

# “TOP 5”

## Coronavirus Challenges for Employers and How to Navigate Them

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# Introduction and Agenda

- Work-From-Home Arrangements
- Accommodation and Leaves of Absence
- Employee Privacy
- Employee Compensation and Benefits
- Furloughs and Layoffs

# WORK-FROM-HOME ARRANGEMENTS

# Work-From-Home Arrangements

## General Considerations

- Decide whether it is optional, recommended, or mandatory
- Issue a policy or guidelines regarding WFH:
  - Stay in contact at all times during regular business hours as if you were in the office (*i.e.*, business as usual)
  - Remain logged in to email, Slack, etc.
  - Respond promptly to work email, text, and Slack
  - Use only company-approved devices to access systems remotely
  - Obligation to maintain protection of confidential information still applies
- Address abuse of WFH (*e.g.*, unresponsive, big drop in productivity)

# Work-From-Home Arrangements

## Shelter-in-Place Orders

- Effective in Bay Area (and likely in other cities and states) and affects non-essential businesses
- Exhaustive list of “essential businesses,” including healthcare institutions, grocery stores, banks, businesses providing mailing and shipping services, and businesses that supply products needed for people to WFH
- Exception for “minimum basic operations” for non-essential businesses
  - “The minimum necessary activities to maintain the value of the business’s inventory, ensure security, process payroll and employee benefits, or for related functions.”
  - “The minimum necessary activities to facilitate employees of the business being able to continue to work remotely from their residences.”
  - Employees must comply with social distancing requirements, to the extent possible, while carrying out such operations—*i.e.*, maintaining at least six-foot social distancing, washing hands frequently, covering coughs and sneezes, regularly cleaning high-touch surfaces, and not shaking hands
  - Recommend providing a letter to employees performing minimum basic operations to be shown to law enforcement (if needed)

# Work-From-Home Arrangements

## Injury/Workers' Compensation Issues

- Employers may be responsible for injuries sustained by employees while working from home
- Instruct employees to maintain a safe working environment free from obstructions
- Check with your insurance broker/workers' compensation carrier regarding coverage for injuries sustained in WFH environment

# Work-From-Home Arrangements

## Reimbursement of Business Expenses

- Consider reimbursement of personal cell phone and home internet if needed for employees to WFH
- Required in CA under the Labor Code and court decisions—must reimburse a “reasonable percentage” because cannot pass on operating costs to employees
  - Reimbursement requirement in CA may hinge on whether WFH is optional or mandatory
  - For Bay Area, recommend reimbursement given shelter-in-place orders

# ACCOMODATION AND LEAVES OF ABSENCE

# Accommodation

## Disability-Related Accommodations

- Assess current employee accommodations
- Determine whether the accommodation is reasonable in the WFH context or whether it presents an undue hardship (high bar)
- If reasonable, effect the accommodation in the employee's home
  - *E.g.*, deliver special chair, provide access to software

# Leaves of Absence

## Available Leaves and Wage Substitution

- Federal and state disability leave laws are available for sick employees or those caring for sick family members
  - *E.g.*, Family and Medical Leave Act, Americans with Disabilities Act
  - *E.g.*, California Family Rights Act, California Fair Employment and Housing Act, New York Paid Family Leave Law, New York City's Earned Safe and Sick Time Act
- Some states provide wage substitution benefits to use during leave
  - *E.g.*, State Disability Insurance, Unemployment Insurance, Paid Family Leave (all available in CA and NY)
    - In CA, Governor Newsom waived the one-week unpaid waiting period for SDI and UI benefits

# EMPLOYEE PRIVACY

# Employee Privacy

- Inquiries into employee/candidate travel
  - Generally permissible if undertaken to ensure employee safety (must be business-related)
- Inquiries into infection of employees
  - Require disclosure of COVID-19 diagnosis to HR to help ensure health and safety of the workplace and take remedial measures (some risk)
  - Better to instruct employees to self-quarantine if they experience flu-like symptoms, have been exposed to someone with COVID-19, or are diagnosed with COVID-19
- Testing of employees
  - Do not recommend requiring this of employees, but 14-day self-quarantine will help address safety concerns regarding spread of infection

# Employee Privacy

- Privacy best practices
  - Tell employees to report any COVID-19 infection to HR and do not require that they notify their manager or team members
  - HR should protect the identity of the infected employee
  - HR should notify employees in the office and those employees who had contact with the infected employee in a way that prioritizes safety, while protecting employee privacy
    - “You may have been exposed to the virus at our workplace”/ “We have a confirmed case of COVID-19”
    - Do not reveal the person’s identity in the communication or otherwise

# EMPLOYEE COMPENSATION AND BENEFITS

# Pay for Exempt and Non-Exempt Employees

- If employees perform work remotely, they must be compensated for this time
  - Non-exempt employees should be paid for the actual time worked
  - Exempt employees should be paid their full salary for the relevant week if they perform any work during that week

# Pay for Exempt and Non-Exempt Employees

- Hourly, non-exempt employees and other employees who may not be able to work from home—consider whether to:
  - Continue to compensate as usual (Bay Area trend and best practice given the circumstances, if feasible)
  - Substitute paid sick leave or vacation/PTO, if consistent with policies and recent government orders
  - Compensate employees only for time they can actually work (non-exempt employees)
  - Withhold pay entirely, given they cannot perform work remotely (least popular option)

# Reporting Time Pay (Hourly Employees)

- If an hourly employee reports for their regularly scheduled shift, but is required to work fewer hours or is sent home
  - CA: They must be compensated for at least two hours, or no more than four hours, of reporting time pay
  - NY: They must be compensated for at least four hours or their regularly scheduled shift (whichever is less)
- Note: Reporting time pay may apply to employees who are required to self-quarantine at the direction of their employer

# Paid Sick Leave—Federal Law

- Federal bill introduced to guarantee paid sick leave in response to coronavirus (passed House and waiting for Senate)
  - Would mandate all employers to let workers accrue seven days of paid sick leave and immediately provide 14 additional days when there is a public health emergency
  - Expands unemployment benefits

# Paid Sick Leave—California & New York

## California Paid Sick Leave

- Per recent guidance, can be used for
  - Absences due to COVID-19 illness;
  - Diagnosis, care, or treatment of an existing health condition; or
  - Preventative care for employee or their family member, including:
    - Self-quarantine as a result of potential or actual exposure to COVID-19 if quarantine recommended by civil authorities
    - Self-quarantine where workers have traveled to a high-risk area

## New York Paid Sick Leave

- While New York City law requires employers to provide employees with paid sick leave, New York State law does not
- New York State Legislature pushing to pass state-wide sick leave law in response to COVID-19 crisis

# Use of Vacation/PTO—California

## California Vacation and PTO v. Sick Leave

- Employees may use sick leave or vacation/PTO for COVID-related issues
  - Employees may choose to take such leave and be compensated provided that terms of the vacation or paid time off policy allow for leave in this circumstance
  - Consider implications of discretionary time off policies
- Cannot require worker to exhaust paid sick leave before using vacation or PTO

# Paid Sick Leave—San Francisco

## San Francisco Expands Paid Sick Leave Coverage

- Examples of new permitted uses of sick leave include:
  - Time off for members of a “vulnerable population” (a person who is 60+ years or has a health condition)
  - Time off for employees whose work location temporarily ceases operations, or who need to care for a family member whose school, child care provider, or senior care provider temporarily ceases operations, in response to a public health or other public official’s recommendation
- Cannot require doctor’s note for use of sick leave during COVID-19 emergency

# Paid Sick Leave—School Closures (Leave Options)

## Federal Law

- No obligation to provide leave (whether paid or unpaid), unless provided for in employer's leave or paid time off policies

## California

- Paid sick leave (CA Paid Sick Leave and SF Paid Sick Leave Ordinance)
- Vacation or PTO
- 40 hours of leave (only for worksite with 25+ employees)

## New York

- Requires leave for a child whose school or childcare provider has been closed by order of a public official due to a “public health emergency”

# FURLOUGHS AND LAYOFFS

# Reduction in Force (“RIF”)

- Many calls from clients wanting to implement RIFs
- Special requirements for RIFs, including separation agreement nuances
- May trigger federal or state WARN notice requirements
  - Federal WARN threshold—employers with 100+ employees
  - CA (75+), NY (50+), and other states have their own WARN laws with different triggers and requirements
  - Limited exceptions to WARN, including relating to faltering businesses and unforeseeable business circumstances

# RIF Alternatives—Reducing Salaries and/or Schedules

- Generally lawful and permissible, but keep in mind some considerations:
  - Do not decrease salary below federal and/or state salary minimum threshold for exempt employees
  - For hourly workers, do not decrease hourly rate below applicable federal, state, or local minimum wage
  - May need employee consent if a condition in their offer letter and/or agreement
  - Visa considerations
  - May trigger contractual severance obligations for executives
  - Schedule reduction may impact benefits eligibility
  - Significant schedule reduction ( $\geq 50\%$ ) could implicate WARN

# RIF Alternatives—Furlough

- Can be company-wide or business-unit-specific
- For salaried, exempt employees, should occur in full workweek increments (Monday-Sunday) to maintain exempt status
- May impact benefits eligibility and equity vesting; could trigger unemployment benefits
- Could serve as a termination of employment, triggering payout of vacation, and WARN obligations in states like CA



*Thank you!*