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New Year, Same Pandemic

A Primer on COVID-19 Issues in 2021

Maria Brunel, CSP

mbrunel@pomsassoc.com

Julie Garcia, ARM-P, SPHR, SHRM-SCP

jgarcia@pomsassoc.com

Larry Vigil, CSP, CSR, CPSI, CIC

lvigil@pomsassoc.com

Steven G. Meilleur, Ph.D.

smeilleur@pomsassoc.com

Agenda

- CA: Emergency Temporary Standard – Maria Brunel
- AB 685 – Maria Brunel
- OSHA/NM: Department of Labor and Environment Department – Larry Vigil
- Employment Issues and COVID-19 Vaccinations – Steven Meilleur

Cal/OSHA Emergency Temp Standard - What Employers Need to Know

- Cal/OSHA GISO 3205 COVID-19 Prevention
- Went into effect on 11-30-20
- Applies to most California employers except:
 - one (1) employee that does not have contact with other people;
 - employees working from home; and
 - those covered by California's Aerosol Transmissible Disease (ATD) standards including employees of various health facilities, emergency responders, and other care organizations

Cal/OSHA Emergency Temp Standard - What Employers Need to Know

- Requirements for employers covered by the COVID-19 Prevention Standard
 - Establish, implement, and maintain an effective written COVID-19 Prevention Program that includes:
 - Identifying and evaluating employee exposures to COVID-19 health hazards.
 - Implementing effective policies and procedures to correct unsafe and unhealthy conditions (such as safe physical distancing, modifying the workplace and staggering work schedules).
 - Providing and ensuring workers wear face coverings to prevent exposure in the workplace.
 - Provide effective training and instruction to employees on how COVID-19 is spread, infection prevention techniques, and information regarding COVID-19-related benefits that affected employees may be entitled to under applicable federal, state, or local laws.

Cal/OSHA Emergency Temp Standard - What Employers Need to Know

When there are multiple COVID-19 infections and COVID-19 outbreaks

- Employers must follow the requirements for testing and notifying public health departments of workplace outbreaks (three or more cases in a workplace in a 14-day period) and major outbreaks (20 or more cases within a 30-day period).
- COVID-19 testing for employees who might have been exposed
 - Requires employers to offer COVID-19 testing at no cost to their employees during their working hours who had potential COVID-19 exposure in the workplace and provide them with the information on benefits.
- Notification requirements to the local health department
 - A new requirement that obligates employers to contact the local health department immediately but no longer than 48 hours after learning of three or more COVID-19 cases to obtain guidance on preventing the further spread of COVID-19 within their workplace.

Cal/OSHA Emergency Temp Standard - What Employers Need to Know

Recordkeeping and reporting COVID-19 cases

- Employers must maintain a record of and track all COVID-19 cases, while ensuring medical information remains confidential.
- These records must be made available to employees, authorized employee representatives, or as otherwise required by law, with personal identifying information removed.
- When a COVID-19-related serious illness (e.g., COVID-19 illness requiring inpatient hospitalization) or death occurs, the employer must report this immediately to the nearest Cal/OSHA enforcement district office.

COVID-19 Prevention Program (CPP)

- The written elements of the COVID-19 prevention program include:
 - Authority and Responsibility
 - Identification and Evaluation
 - Correction of COVID-19 Hazards
 - Control of COVID-19 Hazards
 - Investigating and Responding to COVID-19 Cases
 - System for Communicating
 - Training and Instruction
 - Exclusion of COVID-19 Cases
 - Reporting, Recordkeeping, and Access
 - Return to Work Criteria

Cal/OSHA COVID-19 Guidance and Resources

- Cal/OSHA COVID-19 Guidance and Resources (necessary information on all Cal/OSHA guidelines, education materials, model programs, etc.)
 - <https://www.dir.ca.gov/dosh/coronavirus/>
- COVID-19 Emergency Temporary Standards (ETS, Fact Sheets, Model Written Programs, etc.)
 - <https://www.dir.ca.gov/dosh/coronavirus/ETS.html>
- Guidance by Industry (Statewide industry guidance on COVID-19)
 - <https://www.dir.ca.gov/dosh/coronavirus/Guidance-by-Industry.html>
- Frequently Asked Questions (FAQ's on reporting and recording COVID-19 illness, new laws and more)
 - <https://www.dir.ca.gov/dosh/coronavirus/FAQs.html>
- Education Materials and Other Resources (videos and fillable written safety plans)
 - <https://www.dir.ca.gov/dosh/coronavirus/EducationMaterials.html>
- Webinars on COVID-19 (Free and hosted by Cal/OSHA Consultation services)
 - <https://www.dir.ca.gov/dosh/coronavirus/Webinars.html>
- Cal/OSHA Training Academy
 - <https://trainingacademy.dir.ca.gov/page/on-demand-training-covid19>

AB 685

Effective January 1, 2021 through December 31, 2023

- Employers are required to notify all employees at a worksite of potential exposures, COVID-19-related benefits and protections, and disinfection and safety measures that will be taken at the worksite in response to the potential exposure – Same as ETS
- Notify employers to notify all employees who were at a worksite of all potential exposures to COVID-19 and notify the local public health agency of outbreaks – Same as ETS
- Cal/OSHA can issue an Order Prohibiting Use (OPU) to shut down an entire worksite or a specific worksite area that exposes employees to an imminent hazard related to COVID-19
- Cal/OSHA can issue citations for serious violations related to COVID-19 without giving employers 15-day notice before issuance
- Additional Information:
 - <https://www.dir.ca.gov/dosh/coronavirus/AB6852020FAQs.html>

AB 685 - What Employers Need to Do

- Develop a “COVID-19 Exposure Notice Letter” to be sent to employees, employee’s representative, employers of subcontracted employees, and independent contractors (*must be sent within one business day of being informed of potential exposure*)
 - For Employees include:
 - Exposure notice
 - Information regarding COVID-19-related benefits and leave options
 - Disinfection plan and CPP
 - May be sent in a manner normally used to communicate employment related information
 - For Employers of subcontracted employees and independent contractors
 - Exposure notice
 - Notification of disinfection plan in CPP
- Notify the public health department if you have a potential or confirmed COVID-19 exposure (*within 48 hours*)

OSHA Coronavirus Update

- OSHA Inspections
 - \$3,849,222 in Coronavirus Violation Penalties
 - Violations Include Failures to:
 - Implement Written Respiratory Protection Program
 - Provide Medical Evaluation, Fit Test, Training
 - Report an Injury, Illness or Fatality
 - Record an Injury, Illness on OSHA Recordkeeping Forms
 - Comply with the General Duty Clause
 - Santa Fe, NM auto parts store recently agreed to pay fines in the amount of \$79,200

NM OSHA Coronavirus Update

- NM Environment Dept (NM OSHA) Rapid Response
 - Emergency Amendment Refiled 12/3/20
 - Must report positive cases within 4 hours
 - State Agencies initiate “Rapid Response” to provide guidance/support to prevent spread beyond infected employee
- Surveillance Testing and Contact Tracing Plan Exemption
 - All Employees Tested Every 2 Weeks
 - Contact Tracing Requirements
 - Additional Terms And Conditions Apply

NM OSHA Coronavirus Update

- Notify NMED- NM OSHA
 - Online <https://nmgov.force.com/rapidresponse/s/>
 - Email NMENV-OSHA@state.nm.us
 - Phone 505-476-8700
 - Fax 505-476-8734
- Initial Notification Must Include:
 - Establishment name, address
 - Employer representative name and contact information (phone, email)
 - Number of people employed at location
 - Number of employees who tested positive
 - Date each employee was tested
 - Last date each positive employee was in the establishment
 - Date each positive employee began self-quarantine
 - Employee names and other personally identifiable information **should not** be provided

Mandatory COVID-19 Vaccination in Employment

- The employer's **critical considerations** will include:
 1. unless legally prohibited, will the employer require mandatory vaccines for all employees;
 2. with a mandatory vaccine policy, is the employer's internal HR Department prepared for the roll-out; and
 3. what will be the consequence for employees who refuse the offered vaccine.
- At present, no law, regulation, or other guidance directly addresses whether employers may require their employees to get a COVID-19 vaccination.
- However, the **EEOC and OSHA** have interpreted mandatory flu vaccinations previously as a permissible mandate by employers – with certain conditions and restrictions:
 - Under the **Americans with Disabilities Act** (the “ADA”), an employer may require medical testing and other invasive procedures **if job related and consistent with business necessity**.
 - The **EEOC** will likely require that employers comply with other legal requirements with respect to any mandated vaccine, including the ADA and Title VII of the Civil Rights Act of 1964 (“Title VII”).

Mandatory COVID-19 Vaccination in Employment

- **OSHA guidance allows employers to mandate vaccinations for employees**, but provides an exception for employees who refuse a flu vaccine because of a “reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as serious reaction to the vaccine)”
- The **EEOC** has confirmed that under the ADA an employee with **underlying medical conditions** should be entitled to an exemption from mandatory vaccination for valid and supported medical reasons.
- **Title VII** also provides employees with an exception to a mandatory vaccination based upon **sincerely held religious beliefs**.
 - When these objections are raised, the employer should engage in a discussion (the “Interactive Process”) with the employee
- Employee may express a concern that a vaccine may not have met all appropriate medical testing standards or raise a general objection to vaccinations (an “anti-vaxxer”).
 - Provided that a vaccine has met the approval of the FDA, the employer should have a reasonable basis to rely on the medically determined safety of an approved vaccine.

Mandatory COVID-19 Vaccination in Employment

- Until there is additional guidance, it appears that employers may require employees to receive vaccinations when available, subject to the restrictions identified by the EEOC and OSHA.
- If an employer intends to make COVID-19 vaccination of employees a requirement, **update policies** to include the recognized EEOC protective provisions in its policy for those who have medical or religious objections to the vaccination. Amended language should:
 - Confirm the obligation of each employee to use all reasonable steps to keep other employees safe. This may currently include Center for Disease Control (the “CDC”) protocols for hand washing and certain safe distancing requirements.
 - Continue protocols, even with a fully inoculated workforce, until medical experts provide otherwise, these protocols should be maintained.
 - State that the employer requires vaccinations to further the safety of its employees.
 - Do not guarantee vaccine effectiveness, but only confirm the medically provided information regarding the vaccine.

Disclaimer

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Please visit our website at www.pomsassoc.com or call us at 818-449-9300

Michelle Lujan Grisham
Governor



James C. Kenney
Cabinet Secretary, Environment Department

Billy Jimenez
Acting Cabinet Secretary, Department of Health

Contact: Maddy Hayden
New Mexico Environment Department
505.231.8800 | maddy.hayden@state.nm.us

More testing, fewer closures: State launches proactive testing, contact tracing agreement for essential businesses

Businesses conducting 100% percent employee testing will not be considered for closure

In an effort to increase proactive COVID-19 testing of New Mexico's workforce and avoid additional temporary restrictions on essential businesses, the New Mexico Departments of Health and Environment have implemented a voluntary surveillance testing and contact tracing [agreement](#) to enable businesses to prevent mandatory 14-day closures triggered by state rapid responses to COVID-19 cases.

The agreement requires essential businesses to conduct regular COVID-19 testing among staff, as well as assist the Department of Health in contact tracing efforts. If positive cases are discovered as a result of this testing, the resulting rapid response will not count toward the mandatory 14-day closure requirement in the current public health order.

"We're empowering businesses to stay open by contributing to critical public health efforts," said Environment Department Cabinet Secretary James Kenney. "By incentivizing businesses to participate in a regular surveillance testing program, we are keeping New Mexicans safe, slowing the spread of COVID-19, and preventing additional closures of essential businesses."

"Proactive testing is an essential tool in combating the spread of this virus," said Department of Health Acting Secretary Billy Jimenez. "Partners in the private sector through these agreements will make a significant and positive impact in curbing COVID-19 in New Mexico."

To participate in the program, a business must submit to both departments a plan that details surveillance testing and contact tracing efforts the establishment will undertake at a business location. A plan must be submitted for each business location.

The agreements not only allow essential businesses to avoid a 14-day mandatory closure, it also clears a path for businesses currently closed to be allowed to reopen before the 14-day period is over.

Rapid response data will still be counted toward inclusion on the Environment Department's Rapid Response COVID-19 Watchlist and included in the daily rapid response data posted at <https://www.env.nm.gov/rapid-response-data/>.

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New Mexico Environment Department

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Reporting workplace COVID-19 cases to NMED: What you need to know

Updated Dec. 7, 2020

On Aug. 5, 2020, the New Mexico Environment Department (NMED) filed an emergency amendment to require employers to report positive COVID-19 cases in the workplace to the NMED Occupational Health and Safety Bureau within four hours of being notified of the case. The emergency amendment was refiled on Dec. 3, 2020 and is in place for 120 days unless NMED proposes and the Environmental Improvement Board adopts a permanent rule prior to the end of the 120-day period. The emergency amendment is available [here](#).

Why was this rule put into place?

When the state learns of a positive case in the workplace, state agencies initiate a “rapid response,” offering guidance and support to employers around testing, disinfection and other actions that need to be taken to prevent the spread of COVID-19 beyond the infected employee. Most of these rapid responses are led by NMED.

Prior to the emergency amendment, NMED frequently did not learn of positive cases until after the employer was notified by the positive employee, causing a delay in rapid response deployment. The emergency rule, which requires employers to report positive COVID-19 cases among employees within four hours of being notified, ultimately allows NMED to more quickly respond and prevent spread among employees as a result.

How should I notify NMED?

Report positive cases via NMED’s Rapid Response online form at <https://nmgov.force.com/rapidresponse/s/>

If you are unable to use the Rapid Response online form, you may report via email, phone, or fax at:

- NMENV-OSHA@state.nm.us
- Phone: 505-476-8700
- Fax: 505-476-8734

What information does NMED need?

The initial notification must include:

- Establishment name
- Establishment address
- Employer representative name and contact information (phone and email)
- Number of people employed at the location
- Number of employees who tested positive
- Date each positive employee was tested
- Date and time employer was notified of the positive test(s)
- Last date each positive employee was in the establishment
- Date each positive employee began self-quarantine

Please **do not** provide employee names or other personally identifiable information. Additional information may be collected during follow-up from an NMED representative.

Does the four-hour window apply on weekends? After business hours?

Yes.

Which employers does this emergency rule apply to?

The emergency rule applies to all New Mexico employers with a few narrow exemptions. The exemptions include employers on tribal lands, mining operations, federal military installations, most U.S. Department of Energy installations and the U.S. Postal Service.

Healthcare facilities already report employee cases to the Department of Health; do hospitals and other healthcare facilities need to follow the emergency rule?

Yes. NMED will work with the Department of Health to determine which agency will work with the employer to conduct a rapid response.

Do I need to report all COVID-19 cases among employees, or just the ones that are workplace related?

It is typically very difficult to determine the origin of infections, so all COVID-19 cases among employees must be reported. In addition, COVID-positive employees may be infectious to others regardless of where the infection originated, making a rapid response critical.

Many employees are working from home these days. Does the emergency rule require employers to report positive cases among them, too?

Yes.

If an employee who lives in another state but is working in New Mexico and tests positive, do I need to report those positive cases?

Yes. If an employee worked on a jobsite in New Mexico within 14 days of the employer learning the employee tested positive for COVID-19, then the employer must report the case.

What happens if I don't report within four hours?

Failure to report to NMED within four hours may result in enforcement action by the Department, including fines and/or court action.

Additional resources:

- [NMED COVID-19 resources](#)
- [New Mexico Department of Health COVID-19 information](#)

GUIDANCE DOCUMENT:

Mandatory COVID-19 Vaccination in Employment

Employer's Critical Considerations:

1. unless legally prohibited, will the employer require mandatory vaccines for all employees;
2. with a mandatory vaccine policy, is the employer's internal HR Department prepared for the roll-out; and
3. what will be the consequence for employees who refuse the offered vaccine?

What Does the Law Say?

At present, no law, regulation, or other guidance directly addresses whether employers may require their employees to get a COVID-19 vaccination.

However, the EEOC and OSHA have interpreted mandatory flu vaccinations previously as a permissible mandate by employers – with certain conditions and restrictions:

- Under the [Americans with Disabilities Act \(the "ADA"\)](#), an employer may require medical testing and other invasive procedures if job related and consistent with business necessity.
- The [EEOC](#) will likely require that employers comply with other legal requirements with respect to any mandated vaccine, including the ADA and Title VII of the Civil Rights Act of 1964 ("Title VII").
- [OSHA guidance](#) allows employers to mandate vaccinations for employees, but provides an exception for employees who refuse a flu vaccine because of a "reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as serious reaction to the vaccine) . . ."
- The EEOC [has confirmed](#) that under the ADA an employee with underlying medical conditions should be entitled to an exemption from mandatory vaccination for valid and supported medical reasons.
- Title VII also provides employees with an exception to a mandatory vaccination based upon [sincerely held religious beliefs](#).
 - When these objections are raised, the employer should engage in a discussion (the "Interactive Process") with the employee.
- Employee may express a concern that a vaccine may not have met all appropriate medical testing standards or raise a general objection to vaccinations (an "anti-vaxxer").
 - Provided that a vaccine has met the approval of the FDA, the employer should have a reasonable basis to rely on the medically determined safety of an approved vaccine.

Until there is additional guidance, it appears that employers may require employees to receive vaccinations when available, subject to the restrictions identified by the EEOC and OSHA.

Additional Employer Considerations

It is important for employers who are subject to a collective bargaining agreement to evaluate any limitations before requiring vaccinations as a term of employment.

GUIDANCE DOCUMENT:

Mandatory COVID-19 Vaccination in Employment

Employers should also consider the value of a mandatory vaccination policy for their businesses and whether other alternatives, such as voluntary vaccination programs, remote work, physical distancing, and facial coverings can be similarly effective in maintaining a safe work environment.

Consider the employee morale issue. A mandatory vaccination program might have significant ramifications on employee retention and recruitment.

Determine if the full workforce will have mandatory COVID-19 vaccines, or if only a portion of the employees will have this requirement.

- If only a portion, review and modify job descriptions to support the need for vaccinations (e.g., travel requirements, direct interaction with customers, etc.).

Risk may come from an employee suffering a severe side effect from the vaccine, which may result in a workers' compensation claim.

If You Do Enact a Mandatory COVID-19 Vaccination:

Update policies to include the recognized EEOC protective provisions in its policy for those who have medical or religious objections to the vaccination. Amended language should:

- Confirm the obligation of each employee to use all reasonable steps to keep other employees safe. This may currently include [Center for Disease Control \(the "CDC"\) protocols for hand washing and certain safe distancing requirements](#).
- Continue protocols, even with a fully inoculated workforce, until medical experts provide otherwise, these protocols should be maintained.
- State that the employer requires vaccinations to further the safety of its employees.
- Do not guarantee vaccine effectiveness, but only confirm the [medically provided information regarding the vaccine](#).

Prepare and train human resources personnel in fielding, responding to, and documenting requests for accommodations, as well as how best to engage in the interactive process with employees who request accommodations.

- HR Department should be designated as the vaccination response team to ensure that a consistent and well-informed response is provided to all employee questions.
- Communication with the medical health insurance provider to confirm whether the vaccination will be covered and if the employee will have responsibility for any portion of the cost. The employer may consider covering cost of the vaccination.

Develop a consistent approach to deal with employees who refuse the vaccine (without a legal basis for the refusal). If such refusal will result in termination of employment, such termination action should be consistently applied.

Consider creating a specific severance policy for terminated employees (conditioned upon the employee's execution of a release and waiver of claims), but severance would not be required.

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Family First Coronavirus Response Act (FFCRA) Expires

On December 27, 2020, President Trump signed a [COVID-19 relief bill](#). The bill provides for supplemental unemployment benefits, direct payment checks, Paycheck Protection Program loans, and rental assistance, among other things.

What the bill does NOT provide for is the Emergency Paid Sick Leave and the Expanded Family Medical Leave that was mandated by the FFCRA. Instead, paid leave under the FFCRA expired December 31, 2020, and only the tax credit for private for-profit and private non-profit employers was extended until March 31, 2021.

What does this mean for my organization?

Starting January 1, 2021, employers are no longer required to provide paid leave under the FFCRA. However, private for-profit and private non-profit employers may choose to voluntarily provide leave and claim the payroll tax credit until March 31, 2021.

Please note that public sector employers (including public school districts/charters, municipalities, and other governmental agencies) do not qualify for the payroll tax credits. Employers in the private sector with questions about claiming the payroll tax credits for qualified leave wages should consult with the IRS. More information can be found on the [IRS website](#).

For more information, visit the [Frequently Asked Questions section of the Department of Labor's Wage and Hour Division website](#).

What are my next steps as an employer?

Public sector employers should end all FFCRA leave effective December 31, 2020.

Private for-profit and private non-profit employers have several choices as we head into 2021. You could:

- End all FFCRA leave effective December 31, 2020.
- Continue to provide Emergency Paid Sick Leave until March 31, 2021 to employees who have remaining FFCRA leave balances but discontinue the FFCRA Expanded Family Medical Leave.

Employers should clearly communicate with their employees their decision regarding the continued provision of FFCRA-qualifying leave so the employees understand what leave is available to them in the new year.

What else should I know?

Employers who choose to end the leave entitlement on December 31, 2020 are reminded that some employees may still be entitled to leave (paid or unpaid) under other laws such as the regular Family and Medical Leave Act (FMLA) or state and local laws or company policy. In addition, COVID-19 guidance from agencies such as the CDC and the EEOC continues to apply, including isolation procedures for people exposed to or positive for the virus, and employers are still required to reasonably accommodate employees under the ADA.

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