Legal, Practical, and Policy Imperatives in the Transition from Shutdown to Phased Opening of New-Reality Work and School Sites

Monthly Webinar Series
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Real World Solutions for Real World Problems®

Presented By:
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Patricia S. Eyres (Patti) is a Phi Beta Kappa graduate of Stanford University (B.A. with Distinction 1974). She earned her law degree from Loyola Law School (J.D. cum laude 1977). Patti calls herself a “recovering litigator,” who knows first-hand the value of paying attention to prevention. After spending 18 years devoted exclusively to defending companies in the courtroom, she resolved to help business leaders recognize potential legal landmines before they explode into lawsuits. She brings a unique and practical perspective to the critical legal issues impacting the workplace.

Patti also supervises the firm’s specialized Education law practice, guiding public school districts through in a wide range of employment-related actions involving return-to-work, reasonable accommodation and leave of absence requirements. She consults with school districts on how to conduct and document the interactive process, internal misconduct investigations, disciplinary actions and due process hearings. She serves as an independent harassment/discrimination investigator, and trains HR professionals to conduct misconduct investigations. She is a recognized expert in helping guiding public agency and private industry employers through their critical compliance processes for evaluating workplace reasonable accommodations, making return to work decisions and managing multiple leaves of absence. She is the author of The Employer’s Guide to Leaves of Absence and the Return to Work Process (1st Edition 2010; 2nd Ed. 2014, 3rd Ed. 2018), the Interactive Process Manual for California School Districts (1st Edition 2007; 2nd Ed. 2010; 3rd Ed. 2013, 4th Ed. 2018), and the Administrator’s Desktop Guide to Return to Work, Reasonable Accommodations & Leaves of Absence (2016).

As CEO/Publisher of Proactive Law Press, LLC, which is headquartered Arizona, Eyres supervises the production and publication of books, training materials educational products for business owners, public school administrators, front-line leaders, HR and Risk Managers.

Eyres Law Group, LLP

The firm offers a specialized law practice focusing exclusively on helping employers to proactively manage their employment practices in an increasingly regulated and risky environment. Eyres Law Group advises clients in all aspects of employment law from recruiting and hiring through performance management, discipline and termination decisions. In addition to drafting enforceable policies and procedures, guiding employers through their personnel practices and developing defensible documentation, the firm provides an array of specialized training programs and other resources for executives, front line leaders, HR specialists and risk management professionals. Despite your very best efforts, in today's legal climate, some claims are unavoidable. To maximize your successful defense, we support your organization by conducting lawful investigations of internal discrimination or harassment complaints and then guide you through appropriate corrective action.

The firm’s specialized Education law practice, guiding public school districts through in a wide range of employment-related actions involving return-to-work, reasonable accommodation and leave of absence requirements. We work extensively with K-12 public school districts to assure their compliance with the Education Code and overlapping Federal and State law.

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Legal, Practical and Policy Imperatives in the Transition from Shutdown to Phased Opening of New-Reality Work and School Sites

Employment and Education Law Legal Services Hotline Program for School Districts and County Offices of Education

Real World Solutions for Real-World Problems®

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Proactive Planning, Preparation, Policy and Protocols: Key guidance from CDC and directives from public health authorities; state, and county orders for phased return to work amidst COVID 19 – short overview with detailed Appendix addressing safety protocols for students and staff

Law, Regulation, and Policy: Compliance with federal and state laws and regulations, Employment and Safety/Health Laws: State and Federal statutes addressing accommodations, leaves, and handling the needs of high risk employees – WC will be handled in separate webcast and resources

Additional Critical Resources
Transition to Return to Work with Attention to Health and Safety

California Stage 2 Guidance for Employers to Facilitate Safe Re-opening

1. Comply with guidelines issued by public health and safety agencies;
2. Perform a detailed risk assessment;
3. Implement a site-specific protection plan;
4. Train employees on how to limit the spread of COVID-19;
5. Train employees on how to screen themselves for symptoms
6. Implement individual control measures and screenings;
7. Implement protocols to address and approve LOAs & accommodations
9. Implement disinfecting protocols for surfaces, high touch equipment;
10. Implement physical distancing guidelines;
11. Make physical changes to the workplace as necessary for distancing;
12. Help educate parents and others accessing district programs and facilities.

*** Comply with individual County Health Dept. Orders
Elements of a Worksite Specific Plan for Each Facility - 1

1. Establish a written, worksite-specific COVID-19 prevention plan at every office location, perform a comprehensive risk assessment of all work areas, and designate a person at each office workspace to implement the plan.

2. Identify contact information for the local health department where the facility is located for communicating information about COVID-19 outbreaks among employees.

3. Train and communicate with employees and employee representatives on the plan.

4. Regularly evaluate the office workspace for compliance with the plan and document and correct deficiencies identified.

5. Adhere to the federal CDC and state guidelines published and as updated. Failure to do so could result in workplace illnesses that may cause operations to be temporarily closed or limited.

6. Investigate any COVID-19 illness and determine if any work-related factors could have contributed to risk of infection. Update the plan as needed to prevent further cases.

7. Identify close contacts (within six feet for 15 minutes or more) of an infected employee and take steps to isolate COVID-19 positive employee(s) and close contacts.

8. Establish protocols for communicating with individuals who may have been exposed.

Elements of a Worksite Specific Plan for Each Facility - 2
Employee Training Related to COVID 19 and Safety Protocols with Legal Implications


2. Underlying health conditions may make individuals more susceptible to contracting the virus. CDC updates this list frequently.

3. Self-screening at home, including temperature and/or symptom checks using CDC guidelines, and why some screenings may be implemented at the workplace.

4. To seek medical attention if their symptoms become severe, including persistent pain or pressure in the chest, confusion, or bluish lips or face. CDC updates symptom list regularly.

5. Importance of consistent compliance with workplace physical distancing requirements.

Important Employee Training Requirements

6. The importance of frequent handwashing with soap and water, including scrubbing with soap for 20 seconds (or using hand sanitizer with at least 60% ethanol or 70% isopropanol when employees cannot get to a sink or handwashing station, per CDC guidelines)

7. How to enforce requirements for face coverings, proper use, washing and sanitizing after each shift.

8. Properly train subs or temps on prevention policies and have necessary PPE. Discuss these responsibilities ahead of time with organizations supplying temporary and/or contract workers.

9. Information on all available leaves of absence – both statutory and employer sponsored.
OSHA and CDC Guidance for Employers

Infection Disease Preparedness and Response Plans
• Implement infection control measures and enforce consistently
• Develop, implement, & communicate about workplace protections
• Hierarchy of Controls: Engineering, Administrative Safe Practices, PPE

OSHA Recordkeeping and Reporting for COVID-19 Cases
• The case is a confirmed case of COVID-19;
• The case is work related; and
• The case results in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness.

Factors Cal-OSHA Will Consider in Determining Employer Work-Related Determination
• Reasonableness of employer’s investigation into work-relatedness

It would be reasonable for an employer, upon learning of an employee’s COVID-19 illness, to ask the employee how he or she believes he contracted the virus, to discuss with the employee activities at work and outside of work that may have led to the illness, and to review the employee’s work environment for potential exposure.

• The evidence available to the employer.

At the time it made the decision about work-relatedness and whether it learned additional information.

The evidence that a COVID-19 illness was contracted at work.
New Cal OSHA Guidance
Updated May 21, 2020
Criteria for Recordable COVID -19 Illness

Likely Work-Related | Likely Not Work-Related
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Several cases develop among workers who work closely together and there is no alternative explanation. | The employee is the only worker who contracts COVID-19 within their vicinity and the employee’s job duties do not involve frequent contact with the general public, regardless of the rate of community spread.
The employee’s illness is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation. | Outside of the workplace, the employee closely and frequently associates with someone (e.g., a family member, significant other, or close friend) who (1) has COVID-19; (2) is not a coworker, and (3) exposes the employee during the period in which the individual is likely infectious.
The employee’s job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.

Impact of COVID 19 on Injury & Illness Prevention Program

New 5/21/20 guidance states that “for most California workplaces, adopting changes to their IIPP is mandatory since COVID-19 is widespread in all communities.

OSHA and Cal/OSHA require employers to provide a workplace free from “recognized hazards causing or likely to cause death or serious physical harm ....” Employers must establish, implement and maintain an effective injury and illness prevention program (IIPP). It requires employers to:

- Identify and correct workplace hazards;
- Communicate known and foreseeable hazards to employees;
- Ensure that employees comply with the policy;
- Investigate injuries and illnesses; and
- Provide hazard communication training when necessary.
Broad Requirements Set forth Regarding Content and Scope of IIPP
Mirrors much of the CDC Guidelines

- Stay home when sick;
- Specific conditions for return from positive test or symptoms;
- Telework whenever possible;
- Provide PPEs, including cloth face coverings and require their use;
- Social distancing with many concrete measures for virtual meetings;
- Rigorous disinfecting of high touch surfaces;
- Hand washing, cough/sneeze etiquette, etc.;
- Robust hazard communication training;

** Details available through ELG hotline program, ELG and JPA resources and Cal-OSHA website

Employee Rights to Raise Concerns about RTW Due Good Faith Safety Concerns or Request for Accommodation

- **Safety Reporting Retaliation Protection:** Employees can refuse to come to work if they believe they are in imminent danger. Imminent danger is defined as “…any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.”

- **ADA-FEHA Reasonable Accommodation Requests:** Employees who have disabilities or conditions that make them susceptible to serious complications from Covid-19 can request reasonable accommodations before returning to work. These can include telework, additional PPE, changes to their work schedule, etc. FEHA prohibits retaliation, whether or not the accommodation is approved or denied on legitimate basis.
Handling Employee Complaints about Wearing or Using Personal Protective Equipment

Types of Complaints
- Lack of sufficient PPE provided
- Ineffective PPE
- Interference with the employee's ability to safely perform his or her job
- Physical discomfort

What should you do?
- Maintain and provide the correct PPE
- Usage policies and procedures (especially face coverings)
- Develop a procedure for employee complaints
- Assess and address all complaints seriously and promptly
- Gather and document all of the relevant information
- Work directly with the employee in trying to find the solution to the problem

Prevent Risky Responses to Complaints & Address Negative Conduct Immediately

- Don’t ignore or be dismissive of employee’s complaints
- Don’t prevent employees from discussing safety concerns with co-workers
- Encourage prompt reporting of safety concerns
- Immediately respond to reports of PPE shortages
- Promptly address concerns raised about unenforced distancing protocols
- **Conduct an interactive process for every requested accommodation**

- Prevent harassment, bullying, abusive commentary about face masks
- Never, never allow retaliation for safety complaints
- Investigate complaints of bullying and take immediate corrective action
- Handle complaints by employees about age, disability, national origin issues
- **Proactively prevent retaliation for any employee requesting an accommodation.**
School Districts and County Office of Education: Specific Criteria for Resuming On-Site Operations

Guiding Principles for Safe and Efficient Return to School and Work

- Increasing risks with higher or longer interactions between students & staff.
- **Lowest Risk:** Virtual-only classes, activities, and events.
- **More Risk:** Small, in-person classes, activities, and events. Groups of students stay together and with the same teacher throughout/across school days and groups do not mix. Students remain at least 6 feet apart and do not share objects (e.g., hybrid virtual and in-person class structures, staggered/rotated scheduling to accommodate smaller class sizes).
- **Highest Risk:** Full, in-person classes and activities. Large events Students not spaced apart, shared classroom materials. No spacing between classes.

**Priority:** refer to and follow County specific directives and your JPA or ELG Hotline resources.
### CDC Recommendation for “Scaling Up” Educational Operations

**All Stages**

1. Establish and maintain communication with local and State authorities to determine current mitigation levels in your community.

2. Protect and support staff and students who are at higher risk for severe illness, such as providing options for telework and virtual learning.

3. Follow CDC’s Guidance for Schools and Childcare Programs.

4. Provide teachers and staff from higher transmission areas (earlier Step areas) telework and other options as feasible to eliminate travel to schools and camps in lower transmission (later Step) areas and vice versa.

5. Encourage any other external community organizations that use the facilities also follow this guidance.

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### Vigilance to Maintain Healthy Environment

**CDC is Guidance; County Orders Control**

- **Modified layouts:** space seating and desks 6 feet apart, whenever feasible. Desks should face the same direction (not each other).

- **Physical barriers and guides:** sneeze guards and partitions, particularly where 6 ft separation is impractical. Use take on floors and sidewalks.

- **Communal spaces:** close all communal use shared spaces, such as cafeterias, playgrounds with shared equipment, OR stagger use and clean/disinfect between use. Add physical barriers between bathroom sinks, especially where not 6 ft. apart.

- **Food Service:** students bring own meals OR serve individually plated meals in classrooms. If food is served, use pre-packaged boxes or bags for every individual. Use disposable utensils and dishes. Non-disposable items must be frequently washed in hot water and soap.
Best Practices for Scheduling and Logistics for Disinfecting and Distancing

Scheduling

- Alternating work shifts/rotations: one week on and one week off
- Coordinate remote work schedules with shifts back in physical office
- Staggered work arrival/departure times; staggered breaks

Office layout and logistics

- One-way hallways, stairwells, and elevators
- Install partitions or barriers on office cubicles, reception areas, etc.
- Limit in-person meetings to large rooms and/or critical meetings

Breakroom or lunch areas

- Use disinfectant wipes on microwaves, table surfaces after use
- Prohibit communal or shared food, beverages, refrigerator
- Place limits on maximum number of employees present or plexiglass

Safety of Shared Bathrooms is a Big Obstacle to Staff Feeling Comfortable Returning to Work

- Restrooms with high pressure flushes create a plume of droplets that extend far further than 6 feet. The coronavirus has been found in human waste up to a month after the victim has recovered and the droplets from human speaking hang in the air for at least 8 minutes.

- A monitor should make sure that people are waiting their turn in a well spaced manner and to make sure that the restroom is cleaned and sanitized regularly (ideally every thirty minutes to an hour.)

- Consider installing touch free sinks and touch free paper towel dispenses
- Remove hand dryers, which would blow germs around
- Remove doors to create airport-style no touch entrances
Imperatives: Employees and Students
Stay Home Whenever Appropriate

1. Educate staff and families about they and their children should stay home and when they can return to school.

2. Actively encourage employees and students who are sick or who have recently had close contact with a person with COVID-19 to stay home.

3. Enforce policies to encourage sick employees and students to stay at home without fear of reprisal, and ensure employees, students, and students’ families understand these imperatives.

4. Staff and students must stay home if they have tested positive or are showing COVID-19 symptoms.

What to Do if Staff or Students Get Sick Onsite
Isolate and Transport

• Immediately separate students or staff with COVID-19 symptoms (fever, chills, cough, shortness of breath) at school. They should go home or to a healthcare facility depending on how severe their symptoms are, and follow public health authorities guidelines.

• Work with administrators, nurses, and other healthcare providers to identify an isolation room or area to separate anyone who has COVID-19 symptoms or tests positive but does not have symptoms. School nurses and other healthcare providers should use Standard and Transmission-Based Precautions when caring for sick people.

• Establish procedures for safely transporting anyone who is sick to their home or to a healthcare facility. If you are calling an ambulance or bringing someone to the hospital, try to call first to alert them that the person may have COVID-19.
What to Do if Staff or Students Get Sick Onsite

Clean and Disinfect

• Close off areas used by sick person.
• Do not use these areas until after cleaning and disinfecting.
• Wait at least 24 hours before cleaning and disinfecting. If 24 hours is not feasible, wait as long as possible.
• Ensure safe and correct use and storage of cleaning and disinfection products.
• Train the custodial and maintenance staff and others who will perform this work. Provide all appropriate PPEs.

What to do if Staff or Students Get Sick Onsite

Notify Public Health Authorities and Close Contacts

• In accordance with state and local laws and regulations, school administrators should notify local health officials, staff, and families immediately of any case of COVID-19 while maintaining confidentiality in accordance with the ADA, the FEHA, and medical privacy standards.
• Inform those who have had close contact with a person diagnosed with COVID-19 to stay home and self monitor for symptoms. Apply LOA policies in a flexible manner (preventative care).
• Follow guidance from CDC and public health authorities if symptoms develop.
When Employees and Students May Return to School and Work

- A staff member or student who has COVID-19 may return 3 days after their fever us normal; and
- All of their other symptoms have improved; and
- Ten days have passed since their first symptom OR they have tested negative twice in a row, with the tests being 24 hours apart and they have no fever or other symptoms.
- If a staff member or student has had direct exposure with COVID-19, they can return 14 days after their last exposure, as long as they do not have a fever or any other symptoms.

Employees with Major Risk Factors will Remain a Challenge Moving Forward

- Age over 65, chronic conditions (lung, heart, respiratory, inflammatory, liver, kidney), weakened immunities, severe obesity, severe gastric, sleep apnea
- Encourage them to self identify without fear of reprisal
- Avoid making unnecessary medical inquiries
- Encourage telework
- Stagger shifts, implement other measures for physical distancing
- Consistent with applicable law, put in place policies to protect the privacy of people at higher risk regarding underlying medical conditions.
- Strictly comply with LOA and disability statutes and regulations for reasonable accommodations – ADA, FEHA, Rehabilitation Act, etc.
Policies and Procedures
Prevention, Planning, Processes
Implementation and Enforcement

Key Policies to Review, Update, and Implement
During Ongoing COVID 19 Pandemic

Safety and Health
- General workplace safety
- IIPP and OSHA recording and reporting compliance
- OSHA hierarchy of controls and policies for distancing, disinfecting, etc.
- Temperature and health monitoring

Employment Practices
- Leaves of absence for illness or high risk conditions (self or family)
- Leaves of absence for preventative care (self or family)
- Leaves for school, camp, or child care schedules or emergencies
- Interactive process and reasonable accommodations – onsite modifications
- Reasonable accommodations – telework OR extended leave
- Wage and hour compliance during health monitoring, telework, etc.
- Benefits and continuation coverage when in unpaid leave
Robust LOA Policies and Enforcement a Critical Tool

- Implement flexible sick leave practices that enable staff to stay home when they are sick, have been exposed, or caring for someone who is sick.

- Examine and revise policies for leave, telework, compensation, discipline.

- Leave policies should be flexible and not punish people for taking time off.

- Encourage sick employees to stay home and away from co-workers.

- Should also account for employees who need to stay home with their children if there are school or childcare closures, or to care for sick family members. Consider Labor code childcare emergencies and FFCRA through at least 12/31/20.

Checklist: Proactive Planning and Policy for Re-Configuration of Physical Workplace – 1

** See Appendix and County Orders for Details

- Consider public areas, such as hallways, restrooms, and elevators
- Floor plans and 6 ft markings
- Plexiglas barriers
- Remove seating in conference rooms, break or lunch rooms
- Restroom access limitations
- Hand sanitizer stations
- Deliveries for offices to central location, possible disinfection techniques
- One way pedestrian traffic in hallways and corridors
- No sharing of kitchen utensils
- No sharing of tools or equipment when feasible; otherwise regular disinfecting
- Consider ventilation, HVAC and air systems (filters if possible)
- Limit time spent in meetings or gatherings to minimal increments
Checklist of Policies for Risk Management
Legal Compliance and Defenses – 2
** See Appendix and County Orders for Details

New policies to enact and enforce
• Physical distancing
• Daily or alternating day temp checks and monitoring symptoms
• Handwashing, cleaning and disinfecting – allocation of responsibilities
• Limiting meetings and gatherings
• Return to work after COVID related infection or self-isolation for exposure (implicates accommodations and leaves)

Temperature checks and monitoring
• Required by some local and county orders
• Protect the screener with PPE and barriers
• Proper training and confidentiality issues
• Screening out of view, safe distance from other workers,
• Handling results: sick leave and privacy in reporting results

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Who should be Encouraged to Stay Home from Work?

High risk categories: (CAVEAT: be careful about some forms of discrimination)
• Age 65 or over
• Heart disease or severe hypertension
• Diabetes, sleep apnea, severe morbid obesity (over 40 BMI)
• chronic inflammatory conditions – gastric, rheumatoid arthritis
• Respiratory conditions – asthma, COPE
• Liver or kidney disease
• Current or recent pregnancy

Current CDE symptom list: cough, shortness of breath, fever, chills, severe chills with shaking, muscle pain, sore throat, loss of taste and/or smell

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Sound Policies for Risk Management
Legal Compliance and Defenses - 3

Queries to employees about health

• Do you have fever, chills, sore throat, etc. (list symptoms)?
• Do you require a reasonable accommodation?
• What modifications or adjustments do you require to assist you in performing your essential job functions? (individualized interactive process)
• Do you have an underlying condition that puts you at greater risk of serious complication if you become infected with COVID-19
• These questions appropriate when job related or due to business necessity. Teleworkers aren’t asked these questions unless they will periodically be at the workplace or required to travel for business.

Asking Questions about Family Members who Test Positive or Have Symptoms

• Asking an employee about his contact with family members unnecessarily limits the possible extent of an employee’s potential exposure to COVID-19.

• From a public health and workforce management perspective, ask whether an individual has had contact with anyone who the employee knows has been diagnosed with COVID-19, or who may have symptoms associated with the disease.

• From EEOC’s perspective, this general question is more legally sound. The Genetic Information Nondiscrimination Act -- GINA for short -- prohibits employers from asking employees medical questions about family members’ specific medical conditions or history of disease.
Establish Policy and Procedure for When and how to Implement Screening

- Temperature and/or symptom screenings for all workers at the beginning of their shift and any vendors, contractors, or other workers entering the facility.

- Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening. Establish confidentiality standards.

- If requiring self-screening at home, ensure that screening was performed prior to the worker leaving the home for their shift and follows CDC guidelines or county requirements.

- Require workers who are sick or exhibiting symptoms of COVID-19 to stay home.

Employee May Not Refuse to Consent to Testing and Monitoring

- The ADA and FEHA permit your entity to prohibit an employee from physical presence in the workplace after refusal to answer questions about symptoms associated with COVID-19, or has been tested for COVID-19.

- May also bar employees who refuse temperature checks or do not comply with apps for home testing and reporting before each shift.

- To help with cooperation: ask the reasons for the employee’s refusal. You may be able to reassure employee that these steps are for everyone’s safety.

- Assure employees the results will be confidential. Assure employees that if they believe they need an accommodation for certain underlying symptoms related to a disability, they request accommodation and entity for accommodation. **Always conduct a good faith interactive process, to comply with CA FEHA, and avoid retaliation claim.**

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Acceptable Testing Procedures

• Body temperature tests;

• Sending employees with COVID-19 symptoms home;

• Asking employees who report feeling sick about symptoms of COVID-19;

• Questions about travel to at-risk areas

• Pre-employment testing? (yes, post offer)

Testing and Questioning All Similarly Situated People is Vital to Avoid Discrimination

• Don’t require only certain employees to have regular temperature checks. Example: don’t single out those with underlying conditions who do come to physical worksite. Don’t test only those over 65.

• May ask an individual employee about symptoms or be tested only if there is a reasonable belief, based on objective evidence, that the employee has COVID 19.

• Example: an employee with a persistent, hacking cough, manager can ask whether the employee has been to a doctor, and whether the employee knows if she has or might have COVID-19. These types of questions are permissible because of direct threat of COVID 19 infection.

• Must be based on objective, first-hand observation and not “rumor” or subjective assumptions about at-risk workers.
Health Screening Protocols to Avoid Discrimination or Disparate Treatment - 1

• Ask the same questions of every employee – don’t single out only the high risk or “vulnerable” categories.

• Employees should consent in writing to testing – may not refuse if it is a consistent condition of entering certain worksites.

• Limit the scope of screening to COVID-19 – temperature, symptoms, known exposures, and/or self or family high risk categories.

• Retain all testing results as confidential medical records.

• Consider alternative testing methods if necessary for reasonable accommodation.

Health Screening Protocols to Avoid Discrimination or Disparate Treatment - 2

• Handle employee questions, concerns, or reluctance to participate properly, starting with asking that concerns the employee has.

• Ask of a reasonable accommodation is necessary?

• Be aware that wage and hour laws require paying non-exempt employees for testing and monitoring time, pre-shift, and during shift. This may include standing in line to have temperatures taken, so consider alternatives to reduce lines – for wage purposes and also to assure physical distancing.

• Pay employees for the day to go home, if they have a temperature.

• ** SEE appendix for sample guidelines for implementation
Best Practices to Prepare for Face Coverings

- State and local public health orders really and change often with regard to whether or not face coverings are mandatory

- Ultimately comes down to a district decision: should your agency require face coverings in all circumstances or just in some?

- Employees must require employees to practice social distancing, whether or not there is a face covering policy

- Best practice: adopt and circulate written protocols on face coverings and disseminate to employees. Focus on special considerations for workplaces with high risk individuals

- *** See details in Appendix with checklists for implementation

What Should Individuals Do if they Have COVID-19 Symptoms?

- If coronavirus symptoms suggest the need for medical attention, contact a healthcare provider.
- Call healthcare provider if you have the following symptoms:
  - Difficulty breathing (shortness of breath)
  - Symptoms such as fever and cough are getting worse
  - You are unable to care for symptoms at home

- Those over 60 years old and/or have a compromised immune system or a chronic serious medical condition, should contact your health provider by phone. NOTE: test kits are scare and providers are ordering stay at home for those who are not in high risk group, even with symptoms

- If need to go to the hospital, call ahead first so they can prepare for arrival. If you call 911, be sure to tell them you are experiencing symptoms of coronavirus.
Instruct Managers about Reporting about a Worker Positive for COVID-19

- The information that an employee has symptoms of, or a diagnosis of, COVID-19, is medical information. Must be reported to appropriate employer officials so that they can take actions consistent with guidance from the CDC and other public health authorities.

- Whether to report “unnamed” employee or identify individual depends on each workplace and why a specific official needs this information. Employers should make every effort to limit the number of people who get to know the name of the employee.

- A designated representative may interview the employee to get a list of people with whom s/he had possible contact through the workplace, in order to inform those who may have been exposed to monitor their own symptoms or take other precautions for self or family.

Proper Procedures to Follow With a Confirmed Case of COVID-19 in the Workplace - 1

1. Ask infected employee who they have had contact with at work and where they have worked within the last 14 days.

2. Recommended: Map locations of where employee worked within location.

3. Recommended: List of all employees who had contact with infected employee.

4. Remove sick employee from worksite.

5. Close areas where sick employee worked (ideally waive 24 hours before cleaning).
Proper Procedures to Follow With a Confirmed Case of COVID-19 in the Workplace - 2

6. Contact local health department and inform them of confirmed case, ask for any guidance they can provide and inform them of your entity plan.

7. Notify co-workers who were in contact with sick employee (maintain sick employee's privacy and do not disclose identify).

8. Check employees who had community contact for symptoms (fever, cough, shortness of breath, acute respiratory) and take temperatures.


10. Assess whether the infection must be recorded under OSHA

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Other Issues about Reporting Symptoms or COVID 19 Illness

- ADA-FEHA confidentiality does not prevent this employee from communicating to his supervisor about a co-worker's symptoms.

- If entity knows an employee who is teleworking or in self-quarantine because of positive COVID 19 or symptoms supervisor may disclose the information without saying why the employee is teleworking.

- Employee on medical leave: don’t disclose reason for leave, just that employee is on authorized leave.

- Supervisor should contact appropriate management officials to report this information and discuss next steps.

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Childcare Programs and Providers:
Safety Considerations for Students and Staff
in Resuming Operations for Early Childhood Education,
After School Programs, and Related Activities

** See Appendix and County Orders for Details

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Child Care Risk Hierarchy

- As with school site, the more people a child or staff member interact with and the length of the interaction will determine the risk of spread.

- **Lowest Risk**: Children and teachers engage in virtual-only classes, activities, and events.

- **More Risk**: Small, in-person classes, activities, and events. Groups of children stay together and with the same provider and groups do not mix. Children remain at least 6 feet apart and do not share objects.

- **Highest Risk**: Full sized, in-person classes, activities, and events. Children are not spaced apart, share classroom materials or supplies, and mix between activities.
CDC Recommendations for “Scaling Up” Childcare Operations

Step 1: Restrict childcare programs to children of essential workers only

Step 2: Expand to all children with enhanced social distancing measures

Step 3: Remain open with distancing measures.

Applies to: Pre-K programs and private and public schools, after school child care programs, municipal run programs, and private facilities.

** See Appendix and County Orders for Details

Identify and Provide Significant Precautions for High Risk Teachers and Staff

• Offer options for staff at higher risk of severe illness (including older adults and people of all ages with certain underlying medical conditions) that limit their exposure risk (e.g., telework, modified job responsibilities that limit exposure risk).

• Consistent with applicable law, put in place policies to protect the privacy of people at higher risk regarding underlying medical conditions.

• Always consider an interactive process and reasonable accommodations to keep employees at work, where modifications can keep them safe.

• Alternative accommodations: provide flexibility with leave, or telework.
Three Major Issues on Employees’ Minds as they Return to Work

1. Can I refuse to report to work?
If they have a reasonable good faith concern that their working conditions aren’t safe, they are likely protected if they refuse to report to work. If they have a condition that puts them at a higher risk for COVID-19 complications, they have a good case for telework or a leave.

2. Does my employer have to protect me from contracting COVID-19 at work?
Yes, to the greatest extent possible. As long as employers are following the guidelines and protocols set by the CDC, OSHA, and state/local government and health officials, they are covered.

3. What happens if I get sick or I have a family member who gets sick?
They can – and must – stay home. Sick leave is still available under the FFCRA through 12/31/20. Other leaves will apply (Ed. Code, possibly SDI or PFL)
How to Respond to Employees who Do Not Want to Return to Worksite

Best practices to address anxiety:
• Communicate and discuss safety protocols
• Consistency in responding to anxiety, fear, generalized concerns
• Establish and enforce consistent policies
• Ensure that leaders are trained to enforce policies consistently
• Communicate with unions and other stakeholders to ally fears
• Address telework as often as practice – for all or part of the week
• Address leaves – with verification of medical basis

Reasonable Accommodations
• Telework options
• Leave options
• Mental health issues and concerns – don’t discount them

Must Your District Reasonably Accommodate Generalized Fear?
• Generally, you are not required to “accommodate” employee fears when there is no basis (e.g., no underlying health risk for self or family, no reasonably expressed concern about workplace safety)

• Accommodations may be required if disability present (may be physical, medical, pregnancy-related, or mental health/mood disorder

• Recognize “whistleblower” safety complaint vs. general fear

• Communicate with bargaining unit representatives and be mindful of union-related complaint (concerted activity) v. individual fear

• Ask about reasons or basis for fear and refusal to return; employer is not required to permit employee to remain off work if based on vague and unexplained fears.
California FEHA Regulations
“Major Life Activity” and “Limits” a Major Life Activity

• 3-part definition: actual limitation, record of disability or “regarded as”

• Physical, mental, & social activities, "especially those life activities that affect employability or otherwise present a barrier to employment or advancement."

• “Limits” a major life activity means it makes achievement of the life activity difficult. Whether achievement is difficult is an individualized assessment:
  – what most people in the population can perform with little or no difficulty,
  – what members of the individual’s peer group can perform
  – What the individual would be able to perform with little or no difficulty, if not for the disability.

• Working is a major life activity

Triggers for the Duty to Engage in Interactive Process

Whenever employee states he/she is limited or needs accommodation

Return to work after LOA when COVID related
Recruiting Onboarding In midst of COVID
To protect health and for infection control – per CDC

After COVID symptoms or Self- isolation
Request to Telework or for onsite modifications
To comply with OSHA, CDC or Public health regulations
Interaction: The Heart of the Process

Always an Individual assessment:
• How the employee is “limited” in relation to others?
• Essential job functions, as currently performed, in current environment
• Business needs in the window of time the decision is being made

Process must have integrity and open lines of communication:
• Dialogue — not monologue
• Objective -- not subjective
• Continuous -- not impetuous
• Receptive – not deceptive
• Analysis – not paralysis
• Meet and confer -- not defeat and deter

Specific Considerations for Accommodation Plan
Evaluate Effective Modifications vs. Undue Hardship or Direct / Threat to Safety of Self or Others

1. Start with modifications to the manner of performing essential functions in employee’s current position.

2. Address necessary protocols for response to foreseeable medical incidents.

3. Consider appropriate adjustments to environmental conditions.

4. Implement protective measures for the employee, other staff or visitors.

5. If no accommodation is effective in the employee’s current position, or would result in undue hardship, evaluate reassignment to vacant position that minimizes or mitigates the risk.

6. Last resort: leave to recover or self-isolate within finite and reasonable period of time
Additional Examples of Potential Reasonable Accommodations without Undue Burden

1. Additional or enhanced protective gowns.
2. PPE: Masks, gloves, or other gear beyond those generally provided.
3. Erecting a barrier that provides separation from co-workers.
4. Increasing space between employee and others in meetings.
5. Relaxation of essential travel requirements for employees at high risk.
6. Elimination or substitution of specific “marginal” functions
7. Temporary modified work schedules onsite.
8. Requiring co-workers in department to wear face coverings.
9. Daily temperature checks for all co-workers with unavoidable proximity.
10. Adjusting times certain essential tasks are done – for staggered shifts.
11. Moving the location of employee’s workstation from open cubicle to private office on a temporary basis.

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Additional Principles for Compliance with Interactive and Accommodation Requirements

- Don’t forego discussion request for accommodation that won’t be needed until the employee returns to work, after telework ends.

- An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship. The employer may discuss with the employee whether the same or a different disability is the basis for this new request and why an additional or altered accommodation is needed.

- NOTE: expect requests for accommodations due to infection control and PPE issues: allergies to latex gloves, breathing problems with face coverings, allergies or chemical sensitivities to disinfectants with strong scents or other manifestations. Always trigger an interactive process; don’t just say “infection control is paramount.”

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Employer Cannot Force Employee to Use Leave Prematurely or Unnecessarily if Reasonable Accommodations are Available

- If employee can work intermittently, employer can’t mandate that the leave be taken in a block of time (whether paid or unpaid)
- Can’t mandate that leave begin sooner than the employee’s health care provider specifies, nor extend beyond the provider’s release to return to work
- Can’t mandate that employee use FMLA-CFRA leave for multiple consecutive days of sick leave unless it qualifies as ‘serious health condition’
- Can’t mandate that employee use leave as part of a ‘light duty’ or ‘modified duty’ assignment under workers’ compensation program
- Can’t require use of a job-protected leave day if it would have been a non-duty day for the employee had s/he not been on leave (consider furlough day issues)

Factors to Consider when a Continuous Process is Required

- Is the modification or adjustment working as anticipated?
- Has the disability/limitation changed? (e.g., improved or declined)
- Have there been unanticipated risks to health and safety?
- Have new hazards been introduced that alter safety risks?
- Has there been a fundamental alteration in business operations?
- Have costs and/or disruption stabilized or increased?
- Is proposed discipline for reasons that may be disability-related?
- Are there objective reasons to conduct a neutral fitness for duty evaluation?
- Is the supervisor managing the employee appropriately?
- Is the supervisor managing other employees’ workloads appropriately?
- Do co-workers need training or support to mitigate risks?
- Periodically re-evaluate the accommodation plan to assure that it is effective, or re-engage to make necessary changes.
Factors to Consider in Documenting a Defensible Dialogue and Decision

1. Conduct an individualized analysis for the employee’s limitations.

2. Don’t assume all people with same disability (high risk underlying health condition) are similarly limited for complications for COVID 19 exposure.

3. Don’t speculate about risks; stick to verified information.

4. Identify and implement necessary protocols for physical worksite: distancing, PPE, regular sanitizing of surfaces and temperature taking.

5. Appropriately address any concerns or “fears” for employee and staff.

6. Carefully work with leaders on “do’s and don’ts” for communications.

Is Undue Hardship Even a Feasible Defense for Vulnerable Workers Given Extreme Health Risks from COVID 19?

- EEOC: "An employer does not have to provide a particular reasonable accommodation if it poses an 'undue hardship,' which means 'significant difficulty or expense.' In some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now."

- "If a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems

- More difficult to hire temp workers for temporary positions
Further Considerations for “Significant Expense or Difficulty” to Invoke Undue Hardship

- It may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking.

- It may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions.

- Interactive dialogue should be mutual good faith exploration to determine if there may be an alternative that could be provided that does not pose such problems.

Factors to Consider in Establishing Direct Threat Defense

1. **Duration of the risk.** Example: an employee with TB may pose a risk to health and may be contagious.

2. **Nature and severity of the potential harm.** Example: An employee in safety-sensitive job who has seizure disorder and who may briefly lose consciousness puts self and others at risk. However, don’t make assumptions without medical verification.

3. **Likelihood that potential harm will occur.** Rely upon the most relevant and up to date medical verification, rather than generalized fear; particularly with mental health limitations and certain chronic health conditions.

4. **Potential harm must be “imminent.”** Example: degenerative conditions that are not currently limiting or restrictive is a “future risk,” that isn’t disqualifying.
Considerations for Telework as a Reasonable Accommodation

• Employers must not single out employees either to telework or to continue reporting to the workplace on the basis of race, sex, national origin, religion, sexual preference, disability or veteran’s status.

• Restrictions that were not reasonably accommodated in the past (e.g., driving restrictions) should be re-visited, and undue hardship defenses will be more difficult to establish for individuals in vulnerable populations at high risk of serious COVID 19 complications from exposure or infection on site.

• Telework accommodations with COVID 19 are different because the restriction is from exposure onsite- not necessarily physical performance of essential functions.

What Should the Telework Interactive Process Address

• Medical verification of limitation on working at physical worksites.

• Obtain concrete restrictions on how much onsite exposure would be acceptable and consider options for staggered shifts, other physical distancing modifications to office settings.

• Consider modified schedule, with medical verification, so that employee works part of the week remotely and reports to physical worksite only periodically and under very concrete defined terms for modification of facilities, co-worker face coverings, additional sanitizing, etc.

• Consider telework as an interim arrangement with a very specific accommodation plan that sets a time limit and opportunity for ongoing evaluation of effectiveness for productivity and performance.
Craft a Written Accommodation Plan that is Clear, Specific, Meaningful and Measurable

• Specify performance expectations, standards of conduct when interacting with peers or stakeholders online, requirements for following operating procedures.

• Timekeeping is critical for both wage and hour and managing work outflow. Face to face communications via Zoom, Skype or video calls can keep employees on track. Maintain flexibility due to the stressful conditions.

• Configuration of at-home workstation for both security and safety. Follow ergonomic recommendations.

• Encourage a private, dedicated space for at-home workspace.

What Should Written Telework Accommodation Plan Include?

• Specific restrictions for job tasks and environment: modifications for partial onsite or prohibition of any onsite work. Address anticipated time frame to re-address effectiveness, scope of accommodation, and any modifications.

• Any modifications to work station at home or in the physical facility for periodic on-site work.

• Expectations for operational security, continuity of key operations, records management for CPRA, backups, performance expectations, and terms for extending, suspending, or ending telework accommodation.

• Requirements for availability at all times during working hours, or will remote meetings and appointments be scheduled ahead of time. Remote meetings over phone or on camera?
Documenting your Process for Addressing Accommodation Requests for COVID 19

- Accommodate individuals with disabilities who are at higher risk for developing complications from COVID-19 to greatest extent possible –

- Establish a projected date to re-evaluate ongoing accommodations (like an ERTW transitional assignment).

- Maintain complete documentation on accommodation/leave requests
- Plan for increased accommodation and leave requests
- Have strategies to limit risk of exposure to all employees

- Follow state and local orders and CDC guidance on ways to keep employees working and safe during this pandemic

- When in doubt use the Eyres law Group – school district hotline

Mental Health Considerations and Reasonable Accommodations

- If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may he now be entitled to a reasonable accommodation (absent undue hardship)

- Workers with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.

- As with any accommodation request, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist him and enable him to keep working; explore alternative accommodations that may effectively meet his needs; and request medical documentation if needed.
Managing Mental Health Issues
Identify Significant Stressors on and off Work

- Adapting to telework or new work arrangements
- Childcare issues with schools, camps and child care facilities closed
- Significant fear of returning to being exposed at work
- Coping with a family member who is at high risk, or actually sick
- Sadness over the loss of normalcy and personal interactions
- Fear of economic toil with uncertainty about the future
- Anxiety about the impact of getting sick – both health and income
- Fear of being laid off or losing significant hours
- Lack of confidence that the district can keep everyone healthy
- Fear of retaliation for expressing safety and health concerns
- Anxiety about co-worker bullying – face masks, national origin, LOAs

Strategies to Promote Mental Health and Reduce Unnecessary Stressors

- Focus on what you can do, not circumstances out of your control.
- Assist employees with adjusting to remote work
- Issue clear directives about performance expectations
- Focus on the work produced, not the number of hours or LOAs
- Emphasize workplace cleanliness and safety and supply PPEs
- Direct struggling employees to resources for assistance
- Emphasize non-retaliation policies – early and often
  - *Training leaders to rigorously avoid all forms of retaliation.*
  - *Emphasize reporting and complaint procedures and enforce rigorously.*
  - *Get a grip on bullying, abusive language, and co-worker retaliation.*
Considerations for a Variety of Leaves of Absence

Key Leaves and Benefits to Protect Employees

- FFCRA – FMLA Expansion and Emergency Sick Leave through 12/31/20
- FFCRA - Emergency Child Care Leave through 12/31/20
- FMLA/CFRA Leave – full 12 weeks with concurrent paid accruals
- California Labor Code leave for child care emergencies
- Disability Benefits – SDI through EDD
- Paid Family Leave Benefits – through EDD
- Unemployment Insurance Benefits – federal CARES Act
- Reasonable Accommodations – extended leave
- Ed. Code leaves – applied consecutive to other leaves
- Employer policy or MOU leave accruals
- Employer discretionary paid administrative leave
- Regular and customary leaves unrelated to Covid-19 remain status quo
Pending Legislation would Expand Some Leave Laws

• **AB 3216**: Provides unlimited job protected leave for all employers of any size for family and medical leave due to COVID-19. This is in addition to the federal FFCRA and local LOA requirements.

• **AB 2992**: expands three separate LOAs, including relating to domestic violence (anecdotal incidents of abuse during shutdown).

• **AB 2999**: Imposes up to 10 days of bereavement leave for death of spouse, child, parent, sibling, grandparent, grandchild, or domestic partner, with no lengthy of service requirement. Imposes new private right of action for violations of statute.

• **AB 196 and AB 664**: establish versions of “conclusive presumption” of industrial injury for COVID-19 (also SB 893 presumption for public and private hospitals).

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Employee Working at Usual Worksite May Take Apply Leave for COVID-19 Events

The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;

The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

The employee is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine;

The employee is experiencing any other substantially similar condition.
“Regular” FMLA/CFRA for School District or CIE Employees who Qualify

• Employees who qualify for full 12 weeks may use it, with concurrent leave accruals for self or close family member with serious health condition. NOTE: qualifying factors are broader in HR 2601.

• Family member preventative care is broader under both PFL and Kin Care

DFEH guidance on CFRA:

• Employers may ask employees who exhibit symptoms of COVID-19 to go home and stay home until they have been symptom free for 14 days.

• Employers must provide sick leave and compensate the employee under all applicable sick leave laws. If sick leave is exhausted, employees may be entitled to other paid leave or job protected unpaid leave.

DFEH Guidance on CFRA in Context of COVID-19

• Employees entitled to 12 weeks of job-protected unpaid leave under CFRA if they cannot work because they are ill because of COVID-19 or because they must care for a family member who is ill because of COVID-19. (separate child bonding leaves unrelated to COVID-19 may continue)

• In light of the COVID-19 pandemic, it’s not practical or prudent to require employees to obtain a medical certification from a health care provider within 15 days of an employee’s request for CFRA leave, which is what is normally required. The health care system is overloaded and may not be able to respond to such requests and the need for leave is immediate. Employers should use their judgment and waive certification requirements when granting such leave requests.

• HIPAA exception for disclosure of PHI to prevent a serious and imminent threat to health and safety.
Ask about Underlying Health Conditions Due to COVID-19 to Determine Eligibility for Leave

The employer can send ask the following:

- In light of the COVID-19 pandemic, will you be unable to come to work because of any of the following reasons:
  
  list currently available high risk conditions and ask for a yes or no

- Do you or a member of your household fall into one of the categories identified by the CDC as being at high risk for serious complications from the COVID-19 virus such that you would be advised by public health authorities not to come to work?

- Has a health care provider recommended, as preventative medical care, that you or the close family member avoid exposure to COVID-19 due to an underlying high risk condition?

Other Paid Leave Benefits Provided by California Law

- **SDI/PFL**: EDD has expanded SDI and PFL benefits for COVID-19. This means employees who contract or are quarantined due to COVID-19 may apply for SDI benefits. Employees who need to take time off to care for a family member due to COVID-19 may apply for PFL benefits.

- **Paid Sick Leave Law** for self and expanded family members – illness and preventive care. Preventative care may include self-isolation due to “at risk’ category by age or chronic health condition.

- **Kin Care**: Labor Code provides broader family members include spouse, domestic partner, child, parent, parent in law, sibling, grandparent or grandchild.

- **Child care emergencies**: Labor Code provides unpaid leave with ability to apply sick leave or vacation, as available.
What about other Leaves in Progress Unrelated to COVID-19?

- Employees on pregnancy-disability (PDL) leave before the stay-at-home order should remain on their designated leave, with appropriate paid accruals that otherwise apply.

- For employees who have not yet started their PDL, but may need reasonable accommodation due to high-risk of contracting COVID-19, use interactive process and provide accommodations as appropriate. If exposure to COVID-19 keeps them off, other leave may apply or PDL may begin – depending upon stage of pregnancy.

- When the PDL is concluded, parental child bonding leave (for CFRA eligible employees) may begin, in accordance with law or policy.

- Employees returning to work from PDL or bonding leave will use applicable COVID-19 leaves, IF the prior leave is over.

Other Employment Processes: Discrimination, Harassment & Retaliation in the Midst of COVID 19
Strong Non-Discrimination and Retaliation Provisions of California Law

• Retaliation protection applies for taking or requesting available leave or inquiring about options under every California law.

• Applying for SDI, PFL, other Labor Code leaves, unemployment insurance.

• Rebuttable presumption of retaliation if threats or adverse action occur shortly after protected activity.

• Requesting a reasonable accommodation, regardless of whether it is granted.

• Complaining about discrimination or harassment due to disability or national origin.

• Other forms of discrimination and harassment -

Be Mindful of Potential Discrimination or Harassment for all Protected Characteristics

• Individuals of Asian descent are targeted by references to “Chinese virus” or “Wuhan virus.”

• Slurs, disparate treatment, racial or ethnic commentary, disparaging remarks, bullying, or other forms of verbal, physical, or visual harassment will be aggressively pursued.

• Disparagement or disparate treatment, including bullying or isolation for individuals with symptoms (exception of course is social distancing), but disparaging remarks or gossip should be prohibited.

• Mocking of individuals who request accommodation due to mental health or fear.

• Failure to engage in interactive process.
Be Careful about Discrimination
Apply Policies Consistently

- Employers must be careful to avoid discriminating against individuals who are disabled or perceived as disabled because they are exhibiting symptoms suggestive of having contracted COVID-19, or against individuals belonging to certain races or nationalities where the virus is most prevalent.

- May implement a policy prohibiting employees that recently traveled to certain places (as identified as high risk by the CDC) from coming to work for 14 days. Employers should not send home individuals because they have a stuffy nose, cough, or other mild symptoms that could be due to a variety of illnesses. If employers elect to adopt a policy that requires employees to stay home, they should consider whether such time is compensable under applicable laws.

A Word About this Material

This handout accompanies a presentation for California school districts and COEs. While the information is accurate and up to date, it is not intended to, and does not constitute, legal advice on a specific matter.

You can reach the Eyres Law Group –School Districts Hotline for questions on specific matters:

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