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# COVID-19 Update

## Legislative, Safety, and HR Issues

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# Agenda

- Safety Update
  - CDC: K-12 Schools
  - OSHA
  - NM OSHA
  - Cal/OSHA
- Claims Issues
  - SB 1159
- Mandatory Vaccination Considerations

# CDC Updates for K-12 Schools

- Mitigation Strategies to Reduce Transmission
  - Universal and correct use of masks
  - Physical distancing
- Indicators Of Community Transmission To Reflect Level Of Community Risk
- Phased Mitigation and Learning Modes
- Additional Layers Of Prevention
  - Testing
  - Vaccination

# OSHA COVID-19 Update

- Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace Posted 1/29/21- (Handout)
  - “Stronger” workplace guidance on Coronavirus
  - Not a standard or regulation
  - Section 5(a)(1) of the Occupational Safety and Health Act (the General Duty Clause), which requires employers to maintain a workplace that is “free from recognized hazards.”
- Auto part store fined \$243K – Willful violations
  - Symptomatic employees continued to work
  - Cleaning and disinfecting protocols in company policy not followed

# NM OSHA COVID-19 Update

- NM Environment Dept (NM OSHA) Rapid Response
  - Emergency Amendment Refiled 12/3/20
  - Must report positive cases within 4 hours
    - Online <https://nmgov.force.com/rapidresponse/s/>
      - Available 24/7
      - Multiple reports can be filed at one time
      - Enhanced record management capabilities
  - Unique link to webform created and sent to employer after report filed
  - Failure to report within 4 hours will result in enforcement action including imposing penalties and legal action

# Cal/OSHA Regulatory Updates

- February 1<sup>st</sup> – post 2020 summaries of Cal/OSHA’s Form 300A
- March 2<sup>nd</sup> – Deadline to electronically submit to Fed/OSHA
- COVID-19 Advisory Committee meetings continue to discuss the Emergency Temporary Standard (ETS)
- After February 1, 2021, Cal/OSHA will start assessing monetary penalties against employers for failure to comply with the ETS
- Cal/OSHA penalties going up soon– date to be determined
  - Regulatory and General: From \$13,277 to \$13,434
  - Repeat: From \$132,765 to \$134,334
  - Willful: Minimum increasing from \$9,483 to \$9,595; maximum from \$132,765 to \$134,334
- Cal OSHA COVID-19 FAQs  
<https://www.dir.ca.gov/dosh/coronavirus/FAQs.html>

# Cal/OSHA Cites Employers – Workplace COVID-19 Exposures

- Types of industries being cited:
  - State Prisons
  - Healthcare Facilities
  - Grocery Stores
  - Children Clothing Stores
- Types of citations:
  - Failure to maintain an effective Aerosol Transmissible Diseases (ADT) program, General Industry Safety Orders §5199
  - Failure to maintain an effective Injury & Illness Prevention Program (IIPP), General Industry Safety Orders §3203
  - Failure to immediately report serious COVID-19-related illnesses
  - Not requiring face masks or physical distancing
  - Not providing training
    - <https://trainingacademy.dir.ca.gov/page/on-demand-training-covid19>
    - Employer policies and procedures
    - COVID-19 related benefit information

# COVID-19 Prevention Program (CPP) vs Aerosol Transmissible Diseases (ATD)

- The COVID-19 Prevention Program (CPP) applies to all employers, employees, and to all places of employment with three exceptions:
  1. Workplaces where there is only one employee who does not have contact with other people
  2. Employees who are working from home
  3. Employees who are covered by the Aerosol Transmissible Diseases regulation
  
- Who is covered by the ATD regulation?
  - Hospital staff
  - Emergency Medical Services
  - Some correctional facilities
  - Laboratories
  - Referring employers (primary care clinics, skilled nursing facilities, school nurses)



## The Importance of Safety and Work-Related COVID Claims

CA Senate Bill 1159 created an “outbreak” workers’ compensation presumption.

- Effective as of July 6th, 2020 through December 31st, 2022.
- An outbreak for the purposes of workers’ compensation is based on the number of employees contracting COVID-19 within 14 days of one another.
- The claims administrator is solely responsible for making the determination of an outbreak.
- An outbreak presumption flips the evidentiary burden to the employer to prove COVID was not contracted on the job.

## The Importance of Safety and Work-Related COVID Claims

CA Senate Bill 1159 defines how to dispute a presumption of work-related COVID.

- To dispute the newly adopted outbreak presumption, the employer is required to provide evidence:
  - of the measures put in place to reduce potential transmission of COVID-19 in the employee's place of employment; and
  - any non-occupational risks taken by the employee regarding COVID-19 infection.

*Note: Absent an outbreak, the employee has the burden to prove they contracted COVID-19 at the workplace.*

# Mandatory Vaccine Considerations

- Employers who are subject to a **collective bargaining agreement** must evaluate any limitations before requiring vaccinations as a term of employment.
- 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. For example, an allergic reaction may be considered work-related and **may be compensable under Workers Compensation**.

# Mandatory Vaccine Considerations

- Employees may also claim protection under the **National Labor Relations Act (NLRA)**, which allows employees (including nonunionized employees) to engage in concerted activity regarding the terms and conditions of their employment.
- Under the **FLSA**, employers that require employees to get vaccinated will likely need to pay nonexempt employees their hourly wage and, potentially, overtime, for:
  - Time spent waiting to get vaccinated;
  - Time spent getting vaccinated; and
  - Time spent after getting vaccinated monitoring for an adverse reaction.
- **Align your policy with the state's vaccine distribution plan** and make necessary updates.
  - Consider an employee's ability to receive a COVID-19 vaccination, including their eligibility under the state's vaccine distribution plan and lack of vaccine availability.

# Mandatory Vaccine Considerations

- **Be prepared for employees who refuse to get a COVID-19 vaccination for reasons aside from a medical condition, or religious belief.**
- An employee may have an **objection based on personal opinions or preferences**, such as:
  - Mistrust of a vaccine, based on shortened research and development time and innovative methodology;
  - The fact that the vaccine is approved only for emergency use and has not received full approval by the Food and Drug Administration (FDA);
  - Concern regarding adverse reactions to the vaccine, such as for those with severe food allergies; or
  - Personal choice based on social or political beliefs.
- No retaliation against employees who object to or refuse to get vaccinations based on **medical concerns** (under the ADA), **health and safety concerns** (under the Occupational Safety and Health Act) and **religious grounds** (under Title VII).
- Again, employees who resist receiving a vaccination may also claim **protection under the National Labor Relations Act (NLRA).**

# Mandatory Vaccine Considerations

- **California Department of Public Health:**
  - Vaccine Registration: <https://myturn.ca.gov/landing>
  - Registration FAQs: <https://covid19.ca.gov/vaccines/>
- **New Mexico Department of Health:**
  - Vaccine Registration: <https://cvvaccine.nmhealth.org/>
  - Registration FAQs: <https://cvvaccine.nmhealth.org/faqs.html>

# Disclaimer

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