



COVID-19/coronavirus

EMPLOYMENT RIGHTS, PROTECTIONS, AND BENEFITS IN CALIFORNIA

Schools have been closed or shut down for weeks. The entire state of California has been on a *Stay at Home* order since March 19, 2020. Local bars, restaurants, gyms, movie theatres, and sporting events have also been ordered to shutter their doors. All *public gatherings* have been prohibited.

Employees are feeling the brunt of this pandemic and economic shut down. To try and help, the U.S. Congress passed a new law providing benefits and protections to some workers. More, numerous California laws and benefits already exist to try and help employees weather these tough times.

Many times, employers don't do the right thing. This article provides a basic overview of the California laws and the new federal laws that can help your clients weather these tough times and know their rights if they are laid off, fired, lose hours, or lose work as a result of this pandemic. This is how we as lawyers can contribute – by protecting employees' jobs and livelihoods should employers do the wrong thing when we should all be banding together to do the right thing.

The Fair Employment and Housing Act and California Family Rights Act

First, the laws in California provide

numerous protections already for workers across the state. The Fair Employment and Housing Act ("FEHA") and California Family Rights Act ("CFRA") provide various protections and rights for workers in our state.

FEHA and disease as a disability

First, under the FEHA an employer is prohibited from discriminating against an employee due to a physical or mental disability. A physical disability is defined as including "any physiological disease, disorder, condition" that affects a person's neurological or immunological,

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cardiovascular systems that limits a major life activity. (Gov. Code, § 12926, subd. (m).) More, it includes people who are regarded or treated by an employer as having this condition or who may become a physical disability in the future. Thus, someone who has coronavirus or COVID-19, or has come in contact with someone, would likely fall under this definition. This would also apply if someone is “associated with a person who has, or is perceived to have” the physical disability. (Gov. Code, § 12926, subd. (o).)

More, unlike the Americans with Disabilities Act, transient or temporary conditions may qualify as disabilities. (See *Diaz v. Federal Express Corp.* (CD CA 2005) 373 F.Supp.2d 1034, 1051-1052 [unlike ADA, FEHA has no durational requirement for evaluation of whether condition constitutes disability]; *Ross v. County of Riverside* (2019) 36 Cal.App.5th 580, 595.) However, the California Code of Regulations does say that mild conditions “such as the common cold; seasonal or common influenza” may not be a disability, though these would need to be analyzed on a case-by-case basis. (Cal. Code Regs., tit. 2, § 11065(d)(9) (B).) Because the effects of coronavirus/COVID-19 include severe respiratory issues, pneumonia, and possible death, combined with it being a pandemic and the stay-at-home orders, it is highly likely that this would not qualify as the common flu. Rather, this would be one of those temporary conditions that would qualify as a disability.

Furthermore, under the FEHA, an employer is required to engage in a good-faith interactive process and to provide reasonable accommodations for an employee’s physical or mental disability. (Gov. Code, § 12940, subs. (m)-(n).) Reasonable accommodations include leaves of absences, offering part time or modified work schedules, allowing an employee to work from home, providing paid or unpaid leave for treatment and recovery, as well as providing appropriate social distancing measures in the workplace. (Gov. Code, § 12926, subd. (p); Cal. Code Regs., tit. 2, § 11065(p)(2).)

This could even include job protection. “Holding a job open for a disabled employee who needs time to recuperate or heal is in itself a form of reasonable accommodation and may be all that is required where it appears likely that the employee will be able to return to an existing position at some time in the foreseeable future.” (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 263.) These accommodations must be provided unless the employer can prove that doing so would pose an undue hardship on them. (Gov. Code, § 12940, subd. (m); Cal. Code Regs., tit. 2, § 11068(a).)

Lastly, an employer cannot retaliate against an employee for taking or requesting a leave of absence or a reasonable accommodation.

During this coronavirus/COVID-19 pandemic, providing work from home or leaves of absences is required for all non-essential companies. The FEHA applies to all employers in California that have five or more employees. Thus, almost all employees in California have some basic protections during this pandemic.

California Family Rights Act

The CFRA is another law in California that may provide help for employees affected by coronavirus/COVID-19. The CFRA applies to employers that have at least 50 employees within 75 miles of their worksite. In order to qualify, an employee must have been employed for at least one year and have worked 1,250 hours during the last year. If an employee qualifies, the CFRA provides for up to twelve weeks of job-protected leave for a “serious health condition” of the employee or a member of their family. “Serious health condition” means “an illness, injury (including, but not limited to, on-the-job injuries), impairment, or physical or mental condition of the employee or a child, parent, or spouse of the employee that involves either inpatient care or continuing treatment, including, but

not limited to, treatment for substance abuse.” (Cal. Code Regs., tit. 2, § 11087(q).) Thus, should an employee or family member contract Coronavirus/COVID-19, they are likely to be protected by the CFRA and its federal counterpart, the Family Medical Leave Act (“FMLA”). Furthermore, as explained below, the FMLA was expanded as a result of the coronavirus/COVID-19 pandemic.

Families First Coronavirus Response Act (“Families First”)

The Families First Act went into effect on April 2, 2020 and provides an expansion of the FMLA through the end of 2020. There are two different parts of this law: (1) Emergency Family and Medical Leave and (2) Emergency Paid Sick Leave.

Under both parts of the Families First Act, employers with 25 or more employees are required to return the employee to the same position when the leave ends and cannot terminate or discriminate against an employee for having taken or requested the leave. The only exemption is for employers with fewer than 25 employees if: (1) The position no longer exists due to economic conditions or other changes in the employer’s operating conditions caused by the COVID-19 pandemic; and (2) The employer makes reasonable efforts to restore the employee to an equivalent position.

Emergency family and medical leave

Who does this law cover?

- If you have been employed for 30 days and your employer has fewer than 500 employees or is a governmental entity.
- Employees who are “unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.”

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Reason for Leave	Amount of Pay
1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;	An employee's regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate
2. The employee has been advised by a health care provider to self-quarantine related to COVID-19;	An employee's regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate
3. The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis;	An employee's regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate
4. The employee is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);	2/3 of an employee's regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate
5. The employee is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19; or	2/3 of an employee's regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.	2/3 of an employee's regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate

Are certain employers exempt?

Yes. Employers with more than 500 employees, health-care providers and emergency responders are exempt. Also, small businesses with fewer than 50 employees may be exempt if “compliance would jeopardize the viability of the business as a going concern.”

What types of leaves are covered?

Employees who are “unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.”

How much leave do I get and how much do I get paid?

- 12 weeks of paid leave
- The first 10 days of the leave may be unpaid. (Employees can use vacation or sick time for these first ten days).
- Employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period).

Emergency paid sick leave

Who does this law cover?

- If you have been employed for 30 days and your employer has fewer than 500 employees or is a governmental entity.
- Employees who are “unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.”

Are certain employers exempt?

Small businesses with fewer than 50 employees may be exempt from providing paid sick leave for an employee caring for a child if their school is closed or a childcare provider is unavailable “when the imposition of providing the leave would jeopardize the viability of the business as a going concern.”

What types of leaves are covered and how much do I get paid?

Full-time, covered employees are entitled to 80 hours of paid sick leave. Part-time employees are entitled to their average number of hours worked in a two-week period. Employees *cannot* be required to use other paid

leave before using sick time under this Act.

According to the United States Department of Labor, an employee qualifies if they are unable to work/ telework because the employee (See chart).

Employers are prohibited from (1) requiring workers to find replacements to cover their hours during time off, or (2) discharging or discriminating against workers for requesting paid sick leave or filing a complaint against the employer related to such.

Unemployment or disability benefits

As a result of the coronavirus/ COVID-19 pandemic, an employee has a wide range of possibilities for qualifying for unemployment benefits. If employees have been fired, laid off, or sent home from work on leave without pay, they can apply for unemployment benefits through California’s Employment Development Department (“EDD”).

If an employee is at home taking care of children due to school closures or can’t work due to taking care of a sick or quarantined family member, they too are eligible for unemployment.

If an employee’s hours have been reduced, they are home taking care of a family member, or their employer has shut down operations because of the coronavirus, they may be eligible for unemployment benefits that range from \$40 to \$450 per week.

If an employee is unable to work due to having or being exposed to COVID-19 (certified by a medical professional), they can file a Disability Insurance (“DI”) claim. Benefits are about 60 to 70 percent of wages (depending on your income) and can range from \$50 to \$1,300 per week.

The Governor’s Executive Order of March 12, 2020 waived the one-week unpaid waiting period. So, an employee can collect their unemployment or disability benefits for the first week they are out of work.

The stimulus package passed by the U.S. Senate on March 25, 2020, also

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provided for greater unemployment benefits. Lawmakers agreed to extend unemployment insurance by 13 weeks and include a four-month enhancement of benefits of an extra \$600 a week on top of their state benefits for four months. The program also was broadened to include freelancers, furloughed employees and gig workers, such as Uber drivers.

Your client or potential client should be encouraged to contact the EDD and file a claim with California's Employment Development Department. They can also review the California EDD website to find more information and answers to their questions. (https://edd.ca.gov/about_edd/coronavirus-2019.htm.)

Sick pay and leaves

Under the California law called The Healthy Workplaces, Healthy Families Act of 2014, employers are required to provide 24 hours (3 days) of paid sick days per year. (Lab. Code, § 246.) In Los Angeles, employers are required to provide 48 hours (6 days) per year. (See the Los Angeles Minimum Wage Ordinance.) Furthermore, the State law provides that an employer cannot "deny an employee the right to use accrued sick days, discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using accrued sick days, attempting to exercise the right to use accrued sick days, or complaining about a violation of this law. (Lab. Code, § 246.5.) If an employer does retaliate, then the employee may be eligible to seek recovery of lost wages, reinstatement, and other penalties either through the Department of Industrial Relations or the Attorney General, or through their own action by way of the Private Attorney General Act ("PAGA").

Other leave due to school issues

If your worksite has 25 or more employees, you are able to take off up to 40 hours each year for school events or to

address childcare or school emergencies. A school emergency includes school closures and natural disasters. Also, under this law, if an employer fires, threatens to fire, demotes, suspends or takes any other discriminatory actions against you, then you as the employee are entitled to reinstatement and reimbursement for lost wages and benefits. In some cases, you may even be eligible to recover a civil penalty against the employer for up to three times your lost wages and benefits. (Lab. Code, § 230.8.)

California paid family leave

Under the Paid Family Leave Act, a worker who has lost wages because they need to take time off of work to care for "a seriously ill child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, registered domestic partner, or to bond with a new child entering the family through birth, adoption, or foster care placement, may be eligible for Paid Family Leave ("PFL") benefits." The benefit amounts range from \$500 to \$1,000 per week and are about 60% to 70% of your wages from the past 5 to 18 months before your claim starts.

Wages due at time of termination

California law requires that a laid-off employee be given a final paycheck – including compensation for any unused paid time off – at the time of termination. (Lab. Code, § 203.) An employee who doesn't receive such final pay can file a complaint with the California Division of Labor Standards Enforcement.

Stay tuned

This article was submitted on March 25, 2020. Since then there may have been other new laws or changes to the new laws/stimulus packages addressing the coronavirus/COVID-19 pandemic. By protecting our client employment rights, we are providing a public service during these trying

times. If someone is fired, loses hours, or suffers any other type of adverse employment action as a result of this pandemic, the laws and tools are there for us to stand up and protect them.

Resources

California EDD About coronavirus (COVID-19) (https://edd.ca.gov/about_edd/coronavirus-2019.htm)

Resources for Employers and Workers in California <https://www.labor.ca.gov/coronavirus2019/>

CA Department of Industrial Relations – Paid sick leave https://www.dir.ca.gov/dlse/paid_sick_leave.htm

California Department of Public Health – COVID-19 Updates Page <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/nCOV2019.aspx>

Los Angeles County Safer at Home Order – March 19, 2020 http://ph.lacounty.gov/media/Coronavirus/COVID-19_SaferAtHome_HealthOfficerOrder_20200319_Signed.pdf

List of "Essential Critical Infrastructure Workers" <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf>

State of California coronavirus (COVID-19) Response <https://covid19.ca.gov/>

US Dept. of Homeland Security – Essential Critical Infrastructure Workers <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19>

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