

The Workers' Compensation Newsletter

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COVID-19 IN THE WORKPLACE: Current Trends and Legislation

By Brian Calcagno, LFLM San Francisco



The COVID-19 pandemic remains a significant challenge in California. As of December 2021, California experienced the fastest increase in COVID-19 cases during the entire pandemic with 18.3 new cases per 100,000 people per day, and case rates increasing nine-fold within two months. At that time, the Delta variant was the most common variant causing those infections, but as of January 2022, the Omicron variant surpassed the Delta variant, accounting for more than 99.5 percent of new infections in the United States.

In response to the ongoing pandemic, laws and guidelines related to workplace safety continue to change rapidly. This article covers current California guidance on workplace masking, testing, quarantining, returning to work and supplemental sick pay as well as recent cases involving workplace rules and liability and California Senate Bill 606 which creates two new categories of employer occupational violations and puts employers at enhanced risk of incurring monetary fines.

Guidance on Masking, Testing, Quarantining, Returning to Work, and Sick Pay

The COVID-19 Prevention Emergency Temporary Standards (ETS) are still in effect. In addition to these requirements, employers must follow public health orders on COVID-19.

Masking

On February 7, 2022, citing a decline in cases and hospitalization, the California Department of Public Health announced that the state's near-universal indoor making requirement will end on February 15, 2022 for individuals who are fully vaccinated. Local areas may have their own indoor masking requirements, like San Francisco's Health Order No. C19-07y, and many of these local orders are set to end or have their requirements reduced in coordination with the state guidance.

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In workplaces, employers will still need to follow the ETS which mandates face coverings in a number of situations. Generally, employees do not need to wear a mask if they are fully vaccinated. Employers are required to provide unvaccinated employees with face coverings and ensure that they are worn indoors. Unvaccinated employees are permitted to remove their mask when they are alone in a room or while eating or drinking so long as they maintain six feet from others.

Testing

If there is an outbreak at work, employers need to make FDA-approved COVID tests available to exposed employees at no cost, during paid time, for both vaccinated and unvaccinated employees exposed. Tests can no longer be self-administered and self-read, so workers cannot take a test at home by themselves.

Isolation/Quarantine & Returning to Work

If someone is exposed to COVID at work, state law requires that employers send the employee home, and maintain their usual pay until they meet the return to work criteria set forth by the California Department of Public Health. The CDC and the California Department of Public Health have shortened the isolation period to five-days for individuals who test COVID positive, regardless of vaccination status, if symptoms are not present or resolving, and if an antigen test collected on day five or later is negative. Otherwise, if the person does not test and symptoms resolve, isolation may end after Day 10.

Supplemental COVID Sick Pay Reinstated

On February 9, 2022, Governor. Newsom signed California State Bill 114 which allows up to 80 hours of COVID supplemental paid sick leave for employees at companies with more than 25 employees. The bill provides for two potential separate 40-hour periods of pay. The first being related to several situations where, for example, the employee, or a family member is subject to a quarantine or isolation period related to COVID, or the employee is ill and in the process of confirming a diagnosis. The second potential period applies when the employee tests positive or the employee's family member for who the employee is providing care, tests positive. The bill creates Labor Code sections 248.6 and 248.7, and is retroactive to January 1, 2022 through September 30, 2022, taking effect on February 19, 2022.

The bill was negotiated after prior COVID specific sick pay had expired in September 2021, and is similar but not identical to the

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prior law. It provides new qualifying reasons for leave which include being advised to quarantine, caring for COVID-impacted family members, and attending a COVID-19 vaccination appointment. There is no direct tax or financial relief to employers who are largely responsible for bearing the burden of the cost, which the Legislative Analyst's Office estimated as between \$500 million and \$1 billion.

Recent Cases Related to COVID-19 Workplace Safety

In January, the United States Supreme Court blocked an OSHA rule requiring employers with 100 or more workers to either vaccinate workers or test them weekly with the federal government footing the bill. The mandate, which has since been formally withdrawn, would have covered some 80 million private sector employees, and claimed that it would have saved over 6,500 lives and prevented over 250,000 hospitalizations in 6 months.

The Court's majority found the mandate amounted to a "general public health measure" and not an occupational safety or health standard, and was beyond OSHA's authority. The dissent argued that OSHA is responsible for responding to workplace health emergencies, and cited that COVID has killed nearly one million Americans, hospitalized around four million and is a "menace in work settings," spreading where individuals have little control and little capacity to mitigate risk.

In December, the California Court of Appeal in *See's Candies, Inc., et. al., v Superior Court of California* rejected an employer's demurrer based on the "exclusive remedy defense." According to the lawsuit, an employee alleged she contracted COVID at work due to her employer's failure to implement adequate safety measures, including social distancing, and that after becoming infected, she stayed

home where she infected her daughter and 72-year-old husband. Her husband died the following month.

The employer argued that the negligence and premises liability claims related to the husband's death would not have occurred without the workplace exposure and were therefore barred by the exclusivity of the Workers Compensation Act as "collateral to or derivative of" such an injury." In rejecting this, the court said the defense does not preempt any injury causally linked to an employee injury, but that it remained yet undetermined whether the employer owed a duty of care to nonemployees infected as a result of workplace exposure.

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Laughlin, Falbo, Levy & Moresi LLP has 10 offices throughout California to handle your company's workers' compensation cases. Our offices are located in Anaheim/Orange, Fresno, Los Angeles, Oakland/Concord, Redding, Sacramento, San Bernardino, San Diego, San Francisco, and San Jose. All are staffed with attorneys who are able to represent your interest before the Workers' Compensation Appeals Board and Office of Workers' Compensation Programs.

Laughlin, Falbo, Levy & Moresi LLP conducts educational classes and seminars for clients and professional organizations. Moreover, we would be pleased to address your company with regard to recent legislative changes and their application to claims handling or on any subject in the workers' compensation field which may be of interest to you or about which you believe your staff should be better informed. In addition, we would be happy to address your company on recent appellate court decisions in the workers' compensation field, the American with Disabilities Act, or on the topic of workers' compensation subrogation.

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Cal/OSHA's Enhanced Enforcement Measures Under SB 606

Effective January 1, 2022, Senate Bill 606 extends the California Division of Occupational Safety and Health's (Cal/OSHA's) scope of enforcement, allowing OSHA to issue subpoenas and creating two new categories of violations: "enterprise-wide" violations and "egregious" violations with new penalties for workplace safety compliance. Proponents of the bill cited the need to hold large employers accountable for COVID related workplace hazards and protect essential workers from failures to provide personal protective equipment, access to paid sick leave and enforcement of adequate social distances guidelines.

Enterprise-wide Violations

Under SB 606, employers with more than one worksite will now face a rebuttable presumption that a violation at one location is actually "enterprise-wide" if either of the following are true: (1) the employer has a written policy or procedure that violates a safety or health standard; or (2) Cal/OSHA has evidence of a pattern or practice of the same violation or violations committed by that employer involving more than one of the employer's worksites.

If the employer fails to rebut this presumption, Cal/OSHA is authorized to issue an enterprise-wide citation requiring enterprise-wide abatement. Enterprise-wide violations are subject to the same penalty provisions as "willful" or "repeat" violations. This means that such a violation puts the employer at risk of receiving a civil penalty of up to \$124,709.

Egregious Violations

Cal/OSHA has also introduced "egregious violations" that can lead to exponential penalties for employers. If an inspection or investigation leads Cal/OSHA to conclude that an employer has "willfully and egregiously violated" a safety or health standard, then Cal/OSHA "shall issue a citation to that employer for each egregious violation." Moreover, "each instance of an employee exposed to that violation shall be considered a separate violation for purposes of issuance of fines and penalties."

The scope of what constitutes an "egregious violation" is broad and includes "persistently high rates" of injuries or illnesses, "an extensive history" of prior violations, or "a large number of violations" that "significantly undermine the effectiveness" of safety and health programs however the bill does not provide guidance on what the threshold would be.

What Does this Mean for Employers?

Employers should familiarize themselves with this guidance and new rules as soon as possible to mitigate potential exposure. Employers with multiple worksites should ensure that their written policies and procedures are up to date. Given the uncertainty over what constitutes an "egregious violation" employers should err on the side of caution when reviewing their policies and procedures for compliance with relevant safety and health standards. This may include offering additional health and safety training to personnel. Employers must also be prepared to respond to inquiries from Cal/OSHA, including requests for documentation, and carefully manage all Cal/OSHA inspections from start to finish. ☞

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UPCOMING CONFERENCES & EVENTS

PARMA Conference

February 28 - March 2, 2022

Disneyland (Anaheim, CA)

Platinum Sponsor / Booth 209

*Marc Leibowitz (Partner, LFLM San Diego) & Rob Cutbirth (Partner, Freeman, Mathis & Gary) presenting:
"Challenging Employees and Claims in the New Workplace"*

Monday, February 28 2:00pm - 3:15pm

*Vicki Lindquist (Partner, LFLM Oakland) & Tyrone Spears (Division Chief, City of Los Angeles),
& Dr. Ron Heredia presenting:*

*"When the Carnival of Life Leads to a Claim of PTSD:
A Guide for Rebutting & Defending Against this Presumption"*

Tuesday, March 1 10:45am - 12:15pm

*Kate Lozano (Partner, LFLM San Francisco) & Amy Shen (Boxer & Gerson),
& Nick Corso (Vocational Expert) presenting:*

"What's Work Got to do With It?: Emerging Law and Litigation Over Vocational Apportionment"
Wednesday, March 2 9:00am - 10:15am

Macro Pro & Friends Webinar

March 3, 2022

[Link to Register](#)

Omar Behnawa (Managing Partner, LFLM Anaheim) presenting:

"Overcoming Settlement Barriers Utilizing MSA, Structured Settlements, and Professional Administration"
Thursday, March 3 11:00am

EWC Conference

April 28, 2022

Huntington Beach, CA

Silver Sponsor

*Omar Behnawa (Managing Partner, LFLM Anaheim) presenting:
"Creative Settlements"*

CCWC Conference

June 8 - 10, 2022

Disneyland (Anaheim, CA)

Platinum Sponsor

