

## Returning to In-Person Work: What California Employers Need to Know

After more than a year spent in COVID-19 pandemic lockdown—though it really feels like much longer—hospitalization rates are finally declining and the number of vaccinations are increasing around California. The Los Angeles County Department of Public Health announced on May 10 that the county could achieve herd immunity from the virus among adults by mid-to-late July, putting the county's progress ahead of President Biden's stated goal to have 70% of all adults in the United States receive at least one vaccine shot by July 4.

With a light at the end of the long, pandemic tunnel, employers are beginning to look at the logistics of bringing employees back to in-person, on-site work. The biggest question on employers' minds these days is: "Where do we start?"

The following is a non-exhaustive list of issues and items to consider before reopening—from employees' vaccination statuses to areas of potential liability.

### Vaccination Status

#### **When is someone considered fully vaccinated?**

The California Department of Public Health (CDPH) released updated "[COVID-19 Public Health Recommendations for Fully Vaccinated People](#)." The May 3 guidance states that individuals are considered fully vaccinated for COVID-19 two weeks or more after they have received the second dose of Pfizer-BioNTech or Moderna vaccines' two-dose series, or two weeks or more after they have received the single-dose Johnson & Johnson/Janssen vaccine.

Exactly how the long vaccine protection lasts and how much vaccines protect against emerging COVID-19 variants remain up in the air, however. Employers should continue to employ prevention measures for everyone



(for example, social distancing and masks), regardless of vaccination status, according to the guidance.

And because information continues to evolve, employers should keep monitoring developments in federal, state and county COVID-19 guidance.

#### **Are employees still required to quarantine before returning to in-person work if they are not fully vaccinated?**

Employees who are not fully vaccinated may not return to work in person if they have COVID-19 or have been exposed to COVID-19. Exposed employees who do not develop COVID-19 symptoms may return to work after 10 days have passed since the date of their last known exposure, although a 14-day quarantine period is recommended, according to California Division of Occupational Safety and Health (Cal/OSHA) [COVID-19 Emergency Temporary Standards \(ETS\)](#) updated on May 7.

Health care, emergency response and social services workers who have been exposed to COVID-19 may return to work after seven days with a negative test result in situations where there is a critical staffing shortage, per the ETS.

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**Are there situations where fully vaccinated employees may not return to work?**

Fully vaccinated employees are not allowed to return to work in person if they have COVID-19 or have been exposed to COVID-19 and are exhibiting COVID-19 symptoms. Fully vaccinated employees who have been exposed to COVID-19 but are asymptomatic may return to work on-site, according to the ETS.

**Can employers require employees to be vaccinated or provide proof they've been vaccinated in order to return to work?**

Yes, under current federal guidance from the [Equal Employment Opportunity Commission \(EEOC\)](#), subject to exceptions for those employees who require accommodations for a disability or a sincerely held religious belief. However, the prevailing view, for legal, logistical and practical considerations, seems to be that employers should "strongly encourage, but not require" vaccinations.

In an update to the guidance issued May 28, the EEOC provides examples of reasonable accommodations for disability or religious belief, such as having the unvaccinated employee "wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment." The updated guidance also notes that employees who are unvaccinated because of pregnancy also may be entitled to the same types of accommodations if their employer has made modifications or exceptions for other employees.

The EEOC guidance cautions that requiring employees to be vaccinated might leave employers open to "allegations that the requirement has a disparate impact on—or disproportionately excludes—employees based on their race, color, religion, sex, or national origin under Title VII (or age under the Age Discrimination in Employment Act (40+))," and advises employers to be mindful when developing their vaccination policies that "some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others," making some employees "more likely to be negatively impacted by a vaccination requirement." The guidance also reminds employers: "It would also be unlawful to

apply a vaccination requirement to employees in a way that treats employees differently based on disability, race, color, religion, sex (including pregnancy, sexual orientation and gender identity), national origin, age, or genetic information, unless there is a legitimate non-discriminatory reason."

Equally permissible at the moment is requiring that employees show employers proof of vaccinations, or asking employees to certify that they have been vaccinated. However, if requesting proof of vaccination, employers must be careful to instruct the employee to redact any personal medical information and only provide the dates of vaccination. In its May 28 update, the EEOC reminded employers that the Americans with Disabilities Act (ADA) requires an employer to maintain the confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination, regardless of where the employee gets the vaccination (either from an employer program or from a third party such as a health care provider, pharmacy or government-run vaccine clinic).

Under the updated guidance, employers may encourage employees to get vaccinated by providing employees with educational information about the vaccines and their benefits (the guidance includes a list of resources), and may also incentivize employees, either through rewards or penalties, to participate in an employer-run vaccine program or provide proof of vaccination from a third party, under certain circumstances governed by the ADA.

In California, the Department of Fair Employment and Housing (DFEH) "[Employment Information on COVID-19](#)" indicates that while DFEH offers no guidance on whether or to what extent an employer can mandate employee vaccinations, if an employer chooses to require or encourage its employees to receive one of the available FDA-approved COVID-19 vaccinations it must do so in compliance with the Fair Housing and Employment Act (FHEA), which prohibits discrimination against or harassment of employees based on a protected characteristic, such as disability, perceived disability or religion. In the context of the vaccine requirement, an employer must provide reasonable accommodations related to an employee's known disability or sincerely held religious belief or practice and may not retaliate

against any employee for engaging in protected activities, including requesting a reasonable accommodation.

The DFEH COVID-19 FAQs indicate that providing reasonable accommodations requires engaging in an interactive process with an employee who objects to receiving the vaccine, to determine the appropriate reasonable accommodation. Some examples of potential accommodations include work from home or worksite safeguards and procedures that might allow the employee to work on-site without endangering the employee or others. In the case of an employee who objects to receiving the vaccine for religious reasons, the reasonable accommodation cannot be one that results in segregating the employee from other employees or the public—unless the objecting employee specifically requests it.

In both cases, if the employer can show that an accommodation poses an undue hardship, it may exclude the employee from the workplace.

With COVID-19 guidance and regulations for employers continuing to evolve in California and at the federal level, employers should monitor state and federal COVID-19 websites for updates.

### **Can all of an employer's employees return to work at once?**

Probably not—and employers should consider whether they want them to do so, for a host of practical considerations.

California's [occupancy guidelines](#) emphasize increased ventilation to stop the spread of COVID-19. The state advises providing fresh-air ventilation to the spaces with the highest density of occupants and spaces where occupants may be unmasked. Where ventilation cannot be increased, employers should limit occupancy.

Employers should also review the Los Angeles County Public Health Department's [updated health order](#) and related appendices as they relate to specific businesses with regard to reopening guidelines.

### **Do vaccinated employees need to wear masks at the workplace?**

The Centers for Disease Control and Prevention (CDC) [announced](#) on May 13 that fully vaccinated individuals do not need to wear a mask outdoors and can largely resume

activities without wearing a mask except where required by federal, state and local laws, and workplace guidance. But California employers should continue their mask-wearing policies. Gov. Gavin Newsom recently announced [plans](#) to reopen the state's economy by June 15 as long as enough COVID-19 vaccinations are available for everyone who wants one and hospitalizations remain stable. However, he said mask requirements remain in place for the time being.

Further, Cal/OSHA states that all employers must comply with the state's COVID-19 ETS, which require employers to provide employees with face coverings (or reimburse employees for the cost) and ensure the masks are worn over the nose and mouth when indoors and outdoors.

Exceptions include when an employee is alone in a room, eating or drinking, or using a respirator or other respiratory protection; when an employee cannot use a face covering due to a medical or mental condition; or when specific work cannot be performed while wearing a face covering.

The ETS are anticipated to be updated in conjunction with California's June 15 targeted reopening date; however, it is expected that any updates to the ETS by Cal/OSHA will be more restrictive on workplace safety than the CDC with regard to masking requirements and physical distancing, among other things.

Effective May 6, the [Los Angeles Department of Public Health's mask guidance](#) mandates that employees who have contact with others must wear masks at all times during the workday when in contact or when they are likely to come into contact with others. Exceptions to this rule are when employees are working alone in a private office or when eating.

San Francisco's mask guidance, last updated May 8, is substantially similar.

### **What about other safety measures, such as social distancing and temperature checks?**

California employers should continue to enforce the COVID-19 ETS physical distancing requirements until further notice.

Employers should ensure that employees maintain at least six feet of distance from other individuals where

possible and, if necessary, be prepared to show why physical distancing of at least six feet is not possible.

Physical distancing measures include remote work arrangements; reducing the number of individuals in an area at one time, including visitors; signs and floor markings to indicate where employees and others should be located or their direction and path of travel; staggered arrival, departure, work and break times; and adjusted work processes, such as reducing production speed, to allow greater distance between employees.

California employers that conduct medical checks, including temperature checks, of employees before they begin an on-site shift or return from a break should continue to do so. Employees must be paid for the time it takes to complete the medical check, including time spent waiting in line.

If an employee is required to perform a medical check, such as a temperature check, at home to determine whether the employee is able to go to a physical workplace to work, such as in a hybrid work arrangement, the employer may be required to pay the employee for that time. But whether time spent at home performing a medical check constitutes hours worked depends on the circumstances of each situation, including the level of control exercised by the employer.

In addition, if an employer requires employees to use an application on their personal cellphone as part of a medical check procedure, the employer must pay a reasonable percentage of the cellphone bill to compensate the worker.

## Outbreaks in the Workplace

### **What is considered to be a COVID-19 outbreak in the workplace?**

An outbreak is three or more COVID-19 cases within a 14-day period or as identified by a local health department.

A "major" outbreak is 20 or more COVID-19 cases in a workplace within a 30-day period, according to the California Department of Industrial Relations' updated guidance called "[COVID-19 Emergency Temporary Standards Frequently Asked Questions](#)."

### **How should employers handle a COVID-19 outbreak in the workplace?**

An employer must immediately provide testing to all employees in the exposed workplace and exclude positive cases and exposures from work; repeat the testing one week later; and continue testing employees at least weekly until the workplace no longer qualifies as an outbreak.

For major outbreaks, employers must provide testing to all employees in the exposed workplace at least twice weekly and exclude positive cases and exposures until there are no new cases detected for a 14-day period; implement mechanical ventilation system changes to increase filtration efficiency; evaluate whether air-filtration units are needed in poorly ventilated areas; determine the need for a respiratory protection program or changes to an existing respiratory protection program to address COVID-19 hazards; and consider halting all or part of operations in order to control the virus.

## Employee Training and Work Policies

### **What return-to-work training should employers provide?**

Since this is a new situation for employers and their employees, employers need to implement COVID-19-focused training. The good news is that much of the required training is fairly intuitive. According to the "[COVID-19 Emergency Temporary Standards Frequently Asked Questions](#)," employee training must include:

- Employer policies and procedures to protect employees from COVID-19 hazards.
- Benefits information for employees affected by COVID-19, including paid sick leave and workers' compensation, which can be found on the California Department of Industrial Relations' COVID-19 [website](#).
- The importance of physical distancing, wearing face coverings, frequent hand-washing and/or use of hand sanitizer.
- The infectious nature of COVID-19, how it is transmitted, its symptoms and the importance of getting tested.
- The importance of not coming to work and getting tested if an employee has symptoms.



## Do employers need to have written policies in place regarding returning to in-person work?

Yes. California's ETS mandates that employers develop a written COVID-19 Prevention Program or ensure its elements are included in an existing injury and illness prevention program. These elements include:

- Explanation of the employer's COVID-19 prevention procedures.
- How to identify, evaluate and correct COVID-19 hazards.
- COVID-19 testing protocols.
- Procedures to investigate and respond to COVID-19 cases in the workplace.
- Return-to-work criteria.
- Reporting and record-keeping procedures.

Cal/OSHA also offers a [Model COVID-19 Prevention Program](#) on its website that employers may opt to use.

## State Resources

### Is guidance available on the logistics of bringing employees back on-site?

Yes. California has set up websites dedicated to helping businesses reopen and bring employees back to work on-site that address the needs of various industries and workplace types.

The state's website, [Blueprint for a Safer Economy](#), provides industry-specific guidance for creating safe environments for employees and customers.

Safety requirements also vary by workplace type, from office space to retail center to industrial site. Employer guidelines should address various issues, including the use and/or rearrangement of common areas and meeting rooms, when face masks should be worn, when and where visitors are permitted, and employee self-screening requirements.

California's [COVID-19 Employer Portal](#) is a tool that generates a road map, customizable by county and industry, to ensure safe and compliant workplace reopening and operations.

General COVID-19 resources are also offered by the [California Department of Public Health](#), [Centers for Disease Control and Prevention \(CDC\)](#) and the [World Health Organization](#).

## How Loeb Can Help

Loeb & Loeb's Employment & Labor Law team can help employers determine their obligations and advise on compliance with the local and county health guidance. We can also assist with preparing return-to-work protocols, vaccination policies, communications with employees and record-keeping.

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## Related Professionals

Michelle La Mar . . . . . mlamar@loeb.com  
Sarina Saluja . . . . . ssaluja@loeb.com

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