Professional Perspective

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# Avoiding Pandemic-Driven Employment Litigation in California

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The California government's response to the pandemic has created employment litigation pitfalls for employers. Employers need to navigate Governor Gavin Newsom's May 2020 guidelines for reopening businesses, as well as the law passed in September 2020 designed to supplement the federal Families First Coronavirus Response Act. That law requires private employers with 500 or more employees to provide up to 80 hours of Covid-19-related supplemental paid sick leave to employees who leave their homes to perform work. Cal. Labor Code §§ 248 et seq. (2020)

The guidance that follows is designed to assist California employers' efforts to issue spot and avoid those pitfalls as they press to get back to a form of business approximating "business as usual."

## Managing the Remote Work Exodus

Many employers have been fortunate enough to be able to allow their employees to work from home in response to the various stay-at-home orders. While this workforce transition often maximizes social distancing while maintaining productivity, it is not without litigation risks.

California Labor Code 2802 represents one such risk. It requires employers to reimburse employees "for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties." While many employers attempt to satisfy this reimbursement requirement by issuing equipment—laptops, printers, ink, paper, phones, etc.—there are other associated expenses and costs that can be difficult to isolate and adequately cover, such as work-related increases to electricity, telephone, cell phone, internet, and other utility costs.

Further still, California courts have held that employees are entitled to reimbursement of the business use of a personal phone even if that use does not result in an increase to their monthly bill. As a result of these reimbursement challenges, class action and representative action claims for at-home work expense reimbursement are on the rise.

Employers are taking two approaches to forestall these claims: implementing monthly accountable expense reimbursement plans, and non-accountable expense reimbursement plans.

Under the accountable plan method, each employee submits an expense report itemizing his or her at-home work expenses each month. The employer then reimburses the precise amount claimed on the expense report—with or without expense verification, depending on the employer's plan. This method generates significant paperwork and processing time.

Under the non-accountable plan, the employer makes a reasonable estimate of employees' at-home business expenses and provides that amount as an estimated monthly stipend to cover such expenses. This approach cuts down on the paperwork, and most importantly, eliminates any assertion in class litigation that there has been a systematic failure to reimburse a particular expense. The best non-accountable plans also provide employees with a means for challenging the amount of their stipend and seeking an increase supported by evidence—receipts and invoices—which insulates the amount of the stipend from a generalized challenge that the stipend amount is insufficient for all employees.

Accurately capturing time worked constitutes another litigation risk inherent with an at-home workforce—a risk particular to nonexempt employees. Time-keeping systems that require an employee to boot up a computer operating system or log into a cloud server before the employee may "clock in" for the day should be avoided because the time spent logging in to access the time clock program login time goes unaccounted. Timekeeping applications on mobile phones and scanned paper time sheets can help avoid these issues.

Further still, employees may choose to clock out for lunch and continue working off-the-clock at home despite the employer's policies prohibiting off-the-clock work. One technological safeguard that some employers utilize is the implementation of a 30-minute lock-out program ensuring that employees are not working on their employer-provided computers during the entirety of their 30-minute meal breaks.

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Another "low-tech" safeguard that some employers use is the inclusion of attestations on timesheets and time clock systems where employees expressly verify with every daily work time submission that they were provided with their 30-minute duty-free meal break and that they did not work off the clock. The resulting attestation evidence makes class and representative action litigation unappealing for claimants as it renders any allegations of widespread off-the-clock work implausible.

## Avoiding Discrimination When Employees Return

As workforces begin returning to work on site, the pandemic presents new kinds of litigation risks that might not be immediately apparent.

For example, the Centers for Disease Control and Prevention have advised that individuals 65 years of age and older and individuals with various underlying medical conditions are at an increased risk for severed illness stemming from Covid-19. What has come as a surprise to many employers is that the CDC's advisement does not justify discrimination, no matter how well-meaning and protective the employer's decisions may be.

The California Fair Employment and Housing Act (FEHA) prohibits discrimination against any individual with respect to an employment decision based on a protected characteristic. Most notably here, in light of the pandemic and foregoing CDC advisements, age, disability, perceived disability, or association with someone with a disability are FEHA-protected characteristics. Cal. Gov. Code § 12940 et seq. (2019).

Accordingly, employers planning the resumption of their business operations by recalling a portion of their workforce may not refuse to bring certain employees back to work from a layoff or furlough simply because of their age, disability, or association with someone who is at risk. As the California Department of Fair Employment and Housing (DFEH) observes, "an employer may not return only employees under age 65, even if the employer is doing so to protect its older employees from COVID-19 risks." DFEH Employment Information on COVID-19 (July 24, 2020) at page 6 of 7.

Instead, employers should prepare and implement non-discriminatory rehiring plans based on legitimate recall criteria, and then assess whether the implementation of that plan would have disparate impact on any protected group.

## Paid Sick Leave and Disability Considerations

While employers should not discriminate on the basis of age or disability when calling people back to work, employers should develop a Covid-19 response plan in addition to the employer's existing injury and illness prevention program. The response plan should set forth the employer's protocol for minimizing transmission at the workplace.

For instance, an employer may, and ordinarily should, ask all employees arriving on the worksite if they have Covid-19, are experiencing Covid-19 symptoms—cough, fever, difficulty breathing, chills, muscle pain, headache, sore throat, or recent loss of taste or smell—have been tested for Covid-19 recently, or have come in close proximity recently with someone diagnosed with Covid-19. If the employee has symptoms, or fails or refuses any screening called for in the response plan, they should be sent home to consult with their personal health-care provider.

Note, however, that sending an employee home creates another litigation risk if not handled properly. Payroll rules should be established so that the employee will be paid show-up pay equal to half their scheduled shift, with a maximum of four, and a minimum of two hours pay for the day they are sent home pursuant to the response plan.

Employers should also be mindful that these pre-admittance Covid-19 screening processes will likely identify employee medical conditions and result in requests for associated disability accommodations. Employers are reporting frequent requests by at-risk employees to be permitted to return to an at-home working arrangement. Employers often find it challenging to take the position that a work-from-home dynamic is unduly burdensome when the requesting employee was previously permitted to work from home in response to the original stay-at-home order. Further, granting the remote work accommodation request often promotes more productivity than the alternative accommodation—an extended leave of absence.

Finally, employers of 500 or more individuals must be mindful that each recalled employee who is subsequently sent home pursuant to the employer's Covid-19 response plan and protocols may be eligible for up to $5,110 in supplemental Covid-19 paid sick leave in addition to other paid leave entitlements.


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The new law, which will remain in effect through the year and likely longer, provides that an employee becomes eligible for the Covid-19 paid sick leave if the employee is subject to a federal, state, or local quarantine or isolation order related to Covid-19, the employee is advised by a health care provider to self-quarantine or self-isolate due to concerns related to Covid-19, or most relevant here, the employee is prohibited from working by the employer due to health concerns related to the potential transmission of Covid-19.

## Conclusion

While an exhaustive account of the potential California employment litigation fallout from the pandemic is not possible, employers can go a long way in stemming the tide of future claims by mixing a little forethought and planning in with their zeal to get back to business.

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