

Re-Opening Basics—What Do California Employers Need To Be Thinking About?

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So you want to reopen your business. Good! What do you need to know before doing so?

The primary difficulty in determining the potential risk to employers for re-opening businesses in California during the Covid-19 pandemic is the level of uncertainty. There's the uncertainty that comes with the general facts of the Covid-19 pandemic, of course. But there's the added uncertainty produced by the dissonance between California's response to the pandemic and that of the Federal government.

So, given this uncertainty, what can California employers do to mitigate their risks relating to Covid-19 liability as they re-open? Fortunately, there are a few basic things for employers to bear in mind:

California Employers Must Maintain A "Safe and Healthful" Workplace

California law makes it plain: California employers must "furnish employment and a place of employment that is safe and healthful for the employees." Lab. Code, § 6400. Employers to "shall furnish" and use "safety devices and safeguards" and "shall adopt and use practices, means, methods, operations, and processes" that render the workplace safe. Lab. Code, § 6403. The message is clear; employers have to protect employees from workplace hazards.

Although Lab. Code, § 6401 requires that employers "do every other thing reasonably necessary to protect the life, safety, and health of employees" the labor code does not require an employer "to take all conceivable steps to ensure safety, nor forbid an employer from adopting practices or methods which might conceivably result in harm to an employee...no guaranty of safety is possible. Room for discretion is required." *California Correctional Supervisors Organization, Inc. v. Department of Corrections* (2002) 96 Cal.App.4th 824, 831.

Lab. Code, § 6407 mandates compliance with the occupational health and safety guidelines. Typically, these regulations are set by Cal-Osha, however given the novelty of the pandemic and the wide variety businesses impacted by it, current regulations are more or less limited to general guidance in all but a few scenarios. That guidance is located online [here](#).

Due to the lack of clear directives, the current obligation for employers requires an individualized assessment of the entire physical space of the workplace. Employers should turn a critical eye towards questions like:

- Can the work be done while maintaining proper distancing?
- Where are the choke points where employees might come into contact with one another or with the public?
- Can the risk at those places be mitigated with physical distance or barriers or other equipment?

Also: It's important to encourage employees to report conditions they view as unsafe, to investigate those conditions in good faith and to refrain from retaliating against employees who raise these issues. California Courts take a dim view towards employers that resist safety improvements.

Persons Who Are Working Outside the Home and Contract COVID-19 Will Be Presumed to Have Suffered A Workplace Injury

On May 7, 2020 Governor Newsom signed Executive Order N-62-20 which created a presumption that a person who was working outside the home between March 19 and July 5 that contracts Covid-19 contracted the illness at work. This has the net effect of funneling Covid-19 cases into the worker's compensation system. The Department of Industrial Relations makes it clear that even after this presumption ends on July 5 (or afterwards if it is extended), it will not preclude workers from filing worker's compensation claims for Covid-19 infections. So the upshot here is that **employers should be prepared for more worker's compensation claims and be prepared to respond appropriately and refrain from retaliation.**

Employer Obligations Under FEHA and ADA are Unchanged

With all the new changes in law and business practices around Covid-19 it's easy to overlook the pre-existing obligations that employers have under state and federal anti-discrimination laws. In short, nothing about Covid-19 or the state and federal response thus far has altered employer's responsibilities under Title I of the Americans with Disabilities Act (ADA) or California's Fair Employment and Housing Act (FEHA). Both ADA and FEHA prohibit discrimination on the basis of disability. Employers can reasonably expect that employees with unique medical circumstances may raise issues related both returning to the physical workspace and about the conditions of their work-from-home arrangements.

Broadly speaking, employers should be ready to engage in a **good faith, interactive process** aimed at finding **reasonable accommodations** for employees. However, the precise contours of both a "good-faith interactive process" and a "reasonable accommodation" are notoriously fact-specific and full of potential pitfalls, so consulting a lawyer during the process is best practices.

Contacts



Arthur S. Gaus

Associate

Tel: +1 510.835.6811

E-mail: agaus@burnhambrown.com



Raymond A. Greene

Partner

Tel: +1 510.835.6706

E-mail: rgreene@burnhambrown.com