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PERSPECTIVE

Employer guidelines for COVID-19 infections in the workplace

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Ever since the first announcement of COVID-19, a proverbial legal whirlwind swept through all aspects of life, upending everything as we knew it. The virus forced individuals and businesses alike to adapt. We learned new rules, and then adapted again as amendments superseded what we just learned. Somehow, we complied with complicated, often overlapping, and often conflicting regulations and protocols from federal, state and local government sources.

Most employers complain they already struggled with the myriad California employment laws they needed to know and comply with. The pandemic only made those efforts more daunting, as a failure to adhere to constantly changing regulations could potentially result in fatal consequences.

To assist California employers in understanding some of the recently enacted COVID-19 requirements, we compiled the guide below — outlining what to do if employees notify management of positive COVID-19 test results. The guide is based on current laws and regulations. Employers must continually review the various re-opening protocols and guidance documents for changes and must adopt a COVID-19 Prevention Plan as required under the new Cali-

fornia Department of Industrial Relations (Cal/OSHA) regulations. A template plan can be found on Cal/OSHA's website.

I was just notified that an employee, who physically reports to our worksite, tested positive for COVID-19. What do I need to do?

a. Exclude the employee from work (8 CCR Section 3205(c)(10)(A)): The exclusion period may vary, depending on whether the employee is exhibiting symptoms or not (8 CCR Section 3205(c)(11)). If the employee has symptoms, the employee cannot return until:

At least 24 hours have passed since a fever of 100.4 or higher has resolved without the use of fever-reducing medications; COVID-19 symptoms have improved; and at least 10 days have passed since COVID-19 symptoms first appeared (or as otherwise instructed by the California Department of Public Health or any other applicable quarantine or isolation order).

If the employee does not have symptoms, the employee may return to work after a minimum of 10 days since the date of specimen collection for the employee's first positive test.

If applicable, designate the time off as leave under the federal Family and Medical Leave Act or the California Family Rights Act — and provide information about other potential benefits.

b. Conduct contact tracing and exclude employees who had "close contact" with the

"COVID-19 case" (8 CCR Section 3205(c)(3) and (10) (B)): Investigate and identify those workers who were within six feet of the infected individual for a total of 15 minutes or more in a 24-hour period. Employers must prohibit these employees from returning to the worksite until their quarantine periods expire. Additionally, employers need to assess the day and time the infected employee was last present at the worksite, and evaluate the activities and all locations where the individual visited during the "infectious period" (generally, two days before symptoms start, or when the specimen was collected for the COVID-19 test) (8 CCR Section 3205(c)(3)(B)).

Currently in Los Angeles County, the exclusion or "quarantine" period for "close contacts" is a minimum of 10 days.

c. If possible, allow excluded employees to work from home. If not possible, provide "exclusion pay/benefits" (8 CCR Section 3205(c)(10)(C)): If excluded employees are "able and available" to work but cannot work from home, employers must continue to provide exclusion pay and continued benefits. Employers may require employees to exhaust paid sick leave benefits (i.e., under state/local law or company policy), and may offset payments by the amount employees receive in other benefit payments (e.g., state disability insurance, unemployment insurance, or workers' compensation).

If the employee is not "able and available" to work, the exclusion pay obligation does not apply. Further, exclusion pay does not apply if an employer establishes the employee's exposure was not work-related. Before denying exclusion pay and benefits, employers should consider whether they can meet this burden, which requires "comparable investigations" and "comparable evidence" to show it is more likely than not that an employee's COVID-19 exposure occurred outside the workplace.

d. Give notice to employees within one business day of possible exposure (8 CCR Section 3205(c)(3)(B) (3); Labor Code Section 6409.6): Employers must notify all employees who were at the same worksite as the infected employee that they may have been exposed. They may not disclose identifying information without the employee's express written consent.

Notice must also include information regarding COVID-19 related benefits, the disinfection and safety plan the employer intends to implement and complete per the Centers for Disease Control and Prevention guidelines, as well as references to the employer's non-retaliation policies (Labor Code Section 6409.6(a) (3)-(4)).

e. Refer employees who had potential COVID-19 exposure to testing during working hours (8 CCR Section 3205(c)(3)(B)(4)): Employers are not

required to provide testing at work and may refer employees to a separate testing site, including a free testing site. However, employers must pay employees for the time it takes to get tested, including travel time, and reimbursement for travel expenses (e.g., mileage or public transportation costs, if applicable).

f. Notify the workers' compensation carrier within three business days re employees' positive COVID-19 tests (Labor Code Section 3212.88(i)): Do not provide identifying information unless the employee asserts the infection was work related or filed a workers' compensation claim. Notice must also include:

The date the employee tested positive, which is the date the specimen was collected for testing; the specific address or addresses of the employee's specific place of employment during the 14-day period preceding the date of the employee's positive test; and the highest number of employees who reported to work at the employee's specific place of employment in the 45-day period preceding the last day the employee worked at each specific place of employment.

g. If at least three or more employees test positive for

COVID-19 within a 14-day period, employers must inform the local health department within 48 hours (Labor Code Section 6409.6(b)): Additionally, employers need to provide periodic testing (at least weekly or twice per week depending on the number of COVID-19 cases at work), to all employees at the exposed worksite.

h. Record and track (8 CCR Section 3205(c)(9)(E)): Employers must keep confidential records and track all COVID-19 cases. The records should include the employee's name, contact information, occupation, where the employee worked, the date of the last day at the workplace, and the date of a positive COVID-19 test.

Can I require a negative COVID-19 test as a condition of returning to work? If an employee had the virus, employers cannot require a negative test as a condition for returning to work (8 CCR Section 3205(c)(11)(C)).

As a preventive measure, can I require employees to get tested on a weekly/regular basis? Cal/OSHA regulations require employers to develop and implement a process for screening employees (8 CCR Section 3205(c)(2)(B)). Mandatory periodic testing may be considered a screening process.

Antibody testing (which shows whether someone previously had the virus), is not permitted. Notably, employers need to consider reasonable accommodations for employees who ask to be exempt from testing due to medical or other qualifying reasons.

My teleworking employee tested positive. Is there something I need to do? Employers should notify their workers' compensation carrier and assess whether the employee visited the worksite during the individual's infectious period. If so, follow the rules above regarding notice and contact tracing.

My employee was exposed to COVID-19 outside of work and tested negative. Can the employee return to work? The employee must quarantine for at least 10 days after the last known exposure and self-monitor symptoms. Additional quarantine requirements can be found in Los Angeles County's Quarantine Order.

In the face of this pandemic crisis — employers should remember that the focus is on steps to mitigate the spread and protect others. We hope with vaccines, this will soon be behind us, but for now, it's a daily reality that California employers must manage. ■

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