

Navigating Re-Opening Anxiety: Addressing the Personal, Legal and Operational Impacts of Return to Work

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Presented By:
Michael Youril

Agenda

- I. Legal Regulations and Reopening
- II. Mental Health and Reasonable Accommodation Issues
- III. Vaccination Issues
- IV. Teleworking Issues
- V. Leaves



General Guidance/Applicable Authority Impacting Reopening

- Reopening subject to health and safety laws and related orders
- Comply with ongoing and operative obligations
 - Federal, state, and/or local laws (including public health orders) may apply to circumstance at issue
 - Complying with most prescriptive and/or restrictive guidance will ensure compliance
- Legal and public health authorities that may apply
 - Legal
 - Labor Code
 - Cal/OSHA regulations, including Emergency Temporary Standards (“COVID-19 Regulations”)
 - Public health
 - Centers for Disease Control and Prevention (“CDC”)
 - California Department of Public Health (“CDPH”)
 - Local health department/officer - Local health orders



Return to Work Considerations

- Considerations in returning employees to reopened workplaces
 - Who: Which employees should return?
 - Objective, articulable, and non-discriminatory bases
 - Accommodations considerations
 - When: When should those employees return?
 - Factors for initial reopen date
 - Phased/gradual increase
 - How: How do you return those employees?
 - Operational needs and interests
 - Health and safety considerations/issues
 - Equity issues



Reasonable Accommodations and the Interactive Process



Duty to Accommodate

- State and federal laws require an employer make reasonable accommodations for employees with qualified disabilities unless the accommodation would impose an undue hardship upon the employer
 - Under the FEHA, disability is defined as a physical or mental impairment that limits an employee's major life function
 - Under the ADA, a disability is a physical or mental impairment that *substantially limits one or more* of the person's major life activities



Duty to Accommodate/Interactive Process

- To determine whether or not a reasonable accommodation can be provided, employers are required to engage in a good faith interactive process to determine if there without suffering an undue hardship



What About Other Risk Factors?

- The CDC identifies other non-health conditions that increase or may increase the risk of serious illness related to COVID-19
 - Age
 - Smoking
- These factors do not constitute impairments under the ADA or FEHA
 - Employees may nevertheless request accommodations based on these factors and the employer should engage in the interactive process and have documentation to support any defense



Vaccination Issues



Vaccination Issues: Employee Vaccination Information/Records

- Legal authority
 - Cal/OSHA Emergency Temporary Standards, dated June 17, 2021
 - Equal Employment Opportunity Commission (“EEOC”) (COVID-19 Guidance, K.3.)
 - Confidentiality of Medical Information Act (“CMIA”) (Civil Code § 56.10, et seq.)
- Requiring v. requesting vaccination information/records
 - Treatment of information/records as “confidential medical information”
- Maintenance of information/records
- Use and disclosures
 - Permissible uses (Discussed on next slide)
 - Requisite and discretionary disclosures
 - Employee authorization



Vaccination Issues: Monitoring Employee Vaccination Statuses

- Determine whether to monitor employee vaccination status
 - Other issues flow from this decision
 - Use of vaccination information/records
 - Disclosures of vaccination information/records
 - Maintenance of vaccination records
- Purpose for monitoring employee vaccination status
 - Facilitate compliance with health and safety obligations
 - Quarantine following “close contact” exposures
 - Increased operational flexibility
 - Capacity issues (CDPH guidance on “Activity and Business Tiers”)
 - Other legitimate business purposes



Vaccination Issues: Managing Vaccinated and Unvaccinated Employees

- Managing the interaction of vaccinated and unvaccinated and “decline to state” employees
 - Potential modifications to the physical workplace
 - Use of shared or common spaces (*e.g.*, kitchens, breakrooms, conference/meeting rooms)
 - Capacity restrictions
- Considerations regarding protections for and the comfort of vaccinated employees
 - Fear and/or anxiety of interactions with unvaccinated employees
 - Associational disability claims by vaccinated employees



Vaccination Issues: Recommendations

- Encourage employees to be vaccinated
- If monitoring employee vaccination status, comply with obligations related to the following:
 - Request, and, if necessary require, production of vaccination information/records
 - Request execution of CMIA-compliant authorization form
 - Limit disclosures to those required by law
 - Limit uses to legitimate and non-discriminatory business purposes
- Require that unvaccinated and “decline to state” employees comply with specific health and safety requirements (i.e., mask mandate)
- Manage interaction between vaccinated, unvaccinated and “decline to state” employees



Teleworking Issues



Teleworking Issues: Teleworking Models and Options

- Pre-COVID-19 working arrangements v. new model for working arrangements
 - Full telework
 - Unlikely for most (non-tech) employers
 - Employer workplace only/No telework
 - Short-term: Non-compliant with operative health and safety obligations
 - Medium-term: May be incompatible with employee expectations/demands
 - Hybrid
 - Flexible and responsive to needs
 - Based on local health conditions/obligations and employee expectations/demands
- Most employers will adopt a hybrid teleworking model moving forward
 - Costs (real and cultural)
 - Benefits (employer and employees)



Teleworking Issues: Potential Issues with Hybrid Models

- Acceptance
 - Employees accustomed to teleworking on a full-time basis may object to working at the employer's workplace
 - Employers may prefer that all employees return to pre-COVID-19 working arrangements (*i.e.*, working exclusively from the employer's workplace)
- Operational issues
 - Scheduling concerns
 - Capacity issues if too many employees work from the employer's workplace
 - Service issues if too many employees telework
 - Quality of performance/service provided
 - Compare work performed at the employer's workplace to that performed by telework
- Equity issues
 - Ensuring fairness between regular and teleworking employees and across classifications, departments and the employer's enterprise



Teleworking Issues:

Teleworking as an Accommodation

- Continued provision of teleworking as an accommodation to individuals with qualified disabilities and/or sincerely held religious beliefs
 - Teleworking as an accommodation to individuals who cannot be vaccinated due to a qualified disability or a sincerely held religious belief
- Special circumstances
 - Teleworking as an “accommodation” to individuals who refuse to be vaccinated or “decline to state” their vaccination status
 - Teleworking as an “accommodation” to vaccinated individuals who are afraid/anxious about returning to work
 - Teleworking as an “accommodation” to vaccinated individuals who live with or provide care to someone who is at high-risk for COVID-19 and cannot be vaccinated due to a qualified disability



COVID-19 Related Leaves



Qualifying Reasons for SPSL Leave: Seven Covered Reasons

An employee is entitled to receive SPSL if they are unable to work or telework due to one of the following seven (7) qualifying reasons:

1. Is subject to a quarantine or isolation period related to COVID-19 as defined by an order or guidelines of the California Department of Public Health (“CDPH”), the Centers for Disease Control and Prevention (“CDC”), or a local health officer who has jurisdiction over the workplace.
2. Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. Is attending an appointment to receive a vaccine for protection against contracting COVID-19.
4. Is experiencing symptoms related to a COVID-19 vaccine that prevent the employee from being able to work or telework.
5. Is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
6. Is caring for a family member who is subject to an order or guidelines described in 1., above, or who has been advised to self-quarantine, as described in 2., above.
7. 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.

(Labor Code § 248.2(b)(1)(A)(G))





Michael Youril

Partner | Fresno Office

559.256.7813 | myouril@lcwlegal.com

<https://www.lcwlegal.com/people/michael-youril/>



Liebert Cassidy Whitmore