

# You Have an Employee With COVID-19: Now What?

*Presented by:*

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We wish to express confidence in the information contained herein. Used with discretion, by qualified individuals, it should serve as a valuable management tool in assisting employers to understand the issues involved and to adopt measures to prevent situations which give rise to legal liability. However, this text should not be considered a substitute for experienced labor counsel, as it is designed to provide information in a highly summarized manner.

The reader should consult with Barsamian & Moody at (559) 248-2360 for individual responses to questions or concerns regarding any given situation.

# Overview

- Managing issues concerning employees potentially exposed.
- What to do when an employee is experiencing symptoms.
- Managing positive/confirmed cases of COVID-19.
- Returning employees to work after COVID-19 related isolation.
- Taking time off work for COVID-19 related issues.

# Managing Potential Exposures

How should you respond when an employee is potentially exposed to COVID-19?

# Managing Potential Exposures

Per the CDC's guidance:

- **“Potential exposure”** means:
  - Close contact with an individual with suspected or confirmed COVID-19 during the time period beginning 48 hours before the individual became symptomatic.
    - Even if both individuals are wearing face masks, including PPE.
- **“Close contact”** means:
  - Within 6 feet and for 15 or more minutes, generally.

# Managing Potential Exposures

According to the CDC, essential workers may be permitted to continue working following potential exposure to COVID-19, provided:

- **Remain symptom-free; and**
  - Fever, chills, cough, shortness of breath, difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion, runny nose, nausea, vomiting, and/or diarrhea
- Additional precautions are implemented.

# Managing Potential Exposures

- **Cal/OSHA's COVID-19 General Checklist for Agricultural Employers** (May 26, 2020)
  - <https://www.dir.ca.gov/dosh/Coronavirus/COVID-19-General-Checklist-Employers.pdf>
- **Cal/OSHA's COVID-19 Infection Prevention for Agricultural Employers and Employees** (July 21, 2020)
  - <https://www.dir.ca.gov/dosh/Coronavirus/COVID-19-Infection-Prevention-in-Agriculture.pdf>
- **Cal/OSHA's general guidance** for all industries
  - <https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html>

# Managing Potential Exposures

The CDC recommends implementing the following “additional precautions” for potentially exposed employees:

- **Pre-screen** for temperature and symptoms prior to the individual starting work.
- Regular **self-monitoring** for symptoms.
- Wear a **cloth face covering** at all times while in the workplace for 14 days after last exposure.
- **Social distance** by maintaining 6 feet from others as much as work duties permit.
- **Clean and disinfect** all work areas such as offices, bathrooms, common areas, shared equipment, etc., routinely.

As a practical matter, employers should also:

- **Keep a list** of the individuals that the employee comes in contact with.

# Managing Potential Exposures

Things to consider in managing potential exposures:

- Do your policies create a **disincentive** for employees to report potential exposures?
  - Hazard pay, safety bonuses, and attendance incentives.
- Are you maintaining privacy/confidentiality of medical/health information?

# Responding to Symptomatic Employees

What do you do when an employee is experiencing symptoms of COVID-19?

# Employees Experiencing Symptoms

If an employee is experiencing symptoms, then take the following steps:

1. Send the employee **home**.
  - a. If subject to California COVID-19 Supplemental PSL, FFCRA paid sick leave or Emergency FMLA leave, then advise employee of eligibility for supplemental PSL.
2. Consider advising **testing** (depending on circumstances).
  - a. Paid sick leave is available to seek testing/medical diagnosis.
3. **Clean and disinfect** all work areas (as necessary).
4. Determine which employees were **potentially exposed** to the employee.
5. **Notify potentially exposed employees** and advise them to follow appropriate additional precautions.
  - a. Maintain privacy and confidentiality; do not disclose identity of symptomatic employee.

# Confirmed Cases

You have an employee with COVID-19; Now What?

# Managing Confirmed Cases

Assuming the employee is not working...

- Consider whether employee needs to **continue quarantine/isolation**.
- Determine whether the employee wants to use any **available leave time**.
- Provide the employee with **workers' compensation claim form\***.
- Prepare to **return the employee to work**.
- Cal/OSHA advises **notifying local health officials** upon learning that an employee has COVID-19.

Note: If the employee is working, then in addition to these steps, you need to follow the steps applicable to when an employee reports the onset of symptoms; i.e., immediately send the employee home, clean and disinfect, etc.

# Managing Confirmed Cases

Consider whether the employee needs to continue quarantining/isolating...

- Availability of tests and test results turnaround time will likely vary depending on the locality and the current capacity of local health care providers.
- By the time you learn an employee is positive (or negative), the employee may already be able to return to work.
- Refer to the information concerning returning employees to work.

# Managing Confirmed Cases

Provide employees with a workers' compensation claim form (DWC-1)...

- Executive Order N-62-20 creates a presumption that workers who contract a COVID-19 related illness between March 19 and July 5, 2020, have done so at work, and are eligible for workers' compensation benefits.
- While the presumption expired on July 5, and has not been extended, there is pending legislation that would make the presumption the law.
- Further, it is possible that the law could be applied retroactively. Thus, the safest approach is to continue operating as if the order is still in place, and work with your carrier to challenge cases.
- Remember: **“When in doubt, hand it out!”**

# Managing Confirmed Cases

What information should you provide to the rest of your workforce?

- **Do not disclose the identity** of the individual without express written permission from the individual.
- EEOC takes the position that the FMLA and ADA both prevent disclosure of employee's medical information, so err on the side of confidentiality.
- In seeking the individual's permission, be careful not to pressure the employee into providing consent.

# Resolving Return to Work Issues

How do you return an employee to work after COVID-19 related isolation?

# Returning Employees to Work After COVID-19 Related Isolation

Generally, there are three different return to work scenarios to be aware of:

1. Potential/confirmed COVID-19, and has symptoms.
2. Confirmed COVID-19, but has no symptoms.
3. Potential/confirmed COVID-19, and is severely ill or has severely weakened immune system.

# Returning Employees to Work After COVID-19 Related Isolation

**Potential/confirmed COVID-19 and has symptoms:** The employee can return to work after:

1. 10 days since symptoms first appeared; **and**
  - a. Cal/OSHA's July 21 guidance recommends not returning to work until at least 3 days after recovery and 10 days after the original onset of symptoms.
2. 24 hours with no fever without the use of fever-reducing medications; **and**
3. Other symptoms of COVID-19 are improving.

# Returning Employees to Work After COVID-19 Related Isolation

**Confirmed COVID-19, but has no symptoms:** The employee can return to work after:

1. 10 days have passed since the employee had a positive viral test for COVID-19.
  - a. The exception to this rule is when the individual's healthcare provider recommends testing before the individual can be around others again.
2. If at any time the individual develops symptoms, then they need to apply the guidance for confirmed and symptomatic individuals.

# Returning Employees to Work After COVID-19 Related Isolation

**Potential/confirmed COVID-19 and is severely ill or has a severely weakened immune system:** These employees should be treated the same as other employees with potential/confirmed COVID-10 and who are experiencing symptoms.

- Employers should not assume that employees have weakened immune systems due to a health condition.
- Employers should understand that certain employees may be advised by their health care providers that they need to quarantine for additional time (typically, 10 to 20 days after symptoms first appeared).

# Returning Employees to Work After COVID-19 Related Isolation

Considerations with respect to common “return to work” issues:

- Requiring negative tests to return to work.
- Interactive process and reasonable accommodations.
- Reinfection (unknown at this time); assume possible and apply same protocols for potentially exposed/symptomatic employees.

# Taking Time Off Work

What leaves are available for employees taking time off work due to COVID-19 related reasons?

# Taking Time Off Work

- Employers with **fewer than 500 employees** are subject to the Families First Coronavirus Response Act (FFCRA), which includes:
  - Emergency Family and Medical Leave Act Expansion Act; and
  - Emergency Paid Sick Leave Act
- California employers with **500 or more employees** are subject to Governor Newsom’s Executive Order N-51-20, which provides “**food sector workers**” with COVID-19 Supplemental Paid Sick Leave.

	<b>FFRCA Emergency Paid Sick Leave</b>	<b>California COVID-19 Supplemental PSL (for Food Sector Workers)</b>	<b>FFRCA Expanded Paid Family &amp; Medical Leave</b>
<b>Qualifying reasons for leave:</b>	<p>Unable to work (or telework) due to:</p> <ol style="list-style-type: none"> <li>1. Being subject to federal, state, or local quarantine/isolation order related to COVID-19.</li> <li>2. Doctor advises employee to self-quarantine due to COVID-19 concerns.</li> <li>3. Employee is experiencing symptoms <u>and</u> seeking medical diagnosis.</li> <li>4. Employee is caring for an individual subject to (1) or (2).</li> <li>5. Employee is caring for child affected by school or daycare closure.</li> <li>6. Employee is experiencing similar conditions specified by Secretary of Health and Human Services.</li> </ol>	<p>Unable to work due to:</p> <ol style="list-style-type: none"> <li>1. Being subject to federal, state, or local quarantine/isolation order related to COVID-19.</li> <li>2. Doctor advises employee to self-quarantine due to COVID-19 concerns.</li> <li>3. Employee is <b><u>prohibited from working by the hiring entity</u></b> due to health concerns related to potential transmission of COVID-19.</li> </ol>	<p>Unable to work due to:</p> <ol style="list-style-type: none"> <li>1. Having to care for child due to child's school or child care provider being shutdown or unavailable because of a COVID-19 related reason.</li> </ol>

	<b>FFRCA Emergency Paid Sick Leave</b>	<b>California COVID-19 Supplemental PSL (for Food Sector Workers)</b>	<b>FFRCA Expanded Paid Family &amp; Medical Leave</b>
<b>Amount of Paid Leave:</b>	<ul style="list-style-type: none"> <li>• Up to 80 hours of paid leave for full-time employees.</li> <li>• For part-time employees, you take the number of hours the employee is normally scheduled to work over two workweeks.</li> </ul>	<ul style="list-style-type: none"> <li>• Up to 80 hours of paid leave for full-time employees.</li> <li>• For part-time employees, you take the number of hours the employee is normally scheduled to work over two workweeks.</li> </ul>	<ul style="list-style-type: none"> <li>• 12-weeks of leave, <b><u>but the first two weeks are unpaid</u></b> (but can be covered by other leave).</li> <li>• Note: If employee has already taken FMLA/CFRA leave, then FFCRA does not provide additional leave.</li> <li>• Employers may require that employees use FFCRA leave concurrently with any leave offered under the employer's policies (e.g., vacation, paid time off, etc.)</li> </ul>

	FFRCA Emergency Paid Sick Leave	California COVID-19 Supplemental PSL (for Food Sector Workers)	FFRCA Emergency Family & Medical Leave
<b>Wage payment amount:</b>	<ul style="list-style-type: none"> <li>If leave is because employee is quarantined (pursuant a government order <b><u>or</u></b> advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis, <b><u>then leave paid at employee's regular rate of pay</u></b> up to \$511 per day and \$5,110 over a two-week period.</li> <li>If leave is because employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to a government order <b><u>or</u></b> advice of a health care provider), or to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, <b><u>then leave paid at two-thirds the employee's regular rate of pay</u></b> up to \$200 per day and \$2,000 over a two-week period.</li> </ul>	<ul style="list-style-type: none"> <li><b><u>Leave paid at employee's regular rate of pay</u></b> up to \$511 per day and \$5,110 over a two-week period.</li> </ul>	<ul style="list-style-type: none"> <li>The first two weeks of leave are unpaid, but can be covered by other leave.</li> <li>Remaining 10 weeks of leave <b><u>paid at two-thirds the employee's regular rate of pay</u></b> up to \$200 per day and \$12,000 over a 12-week period.</li> </ul>

# DOL Enforcement Investigation

- Recent letters sent to employers demanding records re FFCRA:
  - administrators for leave,
  - forms,
  - requests for leave,
  - leave payment,
  - leave policies

# Steps to Take in Response

- Contact your legal counsel
- Postpone the initial conference, if needed
- Negotiate down the scope of the records request
- Designate key individuals
  - Primary point of contact
  - Representative for meetings with DOL
  - Onsite escort
  - Interview preparations
  - Oversee production of documents
  - Coordinate inspections

# Steps to Take in Response

- Prepare management team for interviews
- Protect your rights during investigation
  - No undue interference with operations
  - Clarify the scope and expected duration of the investigation
  - Onsite without notice? Ask to return another day
  - Involve legal counsel during interviews
  - Redact or withhold irrelevant information
- Follow best practices when producing documents
  - Do NOT create documents
  - Mark as “Confidential and Proprietary”
  - Keep a duplicate

# Resources

- ✓ [www.theemployerslawfirm.com](http://www.theemployerslawfirm.com)
- ✓ [Executive Order N-62-20](#)
- ✓ [CDC Resources](#)
- ✓ [Cal/OSHA Guidance](#)
- ✓ [Dept of Labor FFCRA FAQ](#)
- ✓ [IRS Guidance on Tax Credits](#)
- ✓ [COVID-19 Employer Playbook](#)

# Questions?

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