

523 W. 6th Street, Suite 707
Los Angeles, CA 90014

213.805.5301 t
213.805.5306 f

www.genieharrisonlaw.com

GENIE HARRISON
genie@genieharrisonlaw.com

BEATRIZ ALFARO
beatriz@genieharrisonlaw.com

ANDREA FIELDS
andie@genieharrisonlaw.com

MIA MUNRO
mia@genieharrisonlaw.com

AMBER PHILLIPS
amber@genieharrisonlaw.com

Refreshers & Temporary Changes in Employment Law as a Result of COVID-19

Both California and the federal government have taken steps to respond to the need to curtail the outbreak of COVID-19 and subsequent shutdown of or limitations on businesses.

I. A Refresher

Employers have always had an obligation to provide a safe workplace and to accommodate employees' disabilities or serious health conditions, or to facilitate employees caring for family members. California Occupational Safety and Health Act of 1973, Cal. Lab. Code §§6300, *et seq.*; The Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code §§12940, *et seq.*; The California Family Rights Act ("CFRA"), Cal. Gov't Code §§ 12945.1, *et seq.*

If an employee's job cannot be performed at home, in whole or in part, and they cannot work from the office or have articulated concerns about health and safety, they may be accommodated via a leave. See Cal. Gov't Code §§12940(a), (m), 12926(p), 2 C.C.R. §11068(c).

If employers offer sick leave/vacation/PTO, employees can use that time to ensure they are paid. 2 C.C.R. 11092(b)(1).

All practices and policies should be uniformly offered to all who need leave as an accommodation.

II. Response to the Crisis

COVID-19 has been declared a pandemic. In response, California has just issued a state-wide order requiring "all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors." Cal. Exec. Order N-33-20. Los Angeles County issued its own order, entitled "Safer at Home Order for Control of COVID-19: Temporary Prohibition of Events and Gatherings of 10 Persons or More, Closure of Non-Essential Businesses and Areas." As the title clearly states, this order requires the closure of all non-essential businesses.

To mitigate the effects on businesses and vulnerable employees, California and the federal government have issued emergency orders modifying several of the employment laws governing California employers and employees.

A. The Families First Coronavirus Response Act

The Families First Coronavirus Response Act (“FFCRA”) responds to the outbreak of COVID-19 in many ways, including, temporarily expanding the Family Medical Leave Act (“FMLA”), transferring \$1 billion to states to support unemployment insurance benefits, and providing emergency paid sick leave. H.R. 6201.

1. Emergency Family and Medical Leave Expansion Act

Division C of the FFCRA is The Emergency Family and Medical Leave Expansion Act (“FMLA Expansion Act”). The FMLA Expansion Act amends the FMLA in the following ways:

- **Employers subject** to the FMLA Expansion Act are:
 - Employers with less than 500 employees
 - Government entities
- **Employers exempt** from the FMLA Expansion Act are:
 - Small businesses with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business as a going concern.
- **Eligible employees** are:
 - Employees who have been employed for at least **30 days**.
 - Employees who are “unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.”
- **Potentially non-eligible employees** are:
 - Certain health care providers and emergency responders.
- Employers must provide 12-weeks of **paid** job-protected FMLA leave to eligible employees
 - The first 10 days may be unpaid.
 - Subsequent days of leave after the 10 days are to be paid in “an amount that is not less than two-thirds of an employee’s regular rate of pay” based on “the number of hours the employee would otherwise be normally scheduled to work...”
 - The paid leave cannot exceed \$200 per day and \$10,000 total in the aggregate.
 - Wages under emergency leave are not subject to the 6.2% social security payroll tax.

- After the leave has ended, employers are **required** to restore employees to their prior positions.
 - Employers with less than 25 employees may be exempt when:
 - The position no longer exists due to economic conditions or other changes in the employer’s operating conditions caused by the COVID-19 pandemic; and
 - The employer makes reasonable efforts to restore the employee to an equivalent position;

2. Emergency Paid Sick Leave Act

Division E of the FFCRA is the Emergency Paid Sick Leave Act (“Paid Sick Leave Act”), which requires an employer to provide an employee with “paid sick time to the extent that the employee is unable to work (or telework) due to a need for leave.”

- **Employers subject** to the Paid Sick Leave Act are:
 - Employers with less than 500 employees.
 - Government entities.
- **Employers exempt** from the Paid Sick Leave Act:
 - Small businesses with less than 50 employees may be exempt from providing paid sick leave for an employee caring for a child if their school is closed or a childcare provider is unavailable when the imposition of providing the leave would jeopardize the viability of the business as a going concern.
- **Eligible employees** are:
 - Employees who have been employed for any length of time.
 - Employee is subject to a Federal, State, or local quarantine or isolation order related to COVID–19.
 - Employee has been advised by a health care provider to self-quarantine due to concerns related to COVID–19.
 - Employee is experiencing symptoms of COVID–19 and is seeking a medical diagnosis.
 - Employee is caring for an individual who is subject to an order to quarantine.
 - Employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID–19 precautions.
 - Employee is experiencing any other substantially similar condition.
- **Potentially non-eligible employees** are:
 - Health care providers and emergency responders.

- **Employers must provide eligible employees with paid sick leave.**
 - Full-time employees will receive 80 hours of sick leave.
 - Part-time workers are granted leave equivalent to their average hours worked in a two-week period, with the sick leave in either instance being available for immediate use regardless of the employee's tenure at the employer.
 - Paid sick leave will not carry over from year to year.

- Employers with already existing paid leave policies are **required** to provide workers with the sick leave **under this Act**
 - ***Employees cannot be required to use other paid leave before using sick time under this Act.***

- Paid Sick Leave Act Calculations:
 - Employees taking leave for themselves must be paid the greater of their normal wage or the applicable minimum wage.
 - Employees taking time off to care for family members must be paid at two-thirds of the rate above.
 - Caps:
 - Sick leave is capped at \$511 per day and \$5,110 in the aggregate for employees who take leave because:
 - 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.
 - Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
 - Sick leave is capped at \$200 per day and \$2,000 in the aggregate for employees who take leave because:
 - The employee is caring for an individual who is subject to an order to quarantine.
 - The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions.
 - The employee is experiencing any other substantially similar condition.
 - Wages under emergency leave are not subject to the 6.2% social security payroll tax.

- Employers are prohibited from (1) requiring workers to find replacements to cover their hours during time off, or (2) discharging or discriminating against workers for requesting paid sick leave or filing a complaint against the employer related to such.
- Employers will have to post a notice containing information regarding the emergency sick leave provisions.

3. Emergency Unemployment Insurance Stabilization and Access Act of 2020

Division E of the FFCRA is the Emergency Unemployment Insurance Stabilization and Access Act of 2020 (“EUISAA”) and transfers \$1 billion to states to provide unemployment insurance benefits relief. Half of the funds will go to administering a state’s unemployment insurance program and half will be reserved to supplement the payment of benefits for states with a 10% increase in unemployment.

B. EEOC Guidance

On March 19, 2020, the Equal Employment Opportunity Commission released previous guidance entitled “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act,” which was originally issued on October 9, 2009, during the spread of the H1N1 virus (“EEOC Guidance”). The EEOC Guidance has been re-issued to incorporate updates regarding the COVID-19 pandemic. www.eeoc.gov/facts/pandemic_flu.html#20.

The EEOC Guidance instructs about how much information an employer may request from an employee who calls in sick during a pandemic, when an employer may take the body temperature of an employee during a pandemic, whether the American with Disabilities Act (“ADA”) allows employers to require employees to stay at home if they have symptoms of the pandemic illness, and whether the ADA allows employers to require employees to provide doctor’s notes certifying fitness for duty upon return to work.

1. Disability-Related Inquiries, Medical Examinations, and Other Issues Under the ADA

Generally, employers are prohibited from making disability-related inquiries and/or requiring medical examinations of potential employees and employees with limited exceptions. However, during the COVID-19 pandemic, employers are entitled to ask questions about a potential employees and employees and conduct examinations related to COVID-19.

For applicants, during the COVID-19 pandemic, an employer may:

- Screen applicants for symptoms of COVID-19 during the hiring process after making a conditional job offer, as long as the practice is uniformly applied for all

entering employees in the same type of job. Must apply to all applicants, whether or not the applicant has a disability.

- Take an applicant's temperature as part of a post-offer, pre-employment medical exam. Any medical exams are permitted after an employer has made a conditional offer of employment.
- Delay the start date of an applicant who has COVID-19 or symptoms associated with the illness.
- Withdraw a job offer when the employer needs the applicant to start immediately but the applicant has COVID-19 or symptoms of the illness.

For current employees, during and after the COVID-19 pandemic, an employer may:

- Send employees home if they display symptoms of the illness.
- Ask employees who call into work sick if they are experiencing symptoms of the illness.
- Take employee temperatures.
- Ask about exposure to the pandemic illness after the employee has traveled during the pandemic.
- Encourage employees to telework.
- Require employees to adopt infection-control policies or wear personal protective equipment.
- Require employees to provide a doctor's note certifying fitness to return to work after being away from the workplace during the pandemic.

Additionally, during a pandemic, employers must still continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship.

2. Direct Threat Defense to an ADA Claim

A defense to an ADA claim that allows employers to terminate an otherwise protected employee because he or she poses a direct threat to the health and safety of other individuals in the workplace. *Morton v. United Parcel Service, Inc.*, 272 F.3d 1249, 1259 (9th Cir. 2001).

Direct threat is defined as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. §1630.2(r).

Based on the guidance of the Center for Disease Control ("CDC") and public health authorities, COVID-19 pandemic meets the direct threat standard, which the EEOC has acknowledged.

C. California EDD

The California Employment Development Department ("EDD") and the California

Governor's office has also taken action to supplement employee wages at this time.

1. Unemployment Insurance Benefits

If your employment has been terminated, suspended, or some similar action was taken, you can apply for unemployment insurance benefits as usual through the EDD. Additionally, the EDD has expanded eligibility for unemployment insurance benefits in response to the COVID-19 pandemic.

If your child's school is closed and you must miss work to care for them because you have no other care options and you are unable to continue working your normal hours remotely, you may be eligible for unemployment insurance benefits.

Additionally, if your employer has reduced your hours or shutdown operations due to COVID-19, you can file for unemployment insurance benefits. Employees who expect to return to their employer after the temporary shutdown of the employer's business are not required to seek work each week. However, employees must remain able and available and ready to work during their unemployment for each week of benefits claims and meet all other eligibility criteria. Benefits range from \$40-\$450 per week.

California Governor Gavin Newsom issued Executive Order N-25-20 on March 12, 2020 ("Waiting Period Order"), which waived the one-week waiting period for people who are unemployed and/or disabled as a result of COVID-19.

2. Disability Insurance

If you are unable to work because you are sick with or have been exposed to COVID-19, you can file a disability insurance claim with the EDD. Disability insurance will pay you approximately 60-70% of your wages, depending on income. Disability insurance benefits are capped at \$1,300 per week.

The one-week waiting period to file a claim has been temporarily waived by the Waiting Period Order.

To file a claim:

[https://www.edd.ca.gov/Disability/How to File a DI Claim in SDI Online.htm](https://www.edd.ca.gov/Disability/How_to_File_a_DI_Claim_in_SDI_Online.htm)

3. Paid Family Leave Claims

If you are unable to work because you are caring for an ill or quarantined family member with COVID-19, you can file a Paid Family Leave ("PFL") claim, which provides up to six weeks of benefit payments to eligible workers who have full or partial loss of wages because they need time off work to care for a seriously ill family member.

Benefits are approximately 60-70% of your wages, depending on income. PFL benefits are capped at \$1,300 per week.

To file a claim:

[www.edd.ca.gov/Disability/How to File a PFL Claim in SDI Online.htm](http://www.edd.ca.gov/Disability/How_to_File_a_PFL_Claim_in_SDI_Online.htm)