

Welcome Back!

Return to Work Considerations for California Employers

Presented by:  

May 19, 2021

1 General MCLE Credit

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Agenda

- Return to Work – The Remote Work Dilemma
- Impact of COVID on Female Workers
- Vaccination Policies
- Key Rules & Regulations
- Q&A

The Remote Work Dilemma

Many employees have adjusted to working from home for over a year. Now that COVID-19 workplace restrictions are starting to ease, is it time to return or continue remote working?

<https://www.instagram.com/reel/COBI7CCJDXb/?igshid=21pmbull7snr>

Return to Work - Legal Considerations



Requiring employees to return to the workplace

Health and Safety considerations

Labor Code § 6400 (a)

Every employer shall furnish employment and a place of employment that is safe and healthful for the employees therein.

Labor Code § 6402

No employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe and healthful.

OSHA

Employers required to maintain a workplace free of any recognized hazards that may cause death or serious injury to their employees and **comply with OSHA standards**. (General Duty Clause)

Return to Work - Legal Considerations

Tread carefully before terminating an employee who refuses to return

- Case-by-case analysis
- Unsafe or unhealthy? – Objective or Subjective Standard



An employee may refuse to perform a specific task when all of the following conditions are met:

1. the employee “asked the employer to eliminate the danger, and the employer failed to do so”;
2. the employee “genuinely believe[s] that an imminent danger exists”;
3. a reasonable person would agree that there is a real danger of death or serious injury”; and
4. the urgency of the hazard does not allow correction through “regular enforcement channels, such as requesting an OSHA inspection.”

Return to Work - Legal Considerations



National Labor Relations Act

Protects “concerted activity” – employee takes action “with or on behalf of other employees” concerning the terms and conditions of their employment.

- Employees must have an “honest belief” that conditions are unsafe or unhealthy.
- Concerted activity protected even if where employees’ concerns may not be objectively reasonable.

Return to Work – Legal Considerations

Disability considerations

Americans with Disabilities Act (ADA) & Fair Employment and Housing (FEHA)

Duty to Provide a Reasonable Accommodation (both physical and non-physical disabilities)

- Continued remote work as an accommodation



Employees with “higher risk for severe illness” from COVID-19

- Older adults
- Certain medical conditions
- Pregnant women

Employer cannot exclude an at-risk employee from workplace unless it poses a “direct threat” to his or her health that cannot be eliminated by a reasonable accommodation



Return to Work – Legal Considerations

Issues Related to Continuing Remote Work



Wage and Hour

(Tracking worktime, meal and rest breaks, etc.)



Privacy and Security

(Oversight and company oversight)



Expense Reimbursements

(Home office expenses)



Disability Accommodations

(Ergonomic Evaluations)



Out of State Remote Employees

(What jurisdiction applies?)

HR Best Practices and Approaches for Return to Work



- Create a plan and assemble a committee with various stakeholders
- Survey employees
- Map out jobs (what jobs will stay remote vs. come back to the office)
- Work through out of state situations
- Consider a “soft” re-opening

Mental Health Considerations Due to COVID

- Increase in substance abuse
- Increase in depression and anxiety
- Offer mental health services

40%

of US Adults reported
struggling with **mental
health or substance abuse.**

63%

of **young people** are suffering
significant symptoms of anxiety
and depression.



Impact of COVID on Female Workers



Nearly **3 million** women have left the labor force entirely

Certain Industries were hit harder where **women make up most of the workforce**

Women of color have disproportionately been impacted over the past 12 months

Reasons Women Were Impacted the Most

1



School Closures

2



Caring for Loved Ones

3



Lack of Available and Affordable Childcare

Why is This Important? Why Should Employers Care?

- Gender-diverse teams have higher sales compared to male-dominated teams
- Gender-diverse business units have higher average revenue than less diverse business units



Create an Environment that Attracts and Retains Women



- Implement flexible schedules
- Give credit for activities and leadership roles taken during work gaps
- Implement parent-friendly policies
- Promote more women to leadership positions at all levels of the company
- Review compensation annually and make adjustments to achieve pay equity

Impact of COVID on Female Workers – Legal Considerations

Gender Pay Gap

SB 973: Pay Data Reporting (Govt. Code § 12999)

- Private employers with 100 or more employees
- Annual reporting requirements to DFEH (e.g., job and pay data based on race, ethnicity, and sex)



DFEH pay reporting portal
(www.dfeh.ca.gov/paydatareporting/)



Impact of COVID on Female Workers

– Legal Considerations



California Equal Pay Act

Labor Code § 1197.5

- Prohibits an employer from paying an employee at wage rate less than the rate of an employee of the opposite sex for “substantially similar work”
- If there is a wage difference, burden on employer to show based on legitimate factors (e.g., seniority system, merit system, etc.)



Pay Equity Audit

- Is there an unintended disparity?
 - Attorney-client privileged

Impact of COVID on Female Workers – Legal Considerations

Caregiver Discrimination as Gender Discrimination



- Gender bias based on stereotypes about competence and commitment of mothers and other women with caregiving responsibilities.
- “Motherhood Penalty” – recommended less for hire often, lower starting salaries, etc.
- “Caregiver” is not a protected status. But...

*Back v. Hastings on Hudson Union Free School District
(Title VII – Sex Discrimination)*

Sex-plus discrimination: Denial of employment opportunities based on stereotypical assumptions about mother’s commitment to her job = sex discrimination

Sexual Harassment and Retaliation



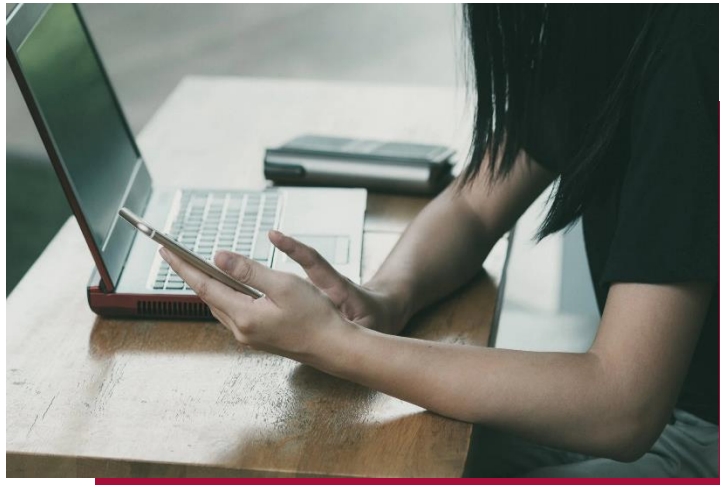
Increased harassment and retaliation during pandemic

- Downsizing used to retaliate for sexual harassment complaints

Job Insecurity



Increased vulnerability to harassment



Online Workplace Harassment

- What is it?
- How to address it?
 - Update anti-harassment policy (online conduct)
 - Timely, complete and thorough investigations
 - Employee policy training
 - Anonymous reporting system



VACCINE

moderna

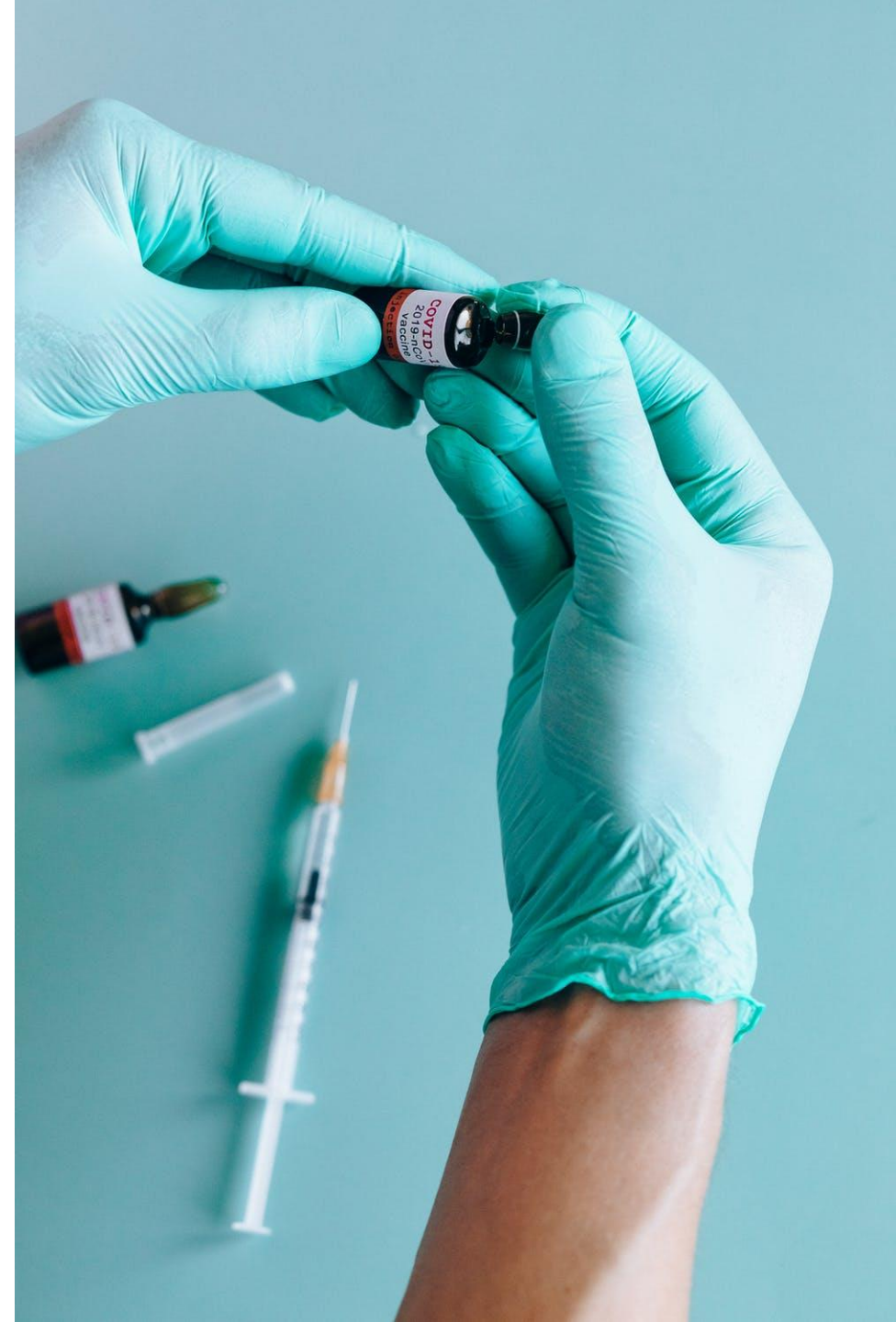
Pfizer

Johnson & Johnson

Vaccines

Generally, it is important for an employer to show confidence in the vaccines

- Remind employees why it is important to be vaccinated and benefits of protecting themselves, their families, co-workers, and community
- Encourage those who do get vaccinated to share that information
 - This may help “convince” those who may be reticent to get one
- Allow for paid time off to get the vaccine



Q *Can an employer mandate that its employees get vaccinated?*

Both the DFEH and the EEOC have said that an employer can legally require their employees to be vaccinated, although neither agency is taking a position on if an employer should make that choice

Exceptions to Requiring Mandatory Vaccinations

1



If the employee has a disability under the Americans with Disabilities Act

2



If the employee has a sincerely held religious belief that prevents him or her from receiving the vaccine.

Accommodations

- Whether the employee is disabled or holds a religious objection, you will need to engage in the interactive process to see if there is a reasonable accommodation.
- Reasonable accommodations can include working from home, job reassignment, job restructuring, or modification of worksite safeguards that enable the employee to work without endangering the employee or others.
- However, that does not mean you can automatically “ban” an employee from the workplace (i.e., make them work from home)
 - You can do so **if** unvaccinated workers **“pose a direct threat to the health or safety of individuals in the workplace,”** which is defined as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”
 - Thus, you must consider duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm
 - So, if you can provide an accommodation that lowers the risk while allowing the employee to come to the office, then you need to do so





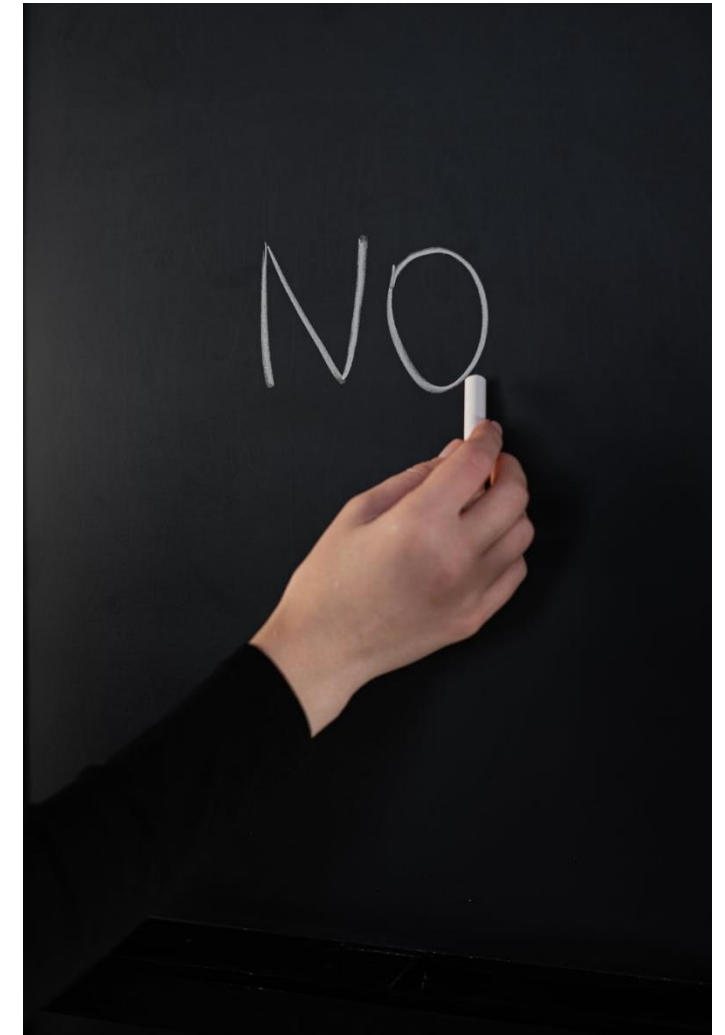
Warning...

- 1) The rules against retaliating or discriminating against an employee because of that disability or belief remain in effect
 - Thus, you cannot retaliate or discriminate against an employee who asks for an accommodation. Similarly, no retaliation if the employee engages in protected activity, such as alleging that the mandatory vaccination policy is discriminatory
- 2) Because vaccination status is not something you can publicly disclose, you need to be aware of the possibility of disclosing an employee's vaccination status by the accommodation itself.

What Is Not a Reasonable Ground for Accommodation?

- While disabilities and sincerely held religious beliefs must be accommodated, that does not apply to an employee who:
 - does not want to get vaccinated;
 - does not trust that the vaccine is safe; or
 - lacks a disability or sincerely held religious belief

If you do put a mandatory vaccination policy in place and employees refuse to get vaccinated – assuming they aren't entitled to an accommodation – then you may enforce reasonable disciplinary policies and practices as to those employees, as long as you don't take adverse employment action against an employee for engaging in legally protected activity—such as complaining that the policy is discriminatory.



Asking for Proof of Vaccination

Per the DFEH, you may ask for employees for proof (i.e., documentation) of vaccination as this question is not a disability-related inquiry, religious creed-related inquiry, or a medical examination.

- Make sure to tell employees to omit any medical information on the proof of shot.
- The employer should then keep this documentation as a confidential medical item.



**Mandatory
Vaccination Policy**

=



YES

**Non-Mandatory
Vaccination Policy**

=



NO

Other Considerations

- Make it easy for employees to get vaccinated during work hours.
- The DFEH requires that you offer paid sick leave for employees with signs and symptoms after vaccination.
- Allow time for vaccine confidence to grow. Workers who are hesitant at first may become more confident after seeing coworkers get vaccinated.
- Make sure employees know COVID-19 vaccine is provided free of charge. They should not be asked to pay any fee, including a vaccine administration fee, and cannot be denied vaccine if they do not have insurance coverage. Providers may bill their insurance plan or program for the administration fee if they have insurance.
- Consider offering incentives to get vaccinated.
- It is also important to keep in mind that even as vaccinations are underway, you may not currently change workplace safety practices or treat vaccinated employees different than non-vaccinated employees as it relates to general safety protocols (masks, social distancing, etc.).



The Workplace



The Occupational Safety and Health Act (OSHA Act) requires employers to comply with safety and health standards promulgated by the Department of Labor (DOL), OSHA, or by a state with an OSHA-approved state plan, which may impose more stringent requirements on employers than federal law

- CA has an OSHA-approved state plan
- **General Duty Requirement** – Under the Occupational Safety and Health Act the employer must ensure a safe and healthy work environment

Develop an Infectious Disease Preparedness Response Plan



Physical Distancing

- Social distancing whenever possible
 - Employers may need to alter workspaces or limit number of employees that may congregate in a single place
- Physical barriers when social distancing is not possible or practical
- Capacity restrictions in common areas, e.g., lunchrooms, breakrooms, bathrooms, elevators, meeting areas, etc.
 - One-directional hallways
- Staggering Shifts/Schedules, Breaks, start times to reduce number of employees at one time
- Limitation on Non-employee personnel presence in workplace

Develop an Infectious Disease Preparedness Response Plan

Personal Protective Equipment (PPE)

- Respirators
 - Requires written comprehensive respiratory protection program
- Face Coverings
 - Provide employees with face coverings at no cost
 - Institute mask policies
- Hygiene Supplies
 - Employers should provide employees with hygiene supplies, including hand sanitizer, tissues, soap, disinfectant supplies, etc.



Develop an Infectious Disease Preparedness Response Plan



Routine Cleaning and Disinfection Guidelines

- Develop, implement, and maintain a plan to perform regular cleanings to reduce risk of COVID-19
 - How often, what areas, equipment needed
- Routinely clean all frequently touched surfaces in the workplace
- **EPA List N:** registered disinfectants for COVID-19
 - EPA expects all registered products on List N to kill COVID-19 virus when used according to the label directions

The Workforce & Employees

SB 93 – Labor Code Section 2810.8

(Signed April 16, 2021)

- Effective immediately through December 31, 2024
- “Within five business days of establishing a position, an employer shall offer its laid-off employees in writing, either by hand or to their last known physical address, and by email and text message to the extent the employer possesses such information, ***all job positions that become available after the effective date of this section for which the laid-off employees are qualified.***”
- Applicable industries:
 - Hotels, private clubs, event centers, airport hospitality, airport service providers, Janitorial, building maintenance, or security service providers





Policies and Procedures for Identification and Isolation of Sick Employees

- Self-monitoring by employees for signs and symptoms of COVID-19
- Develop policies and procedures for employees to report suspected possible exposure or infection



Develop Policies and Procedures for Work Flexibility

- Ensuring sick leave policies are current and compliant
- Developing policies and procedures for remote working, where appropriate

Employers and business should designate someone to keep up with evolving COVID-19 guidelines and update policies and practices as needed



Thank You!



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Questions?