



Coronavirus - A Checklist for California Employers

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The Novel Coronavirus (COVID-19) has been declared a global emergency by the World Health Organization and has caused ripple effects through the community, economy, and everyday life. Employers can use the following checklist to navigate the complicated legal issues they face in today's ever-changing landscape.

EXECUTIVE ORDERS

Do you have to shut down due to an applicable government order?

- Review the California **“Stay at Home”** Executive Order issued by Governor Newsom on March 19, 2020, the **“Essential Critical Infrastructure Workers”** list, and any other local, County and City orders to determine whether your business is deemed related to critical infrastructure.
- If an exception applies, identify minimal workforce needed to operate business.

FEDERAL LAW

1. H.R. 6201, “Families First Coronavirus Act”

- The leave request is between April 1 and December 31, 2020; and
- The company has less than 500 employees.

[If yes, continue to Section 1(A) and 1(B) separately]

A. Emergency Family and Medical Leave Expansion Act

- Employee requesting leave has been employed for 30 days prior to requesting the leave; and
- Employee is unable to work or telework because their minor child's school (or place of care) has been closed or their childcare provider is unavailable because of Coronavirus.

[If yes, continue]

- Provide ten (10) days of unpaid leave;
- Allow the employee to substitute any accrued vacation leave, personal leave, or medical or sick leave [including emergency paid sick leave, if applicable] during this period of unpaid leave;
- Following the unpaid leave, pay employees at two-thirds (2/3) of their regular rate of pay for the number of hours the employee would otherwise be normally scheduled to work, up to \$200 per day and up to a maximum aggregate of \$10,000 per employee; and
- Following the emergency leave of absence, restore the employee to the same or an equivalent position.
 - Employers with less than 25 employees may be exempted from job restoration requirements if the employee's position was eliminated during their leave and if the employer made reasonable efforts to place the employee in an equivalent position.

[Regardless of whether leave is granted under this section, proceed to Section 1(B)]

B. Emergency Paid Sick Leave Act

- Employee requests emergency paid sick leave on one of the six (6) basis, described below (see numbers 1 through 6);
- Provide full-time employees with up to two (2) weeks (80 hours) of paid sick leave;
- Provide part-time employees with the number of hours of paid sick time equal to the number of hours they work, on average, over a 2-week period;
- Pay employees' regular rate of pay for each emergency paid sick leave day up to \$511 per day and up to a maximum aggregate of \$5,110 per employee, when leave is taken because of: (1) a federal, state, or local Coronavirus quarantine or isolation order; (2) a health-care provider recommended the employee self-quarantine; or (3) the employee has Coronavirus symptoms and is seeking diagnosis; and
- Pay two-thirds (2/3) of an employee's regular rate of pay or minimum wage (whichever is greater) up to \$200 per day and a maximum aggregate of \$2,000 per employee, when the leave is taken because: (4) the employee is caring for someone under quarantine or medically directed self-quarantine due to Coronavirus; (5) the employee is caring for a child whose school (or place of care) closed or their childcare provider is unavailable due to Coronavirus; or (6) the employee is employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

[Editor's Note: The Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act are designed to work in concert with one another. For example, an employee who is unable to work because their child's school has closed will be entitled to pay under both Acts, including paying ten days from the sick leave portion during the unpaid ten days of the medical leave portion. For more information, [click here](#).]

2. Americans with Disabilities Act [Reasonable Accommodations]

- Determine if an employee took a leave of absence for a medical "disability;"
- If no medical "disability," restore the employee to their position;
- If a medical "disability," engage the employee in the interactive process and consider providing reasonable accommodations, which may include an extended, unpaid leave of absence.

[Editor's notes: (1) Coronavirus may be, but is not necessarily, considered a medical "disability." Complications stemming from Coronavirus or exacerbations of underlying conditions by Coronavirus may also constitute a "medical disability;" (2) A request to work from home may be a request for a reasonable accommodation. Engage the employee in the interactive process to make this determination; and (3) For more information on the Americans with Disability Act and the Coronavirus, see our blog post [here](#).]

3. Fair Labor and Standards Act [Reducing Wages or Hours]

- Reduce non-exempt employees' hours or wages, do not decrease their wages below minimum wage, continue paying overtime, and continue enforcing meal period/rest break policies (or pay meal/rest premiums); and
- Reduce salaried employees' hours or wages, continue paying all weekly wages for any week that they perform work.
 - If a salaried employee's wages or hours are reduced, and they no longer satisfy the salary basis, convert that employee to an hourly, non-exempt employee.

4. Workers Adjustment and Retraining Notification Act [Layoffs/Reductions in Force]

- Before shutting down a single site of employment or undertaking a mass layoff, consider first allowing employees to work remotely, reducing employees' hours temporarily, or reducing employees' pay temporarily.

[If you considered, continue]

- Employer has over 100 employees, excluding part-time employees; or
- Employer has 100 or more employees, including part-time employees, if the employees collectively work at least 4,000 hours each week excluding overtime.

[If yes, continue]

- An “employment loss” of at least 50 or more full-time employees is occurring as a result of:
 - An employment termination other than a discharge for cause, a voluntary departure, or retirement;
 - A layoff exceeding six months; or
 - A reduction in work hours of more than 50% during each month of a six-month period.

[Editor’s Notes: (1) Determine if the employment loss will exceed six months prior to proceeding; (2) Employees offered a reassignment or transfer are sometimes not considered to have experienced an employment loss. To avoid an “employment loss,” employees must be placed in a similar or equivalent position under the same terms and conditions of employment and for similar wages and benefits; (3) Employers must look ahead 90 days and look back 90 days from each employment loss to take into account both planned and completed employment losses; and (4) If there is a plant closing or mass layoff that triggers the WARN Act, all other employment losses within 30 days of the triggering event are aggregated with it.]

[If yes, continue.]

- [Plant Closing] Permanent or temporary closing of a single location or facilities/operating units within a single site of employment;
- The location is not at a temporary facility;
- The closing is a result of Coronavirus; and
- 50 or more full-time employees suffered an “employment loss” within a 30-day period; then
- Provide 60-days’ WARN Act notice to employees or their representatives, and provide notice to the state dislocated worker unit and chief elected local government official; or
- Provide pay and benefits in lieu of WARN notice; or
- Enter into severance and release agreements with employees.

[Editor’s Notes: (1) 60-days’ advanced notice may not be practical. However, there has been no guidance provided that would allow a shortened timeframe; and (2) Separate buildings or areas that are not directly connected or in immediate proximity may be considered a single site of employment.]

[If no, continue]

- [Mass Layoff] A reduction of force occurs that is not a result of a plant closing;
- The reduction in force is a result of the Coronavirus;
- 50 or more full-time employees suffered an “employment loss,” and the “employment loss” employees constitute at least 33% of active employees; or
- 500 or more full-time employees suffer “employment loss;” then
- Provide 60-days’ WARN Act notice to employees, and provide notice to the state dislocated worker unit and chief elected local government official; or
- Provide pay and benefits in lieu of WARN notice; or
- Enter into severance and release agreements with employees.

[Editor’s Notes: (1) If laying off a group of employees that may otherwise trigger WARN Act notice, do so in an objective, non-discriminatory manner; and (2) Consider offering employees severance and release agreements, described below, where 60-days’ notice is not feasible, as is likely the case here.]

[If you believe WARN Act notice is required, consider if you qualify for the following exemptions.]

- [Unforeseeable Business Circumstances Exception]
- The plant closing or mass layoff was not reasonably foreseeable when a 60-day notice would have otherwise been required; and
- The circumstance giving rise to the exception was caused by a sudden, dramatic, and unexpected action outside the employer’s control. For example, the “employment loss” is a result of an unanticipated and dramatic economic downturn or a government-ordered closing of an employment site that occurs without prior notice.

[Editor's Note: The unforeseeable business circumstances exception seems to fit with most employers suffering from Coronavirus hardship or government-ordered shutdowns. However, because the courts and legislature have not provided instruction as to whether Coronavirus-related shutdowns/layoffs qualify under the exception, you should rely on this exemption only after consulting with employment counsel.]

- [Natural Disaster Exception (rare)]
- A natural disaster occurs (for example, a flood, fire, or earthquake); and
- The plant closing or mass layoff is a direct result of the natural disaster.

[Editor's Note: It is unclear, and probably less reasonable, to rely on the natural disaster exception for Coronavirus-related plant closings or mass layoffs.]

[If WARN Act notice is required, but you wish to instead provide severance, continue.]

- [Severance] Pay all wages owing and due, including accrued and unused paid time off, if any;
- Determine if the employee is over 40-years old;
- If the employee is over 40-years old, include an Age Discrimination Enforcement Act provision, assigning a certain dollar sum to such claims;
- If the employee is not over 40-years old, do not include additional provisions; and
- After both parties have signed the severance agreement, maintain a copy of the agreement for, at least, four (4) years.

CALIFORNIA LAW

5. California Labor Code [Paid Sick Leave and Vacation/Paid Time Off]

- Employee requests to use paid sick leave or paid time off for Coronavirus-related absences;
- Allow employees to exhaust accrued, unused paid sick leave (as required under state or local law) and accrued, unused vacation/paid time off.

[Editor's Notes: (1) California paid sick leave is in addition to the emergency leaves described in Sections (1)(A) and (1)(B); (2) Employers may require employees to exhaust their vacation/paid time off, but employers may not require employees to exhaust their paid sick leave; and (3) Consider paying out state-mandated paid sick leave and paid time off up front in order for the employee to maximize other leaves or state benefits.]

6. Fair Employment and Housing Act [Reasonable Accommodations]

- Apply the same analysis described in Section 2.

7. California Labor Code [Reducing Hours or Wages]

- Reduce employees' hours or wages during, and as a result of, the Coronavirus pandemic;
- Consider providing notice, in **writing**, of the reduction in pay to the Employment Development Department; and/or
- Consider applying to the Employment Development Department's **Work Share Program**.

[Editor's Notes: (1) Please take caution that reducing a salaried employee's hours may not have an affect on their salary. Employers are required to pay employees' salaries for any week that they perform work, even if only for a limited time; (2) An employer and an employee may agree to reduce their wages, so long as those wages do not fall below the required minimum wage. If an employer and a salaried employee agree to reduce the employee's salary, please keep the salary basis for exemption in mind (e.g. for exempt status). If an employer and a salaried employee agree to reduce their wages below the salary basis (while remaining above minimum wage), that employee may require a notice of change in relationship from exempt to non-exempt status, should be given the company's meal period, rest break, and timekeeping policies, and also should begin to track their time on an hourly basis; and (3) There is no guidance provided by the Employment Development Department of whether an employer is required to provide notice of reduced earnings to it during the pandemic.]

8. California Labor Code [Teleworking/Working Remotely - Reimbursements]

- Instruct employees to work from home as a safety measure in response to the Coronavirus pandemic;
- Distribute and/or reinforce policies related to timekeeping, including prohibiting working off-the-clock, recording meal periods, and taking rest breaks to telework employees;
- Distribute and/or reinforce policies requiring teleworking/remote employees to submit documentation for expense;
- Reimburse employees for necessary business expenses after documentation is submitted.

[Editor's Note: This may include [complete or partial] reimbursements for use of cell phone plans, wifi use, printer paper, pens, etc.]

9. Furlough

- If employees cannot work remotely, consider implementing a furlough;
- Prepare a notice of the furlough to employees;
- Determine if you will pay employees during furlough or will advise them to apply for Unemployment Insurance;
- If the employer is not paying employees under furlough, provide them with information to apply for **Unemployment Insurance**;
- Consider paying employees final wages, including accrued and unused paid time off;
- Consider providing COBRA notice;
- Consider employees' rights under the Family Medical Leave Act and California Family Rights Act; and
- Consider providing California WARN Act notice.

10. California WARN Act [As Amended by Governor Newsom on 3/17/20] [Layoffs/Reductions in Force]

- Employer has 75 or more employees, including full-time and part-time employees; and
- Employees have been employed for at least six (6) of the previous twelve (12) months;
[If yes, continue.]
- [Mass Layoff] 50 or more employees are laid off during a 30-day period;
- [Relocation] All or substantially all of a covered establishment's business moves to a location 100+ miles away; or
- [Closing] The business has closed all or substantially all of the operations in a commercial establishment; and
- The layoff, relocation, or closing was a result of Coronavirus-related "business circumstances that were not reasonably foreseeable as of the time that notice would have been required."
[If yes, continue.]
- Provide written notice to affected employees and their representatives, the California Employment Development Department, the local workforce investment board, and the chief elected official of each city and county in which the business operates;
- Consistent with the federal WARN Act, provide as much notice as practicable, and, when notice is given, briefly describe the basis for reducing the notice period; and
- Include the following statement in the notice: "If you have lost your job or been laid off temporarily, you may be eligible for Unemployment Insurance (UI). More information on UI and other resources are available for workers at <https://www.labor.ca.gov/coronavirus2019>."
[If yes, continue.]
- Provide employees with information on how to apply for **Unemployment Insurance**;
- Pay employees final wages, including accrued and unused paid time off;
- Provide COBRA notice; and
- Provide a notice of change in relationship.

[Editor's Note: Governor Newsom's Executive Order references the federal WARN Act "unforeseeable business circumstances" exception, which may strengthen an employer's argument of reasonableness in relying on that exception on a federal level.]

11. Check Local Regulations for Additional Requirements

- Check county regulations for additional requirements related to the Coronavirus, including as to paid sick leave.

12. Consider State Benefits

- Review state benefits provided by the California Employment Development Department.

A. Consider State Benefits Available to Employers

- Consider applying to the Unemployment Insurance **Work Sharing Program**, which helps employers retrain employees and may partially offset reductions in hours or wages, up to 60%, with Unemployment Insurance benefits.

[Or consider]

- If closing your business or planning [temporary] layoffs, consider contacting the Rapid Response team to discuss options for avoiding layoffs or to provide on-site services to assist workers facing job loss. *See [Rapid Response Services for Businesses Fact Sheet \(DE 87144RRB\) \(PDF\)](#)* or contact **America's Job Center of CaliforniaSM**.

B. Inform Employees of State Benefits

- [Employees Unable to Work Due to Having or Being Exposed to Coronavirus] Employees who are unable to work because they have been exposed to or have been diagnosed with Coronavirus may file a **Disability Insurance** claim. These benefits amount to approximately 60-70% of the employee's wages. Notably, Governor Newsom's March 12 **Executive Order** waives the one-week, unpaid waiting period for collectible benefits.
- [Employees Unable to Work Because They are Caring for a Family Member]
- Employees who are unable to work because they are caring for a family member who is diagnosed with Coronavirus or who has been quarantined may file a **Paid Family Leave** claim. Paid Family Leave provides up to six (6) weeks of payment of benefits for approximately 60-70% of the employee's wages.
- [Employee's Child's School Closed]
- Employees whose child's school is closed *may* be eligible for **Unemployment Insurance**, if they must miss work to care for the child. School closure benefits are not guaranteed. The Employment Development Department will interview the employee over-the-phone to determine if that employee is eligible.
- [Employees Whose Employers Have Temporarily Shut Down or Who Have Had Their Work Hours Reduced]
- Employees whose employer has temporarily shut down or have had their work hours reduced as a result of Coronavirus may seek partial wage replacement by filing an **Unemployment Insurance** claim. Employees may receive up to \$450 of benefit per week. Governor Newsom's March 12 **Executive Order** waives the one-week waiting period, so employees may collect benefits as soon as they are out of work.
- [Independent Contractors/Consultants]
- Independent contractors may be eligible for Disability Insurance, if they have elected coverage under the Disability Insurance Elective Coverage and have paid quarterly premiums. Such benefits are not provided through the employer, and the employer need not take any action related to the contractor's state benefits, if any.

13. Review and Comply with Company Policies

- ❑ It is important for employers to review and comply with their written policies while dealing with Coronavirus.

Any misstep in implementing remote working agreements, reductions in hours or wages, furloughs, layoffs or reductions in force can be costly. Employers should be cognizant of their continued obligations under existing laws, including anti-discrimination laws under the ADA and FEHA as well as leaves of absence under the FMLA/CFRA. This checklist is designed to assist with your strategy, but it should not be relied on or substituted for company-specific advice from your employment counsel.

Sheppard Mullin is committed to providing employers with updated information regarding COVID-19 and its impact on the workplace. Stay informed on legal implications with Sheppard Mullin's Coronavirus (COVID-19) Insights [page](#).

As you are aware, things are changing quickly and there is no clear-cut authority or bright line rules. This is not an unequivocal statement of the law, but instead represents our best interpretation of where things currently stand. This article does not address other the potential impacts of the numerous other local, state and federal orders that have been issued in response to the COVID-19 pandemic, including, without limitation, potential liability should an employee become ill, requirements regarding family leave, sick pay and other issues.

This alert is provided for information purposes only and does not constitute legal advice and is not intended to form an attorney client relationship. Please contact your Sheppard Mullin attorney contact for additional information.

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