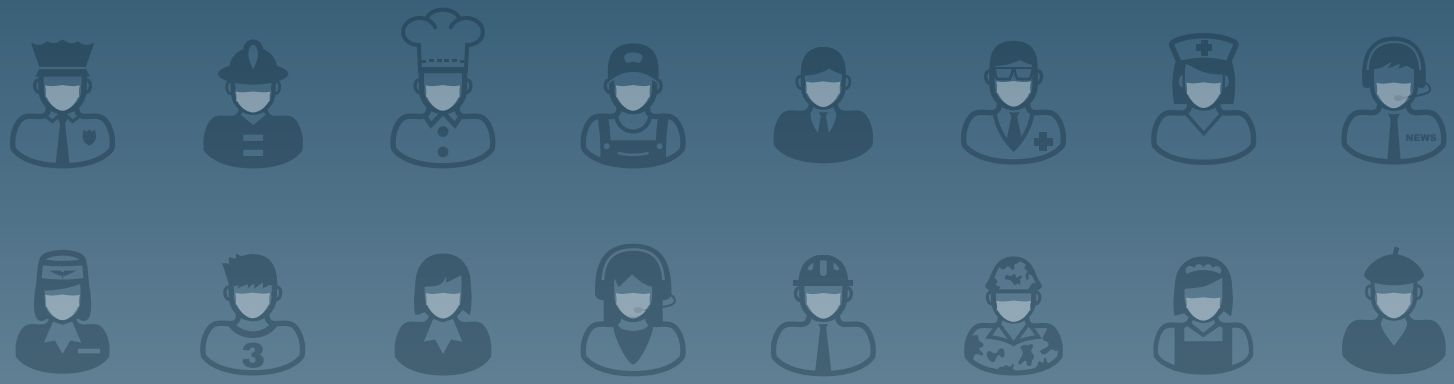

HOW CALIFORNIA BUSINESSES CAN REDUCE LIABILITY FROM COVID-RELATED EMPLOYMENT LAWSUITS

by TODD R. WULFFSON

On August 28, 2020, Governor Gavin Newsom unveiled a new, four-tier system (which replaced the prior four *stage* system) that sets forth how, if a county can show success in reducing COVID-19 transmission, non-essential businesses in that county can re-open with decreasing amounts of restrictions. Although Los Angeles and San Francisco Counties are still in Tier 1 at the time of this writing, Orange and San Diego Counties are now in Tier 2, approaching Tier 3. Most businesses in California, therefore, have re-opened already or will be doing so very soon. However, navigating this new system has forced employers to make a myriad of logistical and other decisions that will impact how, and perhaps if, they weather the COVID-19 storm. Most of these decisions also bring with them varying levels of risk from employment claims; and while the typical California employer is no stranger to lawsuits, the unique issues associated with remaining operational during a pandemic present liability concerns as novel as the new coronavirus itself.

Returning Employees

The most important law for California employers to consider when bringing back furloughed or laid off employees is the Fair Employment and Housing Act (FEHA), Cal. Gov. Code § 12940 (2019). FEHA makes it unlawful to discriminate against an individual with respect to any employment decision based on a protected characteristic, the most notable of which in the pandemic seem to be age and disability status. The issue with age is one of misplaced paternalism: because COVID-19 impacts older people more severely, the desire to "protect" older employees by bringing them back last or giving them the fewest number of working hours risks employer liability.

A similar trend has occurred with disability claims: employers have been reticent to bring back employees who report any symptoms or any contact with a possible COVID-19 patient, and the end result has been that employees

who are perceived as having a higher risk of infection are kept out of work longer or not returned at all. Since California law prohibits discrimination on the basis of "perception" or "association," these employees who are perceived as having a higher risk can sue for a violation of FEHA even if they never contract COVID-19.

To minimize the risk of discrimination claims, employers need to develop and use an objective, non-discriminatory, and legitimate rehiring plan. The employer must look not only at the stated basis for recalling employees (*i.e.* whether there is disparate treatment of any individual), but also whether the result of the recall process will have a disparate impact on any group. In other words, is the group of employees selected for recall representative of the furloughed/laid off employees as a whole?

Even if asked to return, some employees may express hesitation before a vaccine is widely available. Under FEHA, a legitimately fearful employee may be able to make out a viable claim for a real or perceived disability associated with the media-fueled fear of the virus. Employees fearful of infection who return from furlough may also become immediately eligible for paid leaves under the federal Families First Coronavirus Response Act (FFCRA), and/or it may be a reasonable accommodation to allow them to remain furloughed for several months. 29 U.S.C. § 2601 (2020). If the employee can work remotely, it may be advisable to allow them to do so for as long as practicable.

Remote Workers

As a result of improved technology and the relative ubiquity of home internet, a major shift during this pandemic has been to employees working remotely. On the surface, this reduces potential liability for employers, and effectuates the public policy of reducing COVID-19 transmission. Remote working, however, can engender hidden liability for California employers (both for individual claims, as well as representative actions such as class action and Private Attorneys General Act (PAGA) claims), primarily because of one issue—expenses. Cal. Lab. Code § 2698 (2016).

Even if remote workers are given company-issued laptops, printers and other equipment, if employees are using their own electricity, phone, internet and supplies, California has a specific (and relatively unique) Labor Code provision, Section 2802, that creates liability for the business. Cal. Lab. Code § 2802 (2016). Section 2802 requires employers to reimburse employees for all expenditures necessarily incurred by the employee in direct discharge of their duties for the employer. Unfortunately, this is not as easy to apply as it may seem, because California courts have ruled that if an employee is required to use personal equipment, such as a cell phone, for business purposes, the employer must reimburse the employee *even if the business use of the personal phone does not cause the employee to incur expense in excess of their usual, flat monthly rate*. Neither the State Labor Commissioner's office, nor California's courts, have provided any clarification for employers on the scope and amount of expense reimbursement that is required under Section 2802, leaving employers exposed to legal action where attorneys' fees are awarded to successful plaintiffs automatically.

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The best way to ward off claims of unreimbursed expenses is to provide remote workers with a monthly stipend (usually $30-$50) to cover things such as increased utilities, cell phone, internet, etc. caused by working at home. The policy should clearly state that if an employee finds that they have incurred expenses in excess of the stipend for that month, they should notify Human Resources (who may adjust the stipend as necessary), and they should submit the excess expenses for reimbursement. Assuming the stipend amount is reasonable, most employees will not go through the hassle of pro-rating their utility bills, and importantly, the employer can avoid a potential class action, because there is no *systemic* issue of failure to reimburse, just potential individual claims that involve more math than they are likely worth to prosecute.

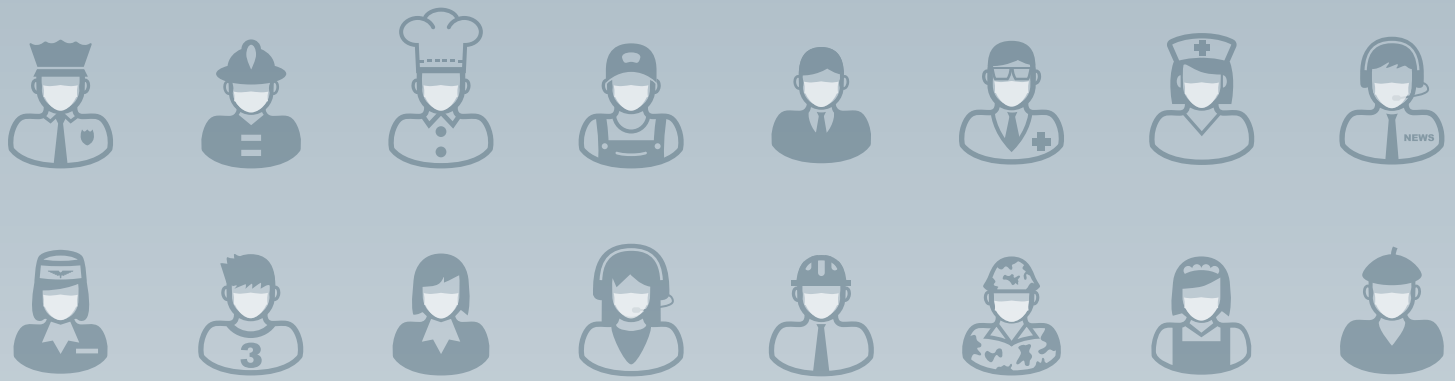
Of course, if employees are incurring driving-related expenses, or concrete expenses associated with purchasing items needed to perform their jobs, those expenses should be documented/approved, and compensated at the IRS mileage reimbursement rate and/or actual cost, as applicable, and the remote worker policy should clearly state that. For nonexempt employees, it is also a good idea to include a reminder of meal and rest period rights, what constitutes expected working hours, and the fact that working remotely is revocable by the employer at any time.

COVID-19 Screening & Testing

Regulations of the Occupational Safety and Health Administration (OSHA) require employers to take all reasonable steps necessary to ensure a safe and healthy workplace. Therefore, even though COVID-19 infection is now legally presumed to be a workers' compensation-covered claim for any employee who is diagnosed fourteen or more days after returning to work, businesses have a legal, as well as a moral, responsibility to minimize exposure at work. Reducing liability means complying with social distancing and hygiene guidelines for the business, following facial covering requirements (keep in mind that bandanas and neck gaiters are improper, the employer must pay for any required facial coverings, and must train employees on how to use them properly), and deciding on any employee testing protocols.

Regardless of whether a business is legally required to perform testing on employees entering its facility (some jurisdictions have mandated it for certain professions), or the company simply decides on its own to do so, any testing needs to be done properly, cautiously, and applied to all employees equally to reduce potential lawsuits. Employers should ensure that certain employees (*e.g.*, older, Asian American, or disabled employees) are not being singled out, and are not required to undergo additional testing.

As far as permissible types of testing, the Equal Employment Opportunity Commission (EEOC) has authorized the touchless taking of employees' temperatures. This can be self-administered by employees at home, but it is more reliable to do so at work. The generally-accepted threshold for a fever is 100.4 degrees, and keep in mind that hourly



employees must be paid for the time spent waiting in line to be screened.

Employers may ask *all* employees who will be physically entering the workplace if they have COVID-19, are experiencing symptoms associated with COVID-19, if they have been tested for COVID-19 recently, or have been in close proximity to someone recently diagnosed. Employers may *not* ask employees working remotely these questions.

Employees with symptoms or who fail or refuse the temperature check or screening, should be sent home to consult with their own healthcare provider. California law requires that employees who are sent home must be paid "show up pay," which is half their normal shift, with a minimum of two, and maximum of four, hours. This rather esoteric issue has been the basis for several class action and PAGA claims in the last several months. It is also important to remember that all medical information obtained from an employee and documented must be maintained in a confidential medical file for the employee.

If employers want to go a step further and actually test employees for COVID-19 infection, the trend seems to be that employers can mandate *viral* tests (evidence of current infection) but not *antibody/serology* tests (evidence of past infection), provided the employer pays for the test, pays for the waiting time, and the test is no more invasive than a nasal swab (*i.e.* no blood tests). In its June 17, 2020, updated guidance, the EEOC stated *it is legal* for employers to require employees to take COVID-19 viral tests. California has specifically *not* adopted the EEOC's guidance on viral testing of employees, but several counties have recommended it as testing has become more available, quicker, and more reliable. If an employer determines that COVID-19 viral testing of employees is appropriate, it must ensure that the testing procedure is legally compliant, reliable, and effective. It also must make sure that employee confidentiality is maintained—co-workers cannot be told the identity of anyone who tested positive. A good way to ensure compliance and to minimize liability is to contract with a qualified lab that handles the testing and simply provides the employer with pass/fail information about employees.

All California employers who re-open should prepare and distribute a "COVID-19 Response Plan" to supplement their Injury and Illness Prevention Program. The Response Plan explains the company's actions to minimize transmission risk in the workplace, including the testing and/or screening the company has chosen to implement. The Response Plan will likely be the first thing OSHA asks to see if the business experiences multiple infections and reports them to OSHA.

Employers need to regularly monitor directives from the CDC, OSHA, Executive Orders from the Governor, and any local health officer advisories. Communicating to employees that the company is aware of the directives and complying with them has the dual benefit of reassuring returned employees, as well as mitigating risk that someone may later claim the business was negligent in returning workers too soon or improperly.

With all that businesses have on their plate with respect to surviving the pandemic, worrying about lawsuits may seem like a less-than-immediate threat. If 2020 has taught us nothing else, however, it is that the biggest liability can come from things we never saw coming. Unfortunately, in California, lawsuits are like driving on the freeway: it does not matter how good of a driver you are—if you drive, you will eventually be in an accident; and if you are a business with employees in California, no matter how hard you try, you will eventually be sued. Therefore, plan ahead and drive defensively.

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