requested of them.

Remote Work

20 What are some best practices employers can follow to ensure workers stay productive while working remotely? [Answer updated as of May 1, 2020]

Employers should set clear expectations at the outset of the remote work arrangement and reiterate them on an ongoing, as-needed basis. Employees should be made aware of, among other things, the Company's intended business hours, their expected schedules and availability for business needs, their productivity goals, time-keeping and break requirements (for non-exempt employees), best practices for protecting Company information, expense reimbursement parameters and policies, and remote workplace safety factors.

21 What are some of the issues specific to non-exempt employees working remotely? [Answer updated as of May 1, 2020]

Probably one of the most important issue relates to ensuring that non-exempt employees continue to follow all of the Company's time-keeping policies and procedures. Non-exempt employees should continue to make sure they accurately record all hours worked (consider whether modifications should be made to the Company's time-keeping system). They should also continue to take all rest breaks and meal periods in a timely fashion. And they should not perform any work off-the-clock or perform any overtime except in accordance with Company policies and/or with prior permission from a supervisor/manager. It may be a good idea to recirculate these policies to affected employees as a reminder of these issues.

22 Are employers required to reimburse employees working remotely for claimed expenses? [Answer updated as of May 1, 2020]

Generally, yes. When employees are required to perform work remotely (by Executive Order – as is the case with COVID-19 in California and elsewhere– or simply by the nature of the employee's work) and incur **reasonable** and **necessary** business-related expenses, their employer is required to reimburse them. This may not be the case for employees who are provided with all necessary equipment and technology from the Company or for those who are expected to, and have the capability of, performing all of their work at the Company's location and who instead **voluntarily** elect to work remotely. These exceptions are fact-specific so, employers should consult with their counsel prior to declining to reimburse expenses in these situations.

23 If expense reimbursement is required, what is and is not reimbursable? [Answer updated as of May 1, 2020]

As noted above, only **reasonable** and **necessary** expenses incurred for the employee to perform their work for the Company are reimbursable. Some common expenses include use of a personal mobile phone, home internet/Wi-Fi, a laptop or desktop computer (if not company-provided), video-conferencing equipment, etc. An employer may identify, ideally through an Expense Reimbursement Policy provided to employees, items that it will not consider for reimbursement, as well as a process to consider requests on a case-by-case basis.

24 How much reimbursement is required? [Answer updated as of May 1, 2020]

Employers should reimburse the exact amount if it is easily discernible and reasonable or, in the case of items that have mixed personal and business uses (for example, a personal mobile phone), a reasonable percentage attributable to business use. What is "reasonable" may vary across users, so employers should take care in determining an amount that in its best estimate will cover the largest percentage of employees (some ways of reaching this amount include use of formulas, data surveys, or outside consultants). An employer may consider different levels of reimbursement based on job title, function, or supervisory authority. Employers should also include a process for employees to submit requests for additional amounts, which would be considered on a case-by-case basis

25 Is reimbursement required if an employee purchases furniture or equipment as a reasonable accommodation for a disability? [Answer updated as of May 1, 2020]

If the employee provided appropriate documentation for the accommodation, the employee can perform the essential functions of their position with the accommodation, and the accommodation does not present an undue hardship, then the Company will be required to pay for this directly or reimburse the employee. It should be noted that cost is generally insufficient to establish an undue hardship. Employers are not, however, required to provide the employee's preferred accommodation if there is another available accommodation that meets the employee's restrictions (for example, a less expensive ergonomic chair). Employees should be instructed not to purchase equipment without approval from the Company.

Furloughs

26 What are some options for employers in lieu of terminations? [Answer updated as of May 1, 2020]

Employers who are looking to reduce workplace-related costs without terminating employees have several options to consider. They may furlough some or all employees (explained in further detail below), or place some or all employees on reduced, modified, or staggered work schedules (these latter approaches have been particularly popular for manufacturers). Salary or wage reductions may be another option as well. California's EDD Work Share program allows qualified employers to cut back on employee pay/hours while providing an offset through unemployment benefits to employees to make up for the difference.

In each instance, however, be sure to consider federal, state, and local regulations that may impact your decision. Salary reductions, for example, may implicate wage notice and pay equity laws. Additionally, salary reductions and other adjustments to pay must be assessed carefully to ensure that they do not violate the general rules governing exempt classification.

27 What is the difference between a furlough and a termination? [Answer updated as of May 1, 2020]

A furlough is generally defined as a period of unpaid leave from work, whereas a termination is a permanent cessation of the employment relationship. The primary distinction between a furlough and a termination is that a furlough may allow workers to be recalled and return to their jobs. A furlough can be partial (a reduction in hours) or full (not providing any hours of work to an employee), and can last for varying periods of time. During a furlough, employees may continue to receive health and certain other benefits.

28 What process should employers use to select employees for furlough? [Answer updated as of May 1, 2020]

A layoff cannot be used as pretext for discrimination or retaliation, such as terminating someone in a protected class or because they are on a protected leave of absence. While a furlough is not a termination, it still creates an adverse employment action because an employee loses hours and pay. Accordingly, employers should take care to develop a process of identifying employees for furlough using objective criteria that does not bear on any of the protected characteristics under the law (age, gender, race, color, sexual orientation, protected leave, etc.). Employers should be prepared to establish that the process was carried out in an objective, non-discriminatory manner. Accordingly, employers should consider a disparate impact analysis prior to the furlough to evaluate the demographics of those being impacted by the furlough and those that are not.

29 Can both exempt and non-exempt employees be furloughed? [Answer updated as of May 1, 2020]

Employers can furlough both exempt and non-exempt employees, but each have different considerations to keep in mind. Exempt employees can be furloughed without any obligation to pay their salary if the employer notifies them in advance, and they do not perform any work in an entire workweek. If the employee performs any work during the workweek, the employee is entitled to their entire weekly salary. By way of example, if an exempt employee starts his workweek at 8:00 a.m. on Monday, and he is notified at noon that he is being furloughed, the employer must pay the employee an entire week's worth of wages, even if he didn't work Tuesday through Friday. Rather, the employer should have notified him the Friday prior so that he received notice in advance and didn't perform any work in the workweek in which he was furloughed. In contrast, for non-exempt employees, employers can furlough without any obligation to pay for time that has not been worked.

30 Do furloughs trigger final pay obligations in California? [Answer updated as of May 1, 2020]

The DLSE has taken the position that a furlough *beyond a pay period* is treated as a termination, triggering final pay and PTO/vacation payout requirements. Courts have not adopted the DLSE's position, so employers that roll out extended furloughs without final pay should assess their risk tolerance if they are not capable of paying out these amounts upon a furlough, especially in light of potential waiting time penalties. Further analysis can be found here.

31 Do furloughs trigger Cal WARN notice obligations? [Answer updated as of May 1, 2020]

Case law suggests that a furlough beyond 4-5 weeks triggers California's Cal WARN requirements (explained more in FAQ 35, below). Under federal WARN, a furlough for a six-month period would trigger the WARN notice requirements.

32 Are employees eligible for unemployment benefits if they are furloughed? [Answer updated as of May 1, 2020]

Yes. In California, both full and partially furloughed employees are eligible to receive at least a portion of benefits so long as they satisfy the other eligibility criteria for benefits. California has waived the one-week waiting period as well as the requirement that claimants search for work.

In addition, the federal CARES Act creates a temporary Pandemic Unemployment Assistance program through December 31, 2020, that expands unemployment benefits to individuals who would not otherwise qualify for unemployment benefits, and who are unemployed, partially unemployed, or unable or unavailable to work due to COVID-19. The CARES Act also provides an additional $600 of weekly federal unemployment compensation through July 31, 2020 and extends benefits up to 13 additional weeks.

33 What else should I evaluate before proceeding with a furlough? [Answer updated as of May 1, 2020]

Furloughs present a complicated mix of business planning and legal issues that are not always apparent. For example, the costs and cost-savings of a furlough are not always obvious such as whether the employer will pay employee-side premiums for benefits given the lack of available payroll deduction? If not, how does the employer anticipate securing those premiums? Further, these short-term cost savings may lead to future litigation risks.

Right now, employers must also consider an additional cost of retaining employees, such as the costs associated with covering paid sick leave under federal, state, or local laws. Mandatory paid leave can be costly, but making furlough decisions about specific employees who are likely to seek paid leave creates a risk of a retaliation claim. On the other hand, various federal laws provide payroll tax credits which may help offset costs for employers who avoid furloughs and are therefore an element to consider.

Further, the distinction between being furloughed and being terminated may have a very strong psychological impact on your employees. Employers likely will find that furloughed employees will be easier to recall and more likely to return with a more positive approach than employees who were terminated. Implementation strategies and careful messaging will be crucial to laying the groundwork for recall regardless of whether an employer chooses between termination or furlough, but recall from furlough should be easier. As a result, employers should account for this benefit when weighing the relative cost savings of a furlough versus termination.

Pay Reductions

34 Can employers reduce employee pay as a cost-saving measure during this time? [Answer updated as of May 1, 2020]

Generally speaking, businesses can legally reduce the compensation paid to their employees, so long as it is done within certain parameters.

First, if you are going to reduce the compensation paid to an exempt employee, then, assuming such employee falls within the executive, administrative, or professional exemptions, such reduction would likely be permissible so long as:

- The employee's reduced salary is at or above the minimum exempt salary threshold in the applicable jurisdiction (California's threshold for administrative, professional, and executive exemptions is currently $54,080 (annualized) for businesses with at least 26 employees and $49,920 for those with fewer);
- The employee is given a notice informing them of their reduced salary to the extent required by law; and
- The employee does not have an employment agreement that permits the employee to resign with good reason – and thereby trigger severance pay – if the Company materially reduces his/her salary (the same holds true if the Company has a severance plan/policy).

If, on the other hand, you are going to reduce the compensation paid to a non-exempt employee, such reduction would likely be permissible so long as the second and third items above are again satisfied and the employee's reduced regular rate of pay doesn't go below the applicable minimum wage. Lastly, if any employees are subject to a collective bargaining agreement, additional actions may be necessary before undertaking the pay reduction.

Reductions in pay cannot be retroactive. That means that if any wages, including bonuses, were earned prior to the reduction, those amounts are still owed and cannot be reduced.

Notwithstanding, employers should still consult with counsel before implementing any pay reductions, as there are case-specific factors to consider.

Federal WARN and Cal-WARN Notice Requirements

35 What is the notice required under the WARN Act and Cal WARN Act, who must provide it and what events trigger it? [Answer updated as of May 1, 2020]

The federal Worker Adjustment and Retraining Notification (WARN) Act applies to employers with 100 or more (excluding part-time) employees or 100 or more employees who in the aggregate work at least 4,000 hours per week exclusive of overtime. At least 60 days advance written notice is required if there is one of the following at a single worksite: (1) a plant

closing that will affect 50 or more employees, or (2) a mass layoff that will affect at least 50 percent and 33 percent of all employees, or at least 500 employees. Affected workers, union representatives, state dislocated worker units, and local government units are all entitled to notice. A furlough of less than six months does not trigger the notice requirement, but a reduction in hours by more than 50 percent does. The WARN Act has an exception for plant closings or mass layoffs due to "business circumstances that were not reasonably foreseeable." It is yet not clear whether COVID-19 would qualify for this exception.

Cal-WARN applies to any "covered establishment" (any industrial or commercial facility or part thereof) that employs or has employed 75 persons (full and part time) within the preceding 12 months. At least 60 days advance notice is required if there is one of the following at the worksite: (1) a mass layoff during any 30 day period of 50 or more full or part time employees who have been employed for at least 6 of the 12 months preceding the date the notice is required; (2) cessation or substantial cessation of industrial or commercial operations in a covered establishment; and (3) relocation of all or substantially all of the industrial or commercial operations in a covered establishment. Short term layoffs longer than four weeks likely trigger Cal WARN. Cal WARN has a "physical calamity" exception, but it is not clear whether COVID-19 would qualify for this exception.

Notably, on March 4, 2020, California Governor Gavin Newsom issued an Executive Order (found here) that suspended the 60-day Cal-WARN notice requirement in instances where the termination, relocation or layoff is caused by COVID-19 related business circumstances that were not reasonably foreseeable at the time notice would have been required. This Executive Order does not eliminate the notice requirement, but requires employers to give notice as soon as practicable. The employer notice also must commit a "brief statement of the basis for reducing the notification period" and specific language regarding unemployment benefits.

36 What is the Work Share program? [Answer updated as of May 1, 2020]

The Work Share program of California's EDD was designed to help employers avoid furloughs by sharing the available work among employees. It allows for the payment of unemployment insurance benefits to employees whose hours and wages have been reduced. For example, instead of laying off 20 percent of a workforce, an employer could reduce payroll by 20 percent, and Unemployment Insurance would pay part of the difference in wages to employees. This approach also could help employers by reducing the need to re-hire and re-train employees when business improves. Employers must first meet certain basic parameters to qualify and must apply for the program, as described in further detail here. To participate in Work Share, at least 10 percent of the employer's regular workforce (or a unit of the workforce), and a minimum of two employees, must be affected by a reduction in hours and wages. The employees' reduction in hours and wages must be at least 10 percent, and must not exceed 60 percent.

37 Can I reduce my employees' hours? [Answer updated as of May 1, 2020]

Exempt employees must be paid their full salary for any week in which they perform any work (regardless of the number of hours worked) until and unless their salaries are specifically modified. Non-exempt/hourly employees can have their hours reduced by any amount, and must only be paid for those hours actually worked.

38 Are employees whose hours have been reduced eligible for unemployment benefits? [Answer updated as of May 1, 2020]

Generally, yes. Non-exempt employees who are working less than their normal hours may be eligible for partial unemployment benefits through California's program and the full $600 through the federal CARES Act program.

39 Do employers who reduce hours have to submit the EDD's Notice of Reduced Earnings form? [Answer updated as of May 1, 2020]

California previously required employers who reduced employee hours to notify the state and provide workers with a Notice of Reduced Earnings form. However, due to the COVID-19 pandemic, employers are currently NOT required to provide employees with the Notice of Reduced Earnings form that they may have used in the past.

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