

Employer Strategies for COVID-19

On March 19, 2020, California's governor, Gavin Newsome, issued a Stay At Home order, effectively shutting down a significant portion of California businesses. Several states have followed suit, and the likelihood of further expansion by other states is probable.

While much of the country is trying to manage with governmental directives to "shelter in place", many employers are struggling to survive the open-ended orders while also maintaining positive relationships with their employees.

The following article is not intended to address every potential situation, but rather, the probable situations an employer may encounter. In addition to the questions and strategies below, there is a chart provided by the State of California at the end of this paper that can help employers' direct employees impacted by the COVID-19 pandemic.

Following are a host of the potential scenarios that an employer may encounter:

Scenario	Potential Solution
1. An essential services employer continues to provide services to the public. What is the best manner they can protect their company from added liability?	The Equal Employment Opportunity Commission (EEOC) just confirmed on 3/18/2020 an employer's right to take an employee's temperature to help ward off the spread of COVID-19. ¹ An employer may want to institute this practice at the beginning and end of each shift, with supporting documentation of the findings. By demonstrating there is a policy in place to ensure safety of guests/invitees, this will help protect them from claims from the general public. If any employee tests at a concerning elevated rate, the employer could send the employee home until the symptoms pass or for the 14 day quarantine period as outlined by the Centers for Disease Control. ²
2. An employee performing an essential service presents with symptoms that are indicative of COVID-19. How do we manage the situation?	Send the employee home to self-quarantine, for a period of 14 days. This is expressly allowed under the law during a pandemic. Further, OSHA requires every employer to provide a safe workplace, and this would fall under that definition. ³ The employee may be able to file for Unemployment Insurance. ⁴ Additionally, the Federal government is actively working on an aid package that could include other financial support, and each employer is encouraged to keep abreast of the changes.

¹ https://www.eeoc.gov/facts/pandemic_flu.html#q7

² <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>

³ https://www.eeoc.gov/facts/pandemic_flu.html#q5

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<p>3. We sent our employee home because they were exhibiting symptoms consistent with COVID-19. Do we need to file a Workers' Compensation claim?</p>	<p>Until the employee expressly states they believe it is related to work, the employer has no obligation or duty to provide an Employee Claim Form (DWC-1)⁵. At this point with no positive diagnosis the employee may be able to file for Unemployment Insurance.</p> <p>Many Workers' Compensation jurisdictions hold that if the employee does not test positive, no "injury" has occurred and there would be no claim. This is especially true for California employer.⁶ Understanding this, employers should review their Employee Handbook for sick leave policies, and also assess whether it is prudent to pay the employee while they remain off work.</p> <p>Additionally, at this point, it would be prudent for the employer to secure information from the employee on how long the employee has had the symptoms, the last day worked prior to symptoms, whether any family members have tested positive, etc. The early gathering of this information will prove beneficial for all parties and allow an informed decision on compensability should the employee ultimately test positive for COVID-19. All of the findings should be clearly documented, along with tracking for whether any other employees are presenting with symptoms.</p>
<p>4. After we sent an employee home to self-quarantine, they requested sick time to be paid. There has been no diagnosis confirmation that they have COVID-19 or are otherwise ill. Do we need to pay them their sick time?</p>	<p>Even though the employee is not actually sick, paid sick leave would still apply. It is important to note that paid sick leave under Families First Coronavirus Response Act (FFCRA) is in addition to the previously mandated State and/or local paid sick leave benefits.</p> <p>Under the law, "preventative care may include self-quarantine as a result of potential exposure to COVID-19".⁷ Note - the option to be paid sick leave is the employee's, and the employer cannot force the employee to use it.⁸</p> <p>If the employee ultimately exhausts their paid sick leave, the employer can also offer to pay them their vacation time.⁹</p>

⁴ https://www.edd.ca.gov/about_edd/coronavirus-2019/faqs.htm#UIBenefits

⁵ Labor Code 5400, Labor Code 5402, Honeywell v. Workers' Comp. Appeal Bd. (2005) 35 Cal.4th 24

⁶ Labor Code 3208.1

⁷ <https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm>, question #1

⁸ <https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm>, question #3

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<p>5. One of our employees ultimately tested positive - does this mean there is a Workers' Compensation claim?</p>	<p>Not necessarily. If an employee tests positive for COVID-19 <u>and</u> the employee expressly states they believe it is related to work, the employer has an obligation or duty to provide an Employee Claim Form (DWC-1). If the employee wants to proceed with reporting the claim under workers' compensation, the claim should be immediately reported so that your insurance carrier may start the claims process and make the compensability determination based on AOE/COE (Arising Out of Employment/Course of Employment) standards.</p> <p>In the event the employee DOES test positive, it is typically the employee's burden to prove that the work environment caused the "injury". In our current state, this would be difficult to accomplish, unless the employee worked in a position that directly exposed them to the virus, such as a nurse, first responder, etc. Ultimately the compensability decision will be made by your workers' compensation insurance carrier based on the investigation and facts of each claim.</p> <p>Because it may prove impossible to determine how the employee came into contact with COVID-19, they can pursue benefits through filing of a Disability Insurance claim.¹⁰</p>
<p>6. An injured worker was performing modified duties, in lieu of receiving temporary disability benefits, and has been sent home per the governmental "stay at home" directive. Does this trigger liability for temporary disability benefits?</p>	<p>This is an area just beginning to receive attention, with a forum post begun on 3/20/20 on WorkCompCentral. There are arguments to be made both for and against paying temporary disability benefits, while this writer believes a case by case assessment should be conducted, with consideration toward essential services, other employees also impacted by the stay at home order, etc.</p> <p>The solution may differ from one insurance carrier to another.</p>
<p>7. An injured worker was on full temporary disability or modified duties, and through a telemedicine evaluation, was released to full duties. Those duties are not available due to the stay at home directive. Are any benefits due?</p>	<p>Depending upon the type of disability (Workers' Compensation <u>or</u> State Disability Benefits) and the duration of the temporary disability the employee was on prior to being released to return to duty, if the job is not available the employee could be eligible for unemployment insurance. We encourage the employer to have a meaningful discussion with the employee concerning this topic.</p>

⁹ <https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm>, question #2

¹⁰ https://www.edd.ca.gov/about_edd/coronavirus-2019/faqs.htm, questions #1 and #2

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<p>8. Are any temporary disability benefits (total disability or wage loss) due where the business/industry is "closed" due to the stay at home order?</p>	<p>This is an interesting situation that is really not addressed in the law. As discussed in other questions, temporary disability is paid where there is wage loss resulting from a work related injury. If no wages are being paid in the industry due to a stay at home order, arguably, there is no wage loss.</p> <p>An argument may be raised by an employee saying that "but for the injury" they could work somewhere else in the "essential services" labor market. If this is argued, the employer should seek documentation from the employee supporting prior work in that field, transferable skills, etc.</p> <p>Also, a cost/benefit analysis should be conducted if the issue becomes more complex, as it could result in dollars being spent to save pennies. And if the Workers' Compensation policy is guaranteed cost, it may prove difficult to have the insurance carrier agree to spend their Expense dollars to save the employer's indemnity exposure.</p>
<p>9. Does it make sense to evaluate all open Workers' Compensation claims and pursue "closure project" efforts?</p>	<p>Absolutely - the current challenge presents an excellent opportunity to cut through the claim process, bypass costly discovery, and negotiate a mutually beneficial resolution to many claims.</p> <p>If a full and final settlement is being accomplished, it is important to secure a resignation from the employee to prevent continued exposure post settlement.</p>
<p>10. We are having many of our employees work from home in a telecommuting fashion. This is new to our company and we would like to ensure we are properly managing this exposure.</p>	<p>It is important to develop protocols for telecommuting, including expectations and responsibilities of both the employer and employees, as well as to document deliverables from the employee's work efforts. It is also advisable to emphasize the need to work in a safe manner to avoid any injury.</p>
<p>11. Our business has been severely impacted by the COVID-19 pandemic, resulting in massive layoffs and/or closure of some locations. What information can we provide to our employees?</p>	<p>Depending on their condition, they may be able to file for Disability Insurance, Unemployment Insurance, or even for Paid Family Medical Leave. The accompanying chart, "Benefits for Workers Impacted by COVID-19" can provide some guidance.</p>

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<p>12. We have some employees who are "exempt". Are they treated any differently than hourly wage employees?</p>	<p>There are various scenarios that can come into play.¹¹ A couple may include:</p> <ul style="list-style-type: none"> - The employee performs no work at all = their salary may be reduced - The employee performs limited work = the employee is entitled to their full salary
<p>13. One of our employees informed us a family member has tested positive for COVID-19, and they are seeking Family and Medical Leave Act (FMLA) leave.</p>	<p>If the employee was not actively working for the employer due to the "stay at home" directive when this occurred, FMLA will likely not apply.</p> <p>Alternatively, if the employee were actively employed, they would be entitled to FMLA protections.¹²</p>
<p>14. The COVID-19 pandemic has created a hardship for our company. Is there any relief offered by the State of California?</p>	<p>Employers statewide directly affected by coronavirus (COVID-19) may request up to a 60-day extension of time from the EDD to file their state payroll reports and/or deposit payroll taxes without penalty or interest. A written request for extension must be received within 60 days from the original delinquent date of the payment or return.¹³</p>

¹¹ <https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm>, question #8

¹² <https://www.dol.gov/agencies/whd/fmla/pandemic>

¹³ https://www.edd.ca.gov/payroll_taxes/emergency_and_disaster_assistance_for_employers.htm