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MCLE Self-Study:

WEAR A MASK, NOT A BLINDFOLD: RETURNING TO WORK POST-PANDEMIC

By Kelly Scott and Pooja Nair

INTRODUCTION

All an employer has to do is turn on the lights, brew some coffee and invite people back, right? Think again. In California, employment law compliance is never easy, and having workers physically return to the workplace is no exception. Considerations include not only the ever-changing pandemic restrictions we have all lived with for well-over a year, but also a myriad of practical and legal issues that every employer will have to confront.

What follows is a discussion of some of the more important issues for California employers to review as we move forward in reopening our economy.

COVID-19 VACCINATIONS

Can an employer have a mandatory vaccine program? Both California's Department of Fair Employment and Housing (DFEH) and the U.S. Equal Employment Opportunity Commission (EEOC) have issued COVID-19 vaccination guidance. These guidances permit employers to require returning employees to be inoculated with a vaccine approved by the Food and Drug Administration (FDA), subject to certain exceptions and requirements.

The DFEH guidance¹ provides that in instituting such a mandatory policy, an employer's policies or practices cannot discriminate or harass employees or applicants based on a characteristic protected by

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the Fair Employment and Housing Act (FEHA), such as a disability or religious belief.² Further, an employer must reasonably accommodate disabilities and sincerely held religious beliefs and engage in an interactive process with the employee for that purpose.³ An employer need not provide an accommodation that would (1) impose an undue hardship; or (2) where the employee cannot perform the essential duties of his or her job even with reasonable accommodations; or (3) in situations when the employee cannot perform the essential duties without endangering co-workers or others, even with a reasonable accommodation.⁴

The DFEH guidance provides examples of accommodations for a disability-based objection to the vaccine, including permitting the employee to telework and providing on-site safeguards that protect both the employee and other employees.⁵ For a religious objection, the guidance indicates that a reasonable accommodation must eliminate the conflict between the employee's sincerely held religious belief and practices (also known as religious creed) and the vaccine.⁶ Examples provided include job restructuring, job reassignment or work practices modifications.⁷ Significantly, unless requested by the employee, an accommodation to address a religious belief or practice will not be deemed reasonable if it results in the employee being segregated from other employees

or the public.⁸ However, as with disability-based accommodations, if the employer shows that an accommodation imposes an undue hardship, the employer may exclude the employee from the workplace.⁹

An employer may not retaliate against employees who request an accommodation based on their disability or sincerely held religious beliefs.¹⁰ Further, employers must protect employees from retaliation for engaging in protected activity, such as alleging that the employer's vaccination policy intentionally discriminates on the basis of race, national origin, or another protected characteristic, or has a disparate impact on a protected group.¹¹ However, if an employee objects to receiving a vaccination because of vaccine safety concerns, the employer is not required by the FEHA to accommodate that employee.¹²

An employer, who administers a COVID-19 vaccination program, may ask employees questions related to COVID-19 that are intended to elicit information about a disability, if the inquiry is job-related and consistent with business necessity.¹³ An employer requiring an employee to receive a COVID-19 vaccination from a third party may require proof of vaccination.¹⁴

Any record regarding vaccination of an employee or applicant must be maintained as a confidential medical record.¹⁵ Additionally, the Americans with Disabilities Act requires employers to keep confidential

any employee medical information obtained in the course of a vaccination program, including pre-screening questions.¹⁶

PANDEMIC GUIDELINES AND LAWS STILL APPLY

Employers should keep in mind that regardless of the increasing number of vaccinations, certain COVID-19 rules continue to apply to every business. These rules can vary depending on the nature of the business. As local guidelines can often exceed state requirements, employers should begin by checking county restrictions on a given activity through the State's "Blueprint for a Safer Economy" website.¹⁷ In addition to complying with any local orders, employers should review the applicable state industry guidance¹⁸ and complete and post the checklist, as may be required.

Failing to comply with COVID-19 rules creates significant risks for employers. In addition to fines or closure as a result of local or state health department or Cal/OSHA action, lawsuits and federal enforcement are possible. As of April 30, 2021, there were 2,379 lawsuits (including 188 class actions) filed against employers due to alleged COVID-19 labor and employment violations, with nearly 600 in California.¹⁹ USA Today reported hundreds of these lawsuits targeting businesses for allegedly failing to provide adequate personal protective equipment (PPE), not enforcing mask-wearing or temperature checks, and failing to comply with sanitation protocols.²⁰ Additionally, the federal government announced almost \$4 million in citations arising from 300 OSHA workplace inspections for COVID-19 violations, including failing to implement a written respiratory protection program, and failing

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to properly keep records.²¹ Similarly, recent California cases include allegations that employers failed to provide sufficient PPE and failed to implement social distancing protocols.²²

As more workplaces begin to reopen, it is important for all employers to be cognizant of the need to maintain a safe workplace in compliance with pandemic guidelines. Pandemic safety measures and restrictions that are likely to remain in place to some degree include physical distancing, restrictions on in-person meetings, and requirements for hand sanitizer and traffic flow.²³ Employers must also fully compensate employees for time spent undergoing COVID-19 screenings, or for protective measures such as temperature checks. California law requires that employers compensate employees for off-the-clock work, even if this time is *de minimis*.²⁴ Additionally, businesses must keep confidential employee responses to COVID-19 screening questions, including temperature checks and questions about symptoms.²⁵

Further, employers must continue to comply with Cal/OSHA's temporary COVID-19-related emergency regulations until October 2, 2021, unless they are extended.²⁶ These regulations apply to most California employees, excluding only employees working from home, worksites which require a single employee who does not have contact with others, and employees covered by Cal/OSHA's Aerosol Transmissible Diseases standard. The regulations require that employers implement a written COVID-19 Prevention Program (CPP), as well as a training program on compliance for employees. Employers should designate a workplace infection prevention coordinator who is

responsible for these issues, as this person will still have an important role in the post-pandemic workplace.²⁷

Employers should note that the rules on notice of exposure to COVID-19 will continue under both the Cal/OSHA regulations and under AB 685, which added sections 6325 and 6432 to the California Labor Code on January 1, 2021.²⁸ Indeed, until January 1, 2023, employers learning of a worksite COVID-19 exposure must provide written notice to all employees, as well as the employers of subcontracted employees, who were on the premises at the same worksite as the qualifying individual within the infectious period, that they may have been exposed to COVID-19.²⁹

Other important continuing requirements are the Cal/OSHA regulations that state that an employer must continue an employee's earnings, seniority, and all other rights and benefits for any employee who is available for work, but who is excluded from the workplace due to a positive COVID-19 test, a local or state isolation order, or during a 14-day period after COVID-19 exposure or positivity.³⁰ If an employer can prove that an employee's exposure was not work-related, the regulations do not require continuation of pay or benefits during the period of any exclusion from the workplace.³¹

Further, as discussed below, employers should be aware that another new law adds an additional COVID-19 sick leave benefit for California employees.

SUPPLEMENTAL PAID SICK LEAVE

California employers with 25 or more employees and in-home supportive services providers are subject to SB 95, which became effective on March 29,

2021 and will remain in place through September 30, 2021.³² SB 95 added sections 248.2 and 248.3 to the California Labor Code and applies retroactively to January 1, 2021. SB 95 provides for COVID-19 supplemental paid sick leave (SPSL) for covered employees who are unable to work or telework due to COVID-19.³³

Qualifying reasons for employees to use SPSL include: the employee is subject to a COVID-19 quarantine/isolation period required by local, state or federal order or guideline (the longest minimum period will apply); the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; the employee is attending an appointment to receive a COVID-19 vaccination; the employee is experiencing symptoms related to a COVID-19 vaccine that prevent the employee from being able to work or telework; the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis; the employee is caring for a family member subject to a quarantine/isolation order or guideline or who has been advised to self-quarantine; and the employee is caring for a child whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19 on the premises.³⁴

Under the law, a covered employee is entitled to 80 hours of SPSL if that employee either works full-time or was scheduled to work, on average, at least 40 hours per week for the employer in the two weeks preceding the date the covered employee took SPSL. For part-time hours, if the employee has a normal weekly schedule, the employee is entitled to leave up to the total number of hours the employee is normally scheduled to work for the employer over two weeks.³⁵

If the employee works a variable number of hours, the employee is entitled to 14 times the average number of hours the employee worked each day for the employer in the six months preceding the date the employee took SPSL.³⁶ If the employee has worked for the employer over a period of fewer than six months but more than 14 days, this calculation is to be based on the entire period the employee has worked for the employer. If the employee works a variable number of hours and has worked for the employer over a period of 14 days or fewer, the employee will be entitled to leave based on the total number of hours the employee has worked for the employer. Covered employee determines how and when to use their available SPSL.³⁷

Covered employers are required to list any SPSL payment as a separate line item and list all available SPSL hours separate from other paid leave on all wage statements. Excluding regular sick leave, most employers may credit any SPSL hours provided to an employee since January 1, 2021, for the same purposes, such as hours taken under the federal Families First Coronavirus Response Act (FFCRA). However, in-home supportive service providers may not credit FFCRA hours. In addition to the wage statements, covered employers must post a required SPSL notice and send the notice to workers not frequenting the workplace.³⁸

Employees who are not exempt from overtime requirements must be paid for their use of SPSL at the higher of: the employee's regular rate of pay for the workweek in which SPSL was taken; the employee's total wages, not including overtime premium pay, divided by the employee's total hours worked in the full pay periods of the prior 90 days

Whatever the future holds, one thing is certain: things will not be the same.

of employment; the California minimum wage; or the local minimum wage. Employees exempt from overtime requirements must be paid for SPSL in the same way as the employer calculates wages for other forms of paid leave time for these employees. SPSL benefits are capped at \$511 per day and \$5,110 in the aggregate for each employee, unless there is a federal increase in these previously established FFCRA limits.³⁹

Smaller businesses employing 25 or fewer workers that are exempt from the legislation, but that decide to provide SPSL anyway are entitled to a federal tax credit.⁴⁰

THE RELUCTANT EMPLOYEE

Everyone has had the opportunity to be vaccinated and things are opening back up. Workers have been asked to return to work, and have been informed of all the steps the business has taken to make sure that the workplace will be a safe environment. Nevertheless, some employees do not want to work because of COVID-19 and are asking to stay home. What should the employer do?

The employer first needs to find out why these employees are asking to stay home. Employees who cite health issues should be asked for a note from their medical providers. As stated above, those

with medical conditions or disabilities that prevent vaccinations and returning to work on any basis at this time may be entitled to reasonable accommodations. Those caring for someone else with health issues may be entitled to a paid or unpaid leave of absence, depending on the circumstances. Regardless, an employer must consider all leaves that might apply, such as the recently expanded California Family Rights Act (CFRA),⁴¹ federal Family Medical Leave Act (FMLA)⁴² leave, or Pregnancy Disability Leave (PDL).⁴³ Employers must also consider the use of SPSL, other paid sick leave, or accrued vacation time.

If the employee in question is not eligible for any leave of any kind, and has no paid time off remaining, the employer should explain this to the employee. The employer should also explain to the employee all that the business has done to help to prevent the spread of the virus. Vaccinations, social distancing, PPE, handwashing policies, etc. Employees need to feel that the business has done all it can to protect them. In addition, it may help employees to understand just how important their work is to the business and their co-workers.

REMOTE WORK POST-PANDEMIC

Whatever the future holds, one thing is certain: things will not be the same. For the immediate future, it is likely that state and local health departments will continue to require employers to consider allowing employees to work remotely to the extent practical. Further, pandemic restrictions still require that telework be considered for persons over the age of 65, or for those who have health conditions, or who may be pregnant. Nonetheless, regardless of any COVID-19 restrictions that may apply, it is clear that a

significant portion of employees have learned to appreciate working from home. Prudential's Pulse of the American Worker survey indicated that 68 percent of U.S. workers prefer a hybrid workplace model post-pandemic, and 42 percent would seek a different job if their employers refused to offer long-term remote work options.⁴⁴ For many businesses, this will mean that allowing remote work to some degree will be essential if their businesses are going to remain competitive and retain key employees.

Whatever the circumstances, having an employee work from home does not provide a free pass in terms of wage and hour requirements. Employers are still required to comply with the California Labor Code and Wage Orders on providing meal and rest breaks, overtime, reimbursing employee expenses associated with telework, including PPE, cell phone, personal computer, and utility costs and the like.⁴⁵ In recently filed lawsuits, employees alleged that after their employers switched to remote work during the pandemic, employees did not reimburse expenses, including PPE, cell phone, personal computer, and utility costs.⁴⁶ These cases are still being decided, but employers continuing to have employees work remotely should make sure to have a written business expense reimbursement policy that specifically addresses all employer telework expenses.

Indeed, from workers' compensation issues to the treatment of an employer's confidential information or trade secrets, all of the employment law concerns that impact an employer's premises continue to apply when employees are working remotely. Claims of discrimination or unfair treatment are also likely where an employer has failed to establish

clear standards for telework. Accordingly, a prudent employer should establish a written remote work program that addresses all eligibility and participation requirements.

RIGHT OF RECALL LAW

In terms of reopening, employers must be aware of any recall requirements that might apply. Collective bargaining agreements frequently have recall rights provisions. In addition, Los Angeles, Long Beach, San Francisco, Pasadena, San Diego, and Oakland have all established recall ordinances that apply to certain sectors. More recently, Senate Bill 93⁴⁷ added a statewide right of recall intended to assist California workers in sectors that have been especially hard hit by the COVID-19 pandemic. This new law, which added section 2810.8 to the California Labor Code and is similar to earlier city COVID-19 ordinances, became effective on April 16, 2021, and will remain in effect through December 31, 2024.⁴⁸

SB 93 applies to certain hotels, private clubs, event centers, airport hospitality operations and providers of janitorial, maintenance, or security services to office, retail, or other commercial buildings. "Hotels" are defined as residential buildings that are designated or used for public lodging or other related services with at least 50 guest rooms or suites. The definitions of "hotels" and "event centers" include contracted, leased, or sublet premises connected to or operated in conjunction with the hotel's or event center's purpose. Covered workers are those with at least six months of service in the 12 months preceding January 1, 2020, and whose most recent separation from active service resulted from a lack of business, reduction in workforce, a public health directive,

government shutdown or other economic, non-disciplinary, COVID-19-related reasons.⁴⁹

When rehiring, covered employers must offer jobs to all qualified laid-off workers in order of seniority. Those workers who previously held the same or similar position who have satisfied the six-month service requirement are considered qualified. The rehire offer must be in writing and workers must be given at least five business days in which to accept or decline the offer. The written offer must be sent to the last known address, email address and text message number. An employer may make simultaneous, conditional offers of employment, with the final hiring decision based on seniority. An employer who declines to recall a laid-off employee on the basis of lack of qualifications, and instead hires someone other than a laid-off employee, must provide the laid-off employee a written notice within 30 days—which includes the length of service of those hired in lieu of that recall, along with all the reasons for the decision.⁵⁰

The law also applies in certain cases where ownership of an employer changes, including where: (i) ownership changed after the employee was laid-off, but the new business is conducting the same or similar operations as before the pandemic; (ii) the form of organization of the employer changed after the pandemic; (iii) substantially all of the assets of the employer were acquired by another entity that conducts the same or similar operations using substantially the same assets; or (iv) the employer relocates the operations at which a laid-off employee was employed before the pandemic to a different location.⁵¹

A claim under the new law may only be brought by the California Division of Labor Standards

Enforcement. Remedies include reinstatement and damages, including front and back pay and the value of lost benefits. In addition, a violation will expose the employer to a civil penalty of \$100 for each employee and liquidated damages in the amount of \$500 for each employee, for each day an employee's rights are violated. The court may also issue preliminary and permanent injunctive relief. SB 93 also imposes liability on any corporate officer or executive, who owns or operates an enterprise and employs or exercises control over the wages, hours or working conditions of any employee.⁵²

All or any part of the new law may be waived by a clear and unambiguous valid collective bargaining agreement. California employers subject to the law should take care to abide by its terms. The statute allocates \$6 million to the Labor Commissioner for staffing resources to implement and enforce the provisions related to the rehiring and retention of workers.⁵³

CONCLUSION

Employers must be aware of all the current and changing obligations under local, state, and federal law as employees return to the workplace. Vaccination guidelines, pandemic safety protocols, remote work obligations, supplemental sick leave, and right of recall laws all present potential pitfalls for unprepared employers. ^{CLA}

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ENDNOTES

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2. *Id.* at 7.
3. *Id.* at 8.
4. *Id.* at 1, 3, 5-9.
5. *Id.*
6. *Id.* at 9-10.
7. *Id.* at 8-9.
8. *Id.* at 2.
9. *Id.* at 1, 3, 5-6.
10. *Id.* at 9.
11. *Id.* at 7-9.
12. *Id.* at 9. ("If an employee does not have a disability reason or sincerely held religious reason for not being vaccinated with an FDA-approved vaccine, the employer is not legally required by the FEHA to reasonably accommodate the employee.").
13. *Id.* at 9.
14. *Id.* at 10.
15. *Id.*
16. *Id.* See also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS, available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last visited May 5, 2021).
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22. See, e.g., *Booth v. Staples, Inc.*, 2020 WL 7348654 (Cal. Super. Ct. L.A. County, Dec. 11, 2020, No. 20STCV47390) (alleging that Staples failed to "implement proper procedures to stop the spread of COVID-19 amongst their employees and the public" including social distancing and provision of PPE); *McGhee v. Postmates Inc.*, 2020 WL 2405000 (Cal. Super. Ct. S.F. County, May 5, 2020, No. CGC-20-584341) (alleging Postmates failed to provide necessary sanitizing materials (such as hand sanitizer and disinfectants) and face coverings and/or failed to provide PPE, failed to allow for handwashing and social distancing, failed to provide proper training regarding, including the usage of PPE, and failed to compensate its couriers for time spent procuring these necessary items).
23. COUNTY OF LOS ANGELES DEPARTMENT OF PUBLIC HEALTH- ORDER OF THE HEALTH OFFICER- PROTOCOLS FOR OFFICE WORKSITES: APPENDIX D. http://publichealth.lacounty.gov/media/coronavirus/docs/protocols/Reopening_OfficeBasedWorksites.pdf (last visited May 4, 2021).
24. *Troester v. Starbucks Corp.*, 5 Cal. 5th 829, 848 (2018), *mod. on den. reh'g.* (Aug. 29, 2018) ("We hold that the relevant California

- statutes and wage order have not incorporated the de minimis doctrine found in the FLSA. The relevant statutes and wage order do not allow employers to require employees to routinely work for minutes off the clock without compensation.”).
25. See *supra* notes 15-16.
 26. CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS DIVISION OF OCCUPATIONAL SAFETY & HEALTH, *Cal/OSHA COVID-19 Emergency Temporary Standards—What Employers Need to Know*, available at https://www.dir.ca.gov/dosh/dosh_publications/COVIDOnePageFS.pdf (last visited May 11, 2021). As of the date of printing, Cal/OSHA’s temporary COVID-19-related emergency regulations were set to expire on October 2, 2021. However, those regulations are currently undergoing revisions. See <https://www.dir.ca.gov/oshsb/documents/DOSHMemorandum.pdf>.
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 36. Cal. Lab. Code § 248.2 (b)(2)(E). (West 2021)
 37. *Id.*
 38. 2021 COVID-19 SUPPLEMENTAL PAID SICK LEAVE, available at <https://www.dir.ca.gov/dlse/2021-COVID-19-Supplemental-Paid-Sick-Leave.pdf> (last visited May 4, 2021).
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 40. See Cal. Lab. Code § 248.2(a)(2); 29 C.F.R. § 826.40(b) (West 2021); IRS Form 7200, ADVANCE PAYMENT OF EMPLOYER CREDITS DUE TO COVID-19, available at <https://www.irs.gov/forms-pubs/about-form-7200> (last visited May 11, 2021).
 41. Cal. Gov’t Code §§ 12945.2-12945.21.
 42. 29 U.S.C. §§ 2611-2620.
 43. Cal. Gov’t Code § 12945.
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 45. See, e.g., Cal. Lab. Code §§ 226, 512, 2802, California Wage Orders on providing meal and rest breaks, reimburse employee expenses associated with telework, including PPE, cell phone, personal computer, and utility costs. These cases are still being decided, but employers continuing to have employees work remotely should make sure to have a written business expense reimbursement policy that specifically addresses all employer telework expenses.
 46. See, e.g., *Hess v. United Parcel Service, Inc.*, 2020 WL 6472456 (Cal. Super. Ct., Alameda County, Oct. 30, 2020, No. RG20078425) (class action based on company’s failure to provide PPE and failure to reimburse business expenses under Cal. Lab. Code § 2802); *Corbin v. Doordash, Inc.*, 2020 WL 2404998 (Cal. Super. Ct., S.F. County, May 5, 2020, No. CGC-20-584342) (alleging that plaintiffs were deprived of right to reimbursement for PPE under Cal. Lab. Code § 2802).
 47. SB 93, 2021 Cal. Stat. 16, § 2 (West 2021).
 48. *Id.*
 49. *Id.*
 50. *Id.*
 51. *Id.*
 52. *Id.*
 53. *Id.*