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March 31, 2020

**CLIENT ALERT
FOR COMPANIES & EMPLOYERS**

COVID-19

Business Operations and Employment Concerns

The purpose of this Alert is to assist businesses and employers navigate COVID-19-related challenges by outlining:

- Best practice guidelines for employees working onsite.
- Best practice guidelines for employee working remotely.
- Employer obligations to provide employee leave related to the COVID-19 outbreak.
- Employer obligations in the event of employees' reduction in hours, furloughs, or layoffs.
- Long term operational issues and business commercial obligations.

It is our hope that these Alerts will serve as a helpful resource as our corporate clients in the US and Headquarters in Japan make important strategic decisions during these fast-changing challenging times. The team at Yorozu Law Group is ready to assist in creating and implementing strategies to manage business and employment risks. Please contact us if we can be of any assistance. It would be our privilege to serve you.

INTRODUCTION & SUMMARY

Governmental authorities at the federal, state, county, and city levels have promulgated legislation, orders, and guidelines related to the novel coronavirus outbreak ("COVID-19") to protect the health, safety, and welfare of its residents and businesses. In California, state, county, and city public health authorities have enacted shelter-in-place orders that have a drastic and immediate impact on business operations and individual activities. A newly enacted federal law will require employers to provide employees with emergency paid sick leave and expanded family and medical leave. Certain cities have changed their local paid sick leave ordinances to allow employees who are particularly vulnerable to COVID-19 to use paid sick leave.

The impact of COVID-19 is widespread, and businesses are facing significant challenges in complying with the various federal state and local employment laws, leave laws, and shelter-in-place orders in the midst of the COVID-19 outbreak. As further explained below, in states or municipalities where shelter-in-place orders have been issued, businesses must make difficult operational decisions in determining whether to continue their regular onsite business, reduce onsite operations and enable employees to work remotely, or temporarily or permanently suspend all business operations. Businesses must also make difficult workforce and employment decisions in determining whether to allow employees to work onsite or remotely, or if financially necessary, whether to reduce employees' pay or hours, or whether to lay off or furlough (temporarily lay off) employees.

The purpose of this Alert is to assist businesses and employers navigate these challenges by outlining:

- Best practice guidelines for employees working onsite.
- Best practice guidelines for employee working remotely.
- Employer obligations to provide employee leave related to the COVID-19 outbreak.
- Employer obligations in the event of employees' reduction in hours, furloughs, or layoffs.
- Long term operational issues and business commercial obligations.

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1. BEST PRACTICES FOR EMPLOYEES WORKING ONSITE

Employers who will continue onsite operations with employees traveling to the workplace should consider the following best practices.

- 1.1 Ensure that all business operations and employees working onsite are in compliance with California and any local county or city shelter-in-place orders.
 - Please refer to Alert No. 1 for an outline of which businesses or services are treated as "essential" under the orders.
 - Please keep in mind that the employer and employees cannot simply decide whether the employee should continue working onsite. If an employee insists on working at the place of business in defiance of an applicable order, both the

employee and the employer may be subject to liability for violating the shelter-in-place order(s).

- 1.2 Provide employees with a transit authorization letter which indicates that the employee is authorized to travel to provide essential services (which may include minimum basic operations) or to work for an essential business.
- 1.3 Implement COVID-19 workplace preparation recommendations from the U.S. Department of Labor Occupational Safety and Health Administration, available at <https://www.osha.gov/Publications/OSHA3990.pdf>, including:
 - Providing hand washing facilities (or hand sanitizer) and encouraging frequent and thorough hand washing (or hand sanitizer use).
 - Encouraging employees to stay home if they are sick.
 - Providing tissues and trash receptacles and encouraging good respiratory hygiene, including covering coughs and sneezes with a tissue or elbow (not hands).
 - Discouraging employees from using other colleagues' phones, desks, or offices.
 - Maintaining regular housekeeping practices, including cleaning, disinfecting, and waste removal.
- 1.4 Modify operations to allow onsite employees to maintain the recommended 6-foot social distance from each other. For example, by allowing some employees to work remotely, reducing the workforce, staggering shifts, or changing the workplace layout or seating arrangement.
- 1.5 Be prepared to immediately send an employee home if he or she is coughing, has a fever, or displays any other COVID-19 symptoms.
 - To maintain workplace safety during the COVID-19 outbreak, employers are permitted to take an employee's temperature. For context, this is an extraordinary allowance because taking an employee's temperature is considered a medical exam that an employer would absolutely be prohibited from conducting under other circumstances. Employers should consult with legal counsel before implementing temperature checks and keep in mind that fevers may have other causes and some individuals with COVID-19 may be asymptomatic.
 - Employers are permitted to ask about COVID-19 symptoms but cannot require employees to disclose the results of a COVID-19 test.

- 1.6 If an employer learns that an any employee working onsite tested positive for COVID-19, the employer should:
- Clean and disinfect the workplace using recommended guidelines from the Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html>.
 - Consult with legal counsel to prepare a notification to other employees who may have been exposed. The employer must maintain the confidentiality of private medical information and cannot disclose the name of the affected employee.
 - Determine if the incident of COVID-19 is a recordable illness for purposes of the Occupational Safety and Health Act of 1970 and, if required, report the incident.

2. BEST PRACTICES FOR EMPLOYEES WORKING REMOTELY

Employers who will continue operations with employees working remotely should consider the following best practices.

- 2.1 Prepare a work from home policy which includes the following provisions:
- Overtime is only permitted with prior approval.
 - Nonexempt employees must submit weekly timesheets which indicate all hours worked and meal and rest breaks taken.
 - The policy is temporary and only for the duration of the COVID-19 outbreak and shelter-in-place orders.
 - Employees must continue to comply with the company's data security and confidential information requirements.
 - Guidelines for home office safety and a requirement for employees to return a certification confirming that the employee's home office complies with those guidelines.
- 2.2 Determine what amount of reimbursement is appropriate for the expenses that an employee incurs by working from home. For example, this may include a reasonable percentage of the employee's internet access charges, personal cell phone expenses (if used for work calls), software, office furniture, printer, and other office supplies.
- 2.3 Contact the company's insurance broker to indicate that employees will be working from home and to confirm workers' compensation coverage.

- 2.4 Confirm whether any of the cities from which employees are working have enacted minimum wage, paid sick leave, or other employment ordinance that is more generous than the employer's policies. (Employers must comply with applicable law where the work is being performed. Although that is normally the employer's worksite, while the shelter-in-place orders are in effect, the work being performed is at the employee's home.)

3. EMPLOYERS' OBLIGATIONS TO PROVIDE LEAVE TO EMPLOYEES

As an overall matter, employers are required to provide leave to employees in accordance with: (a) the employer's vacation or paid time off policy (or other employer leave policy), (b) the employer's paid sick leave policy and applicable California and local paid sick leave laws, and (c) applicable federal or California family or medical leave laws. In addition, an employer may provide leave as an accommodation for an employee's disability under federal or California law.

Employers should be aware of recent legislative changes which have established new temporary federal leave requirements for sick leave and family and medical leave, and new guidance from state and local agencies that allow paid sick leave to be used for new COVID-19 related purposes.

- 3.1 On March 18, 2020, the federal Families First Coronavirus Response Act ("FFCRA") was signed into law. Under the FFCRA, employers with fewer than 500 employees must provide eligible employees with (and will be eligible to receive tax credits for) the following COVID-19-related paid sick leave and paid family and medical leave between April 1, 2020 and December 31, 2020:

- Emergency Paid Sick Leave Act. Employers must generally provide employees with up to 80 hours of emergency paid sick leave ("EPSL") for full-time employees (and prorated leave for part-time employees). Employees are eligible to take EPSL if they are unable to work (or telework) due to (a) a quarantine order (the shelter-in-place orders are not considered quarantine orders under the FFCRA), (b) having COVID-19 symptoms and obtaining a medical diagnosis, (c) caring for someone who is under a quarantine order, (d) caring for the employee's child due to school closure or childcare unavailability related to COVID-19, or (e) other substantially similar condition set forth by authorized governmental officials. Please note that:
 - EPSL is distinct from and in addition to regular paid sick leave under California and local laws.
 - Employers will not receive any credit or offset from the EPSL requirements for any paid leave that the employer already provided to employees before April 1, 2020, even if that paid leave was related to COVID-19 and outside of the employer's regular paid leave policies.

- Employers must post the US Department of Labor’s EPSL/EFMLE (Emergency Family and Medical Leave Expansion, as defined below) notice in the workplace, on the company intranet, and/or by mail or email to employees by April 1, 2020.
 - Employers may set a cap on the daily or aggregate payment of EPSL in accordance with the FFCRA and pursuant to an employer policy which has been provided to employees.
 - Employers must maintain documentation regarding the use and available balance of EPSL.
 - EPSL is not cashed out upon employee separation and will expire at the end of 2020 (i.e., unused EPSL will not roll over).
 - Employers cannot require employees to first use other paid leave such as vacation, paid time off, or regular paid sick leave before using EPSL.
 - Employers cannot retaliate against employees for taking EPSL.
- Emergency Family and Medical Leave Expansion Act. Employers must generally provide employees with up to 12 weeks of job-protected expanded family and medical leave (“EFMLE”) for employees who have been employed for at least 30 days. Employees are eligible to take EFMLE if they are unable to work (or telework) due to the need to care for the employee’s child due to school closure or childcare unavailability related to a COVID-19 emergency. Please note that:
 - Employers must post the US Department of Labor’s EPSL/EFMLE notice in the workplace, on the company intranet, and/or by mail or email to employees by April 1, 2020.
 - Employers must maintain documentation regarding the use of EFMLE.
 - The first 10 days of EFMLE are unpaid, but employees have the option of applying any accrued vacation, paid time off, or regular paid sick leave during this time. (Employees cannot be required to apply paid sick leave.)
 - After 10 days, the employer must provide a payment of 2/3 of the employee’s regular wages for normally scheduled hours. Employers may set a cap on the daily or aggregate payment of EFMLE in accordance with the FFCRA and pursuant to an employer policy which has been provided to employees.
 - Employers cannot retaliate against employees for taking EFMLE.
 - Employers with fewer than 25 employees may be excepted from the obligation to restore an employee to his or her position under certain conditions.
- 3.2 California Paid Sick Leave Law. The California Labor Commissioner, which enforces California’s paid sick leave law, has indicated that California paid sick leave may be used

for a new purpose. In the event that an employee has a child whose school or daycare facility closes for COVID-19-related reasons, the California Labor Commissioner has provided enforcement guidance indicating that the employee has the option to use (but cannot be required to use) California paid sick leave to be with his or her child as preventative care.

- 3.3 Local Paid Sick Leave Ordinances. There are a number of cities that have enacted local paid sick leave ordinances. Some cities have provided guidance to indicate that paid sick leave can be used for a new purpose related to COVID-19. Employers should consult with legal counsel regarding the applicability and permitted uses for local paid sick leave.
- For example, the Office of Labor Standards Enforcement, which enforces the City and County of San Francisco’s local paid sick leave ordinance, has indicated that San Francisco paid sick leave may be used by employees in a vulnerable population who are not sick, but would face a higher risk from COVID-19. A “vulnerable population” is currently defined as a person who is 60 years old or older, or a person with a health condition such as heart disease, lung disease, diabetes, kidney disease, or a weakened immune system.

4. EMPLOYER OBLIGATIONS IN THE EVENT OF REDUCTION IN EMPLOYEES’ HOURS, FURLOUGHS, OR LAYOFFS

As businesses assess the impact of the COVID-19 pandemic on operations, some may need to make difficult decisions to close a worksite or drastically reduce operations. It may also become necessary to reduce employee hours, furlough employees, or permanently lay off employees. Before implementing any workforce changes, businesses should consider the following legal matters:

- 4.1 Consult with legal counsel to analyze risk and evaluate the scope of the workforce change, the criteria for determining how schedules were reduced or employees were selected for furlough or layoff, and whether the proposed workforce changes may have a disproportionate impact on any protected classes of employees.
- 4.2 Determine whether the reduction in employees’ scheduled work may result in:
- An employee becoming eligible for unemployment insurance benefits or ineligible for group health insurance benefits. The employer should provide the employee with appropriate unemployment insurance and COBRA/Cal-COBRA notices.
 - Any changes to an employee’s exempt status. For example, if two full-time employees’ hours are cut to part-time, this could change the exempt status of an

executive employee whose exempt status was based on supervision of those two formerly full-time employees.

- Reduced employee compensation. Reducing scheduled hours for non-exempt employees will reduce their compensation since they are paid based on hours worked. However, reducing scheduled hours for exempt employees will only reduce their compensation if they do not perform any work for an entire workweek—an employer is not allowed to take partial-week deductions from an exempt employee.

4.3 Determine whether the employer's size and the scale of any planned furlough or layoff requires the employer to comply with either the federal WARN Act or the California Cal-WARN Act. (Broadly speaking, these acts require large employers (with 100+ or 75+ employees respectively) that will conduct a mass layoff or worksite closure (resulting in the layoff of 50+ employees in a 30-day period) to provide at least 60 days' advance notice of termination. The advance notice requirement may be excused for reasons related to COVID-19—please consult with legal counsel to confirm the applicability of and compliance with all notice and procedural obligations.)

4.4 If an employer will lay off employees or furlough employees for an indefinite period of time (or with a return-to-work date beyond the normal pay period), the employer must comply with all employee termination requirements, including:

- Provide the employee with a final paycheck on the final day of employment which includes payment of all (a) hours worked and (b) accrued and unused vacation/paid time off.
- Provide the employee with notices regarding the change in relationship, unemployment insurance eligibility, and continuing healthcare eligibility.

4.5 Consider whether the employer will offer employees any severance payments in exchange for waiving employment claims. Please note that a business must meet specific compliance requirements when an employer offers a severance agreement to an employee who is 40 years old or older following the termination of two or more employees.

5. OTHER COMMERCIAL CONCERNS

In addition to the immediate operational and employment matters above, businesses are also likely to have concerns related to long term operations and their commercial obligations. Third party vendors, customers, and others in the supply chain are likely to face similar operational and commercial challenges. Although specific matters should be discussed with legal counsel, we would like to briefly highlight a few issues for consideration.

- 5.1 *Contractual Obligations and Force Majeure.* In the event that a business is unable to fulfil its obligations under an existing contract, or if the other party to the contract may be unable to fulfil its performance obligations, the business should review the contract with legal counsel to determine if non-performance may be excused under a force majeure provision. It will be important to evaluate the specific contract language to identify if a force majeure provision exists, whether the COVID-19 outbreak would qualify as force majeure event, what performance obligations are or are not excused, the consequences on the contract overall, whether there are notices that must be provided, and whether there are any obligations to mitigate damages.
- 5.2 *California Statutory Protection for Impossibility of Performance Under Contract.* In the event that a business is unable to fulfil its performance obligations under an existing contract, but the contract does not include a force majeure provision (or the COVID-19 outbreak does not qualify as a force majeure event), there may be recourse if the contract is governed by California law. Under California Civil Code Section 1511, a party can be excused for a failure to perform that is “prevented or delayed by an irresistible, superhuman cause...unless the parties have expressly agreed to the contrary.”
- 5.3 *Local ordinances may also provide some benefits to businesses.* For example, the City and County of San Francisco has enacted an ordinance to allow a business with annual revenue of up to \$25,000,000 to defer its rental payment obligation on a San Francisco commercial lease for up to six months without eviction. Employers should consult legal counsel when determining whether any local ordinances may provide any temporary benefits to help businesses manage during the COVID-19 outbreak.

Please keep in mind that this is a continuously developing situation that is subject to update based on the evolution of the COVID-19 outbreak, the issuance of additional orders from federal, state, and local governmental agencies, and developments in the interpretation and enforcement of the California and local shelter-in-place orders.

For additional information, please contact Yorozu Law Group at:

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