

Pacific Employers
1331 West Center Ave.
Visalia, CA 93291
559 733-4256
(800) 331-2592
Fax 559 733-8953
www.pacificemployers.com
email - peinfo@pacificemployers.com

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Pacific Employers



MANAGEMENT ADVISOR

Summer 2021
Over 50 Years of Excellence!

SAFETY REPORT! ETS Changes

Cal/OSHA's COVID-19 Emergency Temporary Standards (ETS), were voted on and revised earlier this summer, and a number of things have been updated. Here are some of the biggest changes in the updated ETS:

- Fully vaccinated employees without symptoms do not need to be tested or quarantined after close contacts with COVID-19 cases unless they have symptoms.
- No face covering requirements outdoors (except during outbreaks), regardless of vaccination status, though workers must be trained on CDPH recommendations for outdoor use of face coverings.
- Employers must provide unvaccinated employees with approved respirators for voluntary use when working indoors or in a vehicle with others, upon request.
- No physical distancing requirements whatsoever in the employer-provided housing and transportation regulations.
- Where all employees are vaccinated in employer-provided housing and transportation, employers are exempt from those regulations
- Employers must evaluate ventilation systems to maximize outdoor air and increase filtrations efficiency, and evaluate the use of additional air cleaning systems

While these changes were updated earlier this summer, it does not negate the continuous changes that come from other agencies with more stringent regulations. If you have questions, ask, as COVID-19 related things change very quickly. [PE]

Masking in Indoor Settings Again????

Weren't we moving in the right direction with COVID-19 and working towards ending this pandemic? Did someone hit the rewind button on life, because it feels like a deja vu?

It's no fun to make so much of our content about COVID-19 and the workplace ramifications within it, but it's the unfortunate reality of our world right now. One step forward, and two steps back as we inch our way through this.

At the end of July, the California Department of Public Health (CDPH) issued guidance in response to the new Delta Variant that appears to be on quite the upward trend. This guidance echoes that of the CDC which states all individuals, regardless of vaccination status are recommended to mask in indoor public settings.

What Should Your Organization Do?

It's ultimately up to you, but because the CDPH is recommending indoor masking, Cal/OSHA could enforce that as well. Employers should consider updating their policy to indoor masking again. Just when we thought we could toss those masks... Two steps back again. [PE]



Articles in this Newsletter have been extracted from a variety of technical sources and are presented solely as matters of general interest to employers. They are not intended to serve as legal opinions, and should not be deemed a substitute for the advice of proper counsel in appropriate situations.

FRIENDLY REMINDER: SEXUAL HARASSMENT PREVENTION TRAINING

While required sexual harassment prevention training for employers with five or more employees in the state of California is nothing new, we like to remind you as months get away from us quickly and the obligation to train is still there. So here it is; if you have five or more employees, you have to train employees upon hire (within 6 months) and re-train the rest of your organization every two years. Supervisors must be provided with two (2) hours of training and non-supervisory employees must receive one (1) hour of training.

Our recommendation is to schedule at least two trainings per year. In doing so, you will be able to have new hires attend the training within 6 months, and those who are getting close to their two year mark, should train at the next training. Should you have any questions about training or scheduling, please do not hesitate to reach out to us. [PE]

PROTECTING YOUR BIGGEST ASSET, YOUR EMPLOYEES...

Did you know, in the United States alone in 2019, employers reported 2.8 million non-fatal incidents, along with more than 5,000 employee deaths. The true total of these incidents is most definitely higher, given that employers should, but do not, report every occurrence.

What can employers do to protect their most valuable asset – their workers – and ensure these individuals return home every day just as healthy as when they arrived? We, at Pacific Employers have brainstormed some of the ways to keep your employees healthy, happy, and safe. Some ideas for you are:

- Training
- Worker Engagement
- Minimizing Overtime When Possible
- Providing Team Lunches
- Ensuring Employees Have Open Lines of Communication
- Wellness Competitions and Checks
- Encouraging Meditation and Providing Resources for Relaxation Outside of Work
- Incident Management
- Health and Safety Technology [PE]

Want Breaking News by E-Mail?
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Child Labor Law Poster Enclosed!

What's News!!!

New Bill With Proposed Expansion of CFRA



The state of California is responding to the pandemic with several proposed bills to impact employers if passed. One of those bills would expand the California Family Rights Act (CFRA).

Under the California Family Rights Act, employers in California are required to grant eligible employees up to 12 workweeks of unpaid job protected leave during any 12-month period for family care and medical leave. Under current law, this protected leave includes leave to care for a parent. The bill to expand it, (AB 1033) would include parent-in-law, and not only parent. This bill was passed by the state assembly, and is currently pending in the senate. If passed, it is a change that would need to be accommodated, but it isn't too significant of a change. [PE]

Back to School and Teachers/Staff Must Vaccinate or Test

Kids are back to school, and with that comes another order by the state of California. This time, it's the teachers and staff, but not yet children.

The California Department of Public Health has issued a Public Health Order which requires all public and private school teachers and school staff serving students in kindergarten through 12th grade to either show proof of full vaccination or be tested for COVID-19 at least one per week. California has become the first state to require vaccinations for all faculty and staff. Are you surprised by that? Probably not...

With COVID-19 case numbers on the rise of the Delta Variant, and among both vaccinated and unvaccinated, will schools remain in session? We are very hopeful that children will be able to learn in a better capacity than the circumstances they were given in 2020, but time will tell. Those staff members not vaccinated though, will be required to test at least weekly. [PE]

"Cause a little bit of summer is what the whole year is all about!" – John Mayer



HR Report ~Tiffany Harris~ The COVID Corner (Since It Doesn't End) Mandatory Vaccinations for Health Care Workers

Recently, the California Department of Public Health announced all state employees and health care workers would need to show proof of vaccination for COVID-19 or test at least weekly. Since then, the plot has only thickened for health care workers.

Health Care Workers Required to Vaccinate

The option for health care workers to test weekly/bi-weekly was quickly taken from the individuals working in the health care field when the state of California announced Health Care workers would be required to vaccinate for COVID-19 in order to continue working. Health Care Facilities include:

Health Care Facilities:

- i. General Acute Care Hospitals
- ii. Skilled Nursing Facilities (including Subacute Facilities)
- iii. Intermediate Care Facilities
- iv. Acute Psychiatric Hospitals
- v. Adult Day Health Care Centers
- vi. Program of All-Inclusive Care for the Elderly (PACE) and PACE Centers
- vii. Ambulatory Surgery Centers
- viii. Chemical Dependency Recovery Hospitals
- ix. Clinics & Doctor Offices (including behavioral health, surgical)
- x. Congregate Living Health Facilities
- xi. Dialysis Centers
- xii. Hospice Facilities
- xiii. Pediatric Day Health and Respite Care Facilities
- xiv. Residential Substance Use Treatment and Mental Health Treatment Facilities

In addition to this, the term “worker” at a health care facility includes essentially all individuals who will be in the facility either paid or unpaid, who work indoors where care is provided or where patients would have access to for any purpose. That means, it isn't just doctors and nurses, it's volunteers, interns, students, and all other individuals who help make the facility the operation it is.

There are possible exemptions for those in this field of work and they come in the form of a medical exemption, and in the form of a religious beliefs exemption. If an individual is found to be exempt from vaccinating though, they will still need to be tested for COVID-19 once or twice weekly depending on the actual facility the individual is in. In addition, a surgical mask or better will be required for those exempt individuals to wear.

Who pays for these COVID-19 tests?

Give it up for our most frequently asked question this week. The state mandates individuals who are not vaccinated against COVID-19 be tested at least weekly, but does not specify who is paying for this. The answer... We still do not know. This much we do know: It's either the state, or the employer, not the employee, but the state still has not indicated they would be covering the cost of these tests. As soon as this information comes out, we will give you an update. Until then, hold tight. I know it is stressful and daunting, but we should have answers in time. [PE]

Regular Rate of Pay Vs. Regular Rate of Compensation?

You may have heard about the Loews Hollywood Hotel case or possibly, you know nothing about it. Here's the case in a nutshell: An employee who happened to be a bartender at the Loews Hotel was provided pay via hourly wages as well as quarterly nondiscretionary incentive pay. There were times in which employees would miss their required meal period or their meal period was not provided in a timely manner. When that would happen the Hotel would compensate by paying the employee the meal premium at the employee's base hourly rate.

In 2015, Jessica Ferra (the employee who was paid hourly and provided nondiscretionary bonuses), filed a class action lawsuit stating employees should be paid the premium at their regular rate of pay, not at their base hourly rate.

The “Regular Rate of Compensation” Has the Same Meaning as “Regular Rate of Pay”

The Court first noted that neither the Labor Code nor the applicable Wage Order defined “regular rate of compensation” and that the words themselves could reasonably be interpreted to mean either hourly wages (Loews' interpretation) or hourly wages plus nondiscretionary payments (Ms. Ferra's interpretation). Given the parties' comparison of the term “regular rate of compensation” regarding meal, rest, and recovery periods and “regular rate of pay,” The Court analyzed whether the two terms are synonymous. The Court addressed various “canons of interpretation” used by the courts and invoked by the parties in interpreting the language used by the Industrial Welfare Commission and California legislature with regard to the nature of the hourly premium mandated by law. Although Loews contended that the drafters of the law must have intended something different for “regular rate of compensation” and “regular rate of pay,” both used in the same statute, the Court strongly disagreed, noting that canons of interpretation “are not immutable rules.”

This truly does not make much sense though, right? If the “regular rate of pay” means the same thing as “regular rate of compensation,” why not call it the same thing then? Labor law 101, many many things do not make sense.

In the end, the Court determined the operative term is “regular rate” which has a particular meaning when calculating overtime. Similarly, the Court found no history or support for a contradictory interpretation of regular rate of compensation and instead found the terms were used interchangeably in legislative sessions, court decisions, and by the IWC.

Retroactive Application Ruling Adds to This Unfortunate Conclusion

Oh the dreaded retroactive application ruling cannot be applied here can it? Ah...yes, the Court went one step further and determined the decision will apply retroactively. Such a result was expected since California judicial decisions ordinarily interpret existing law and do not make new law, whereas new laws made by the legislators and commissions acting with regulatory authority typically are prospective only. [PE]



Human Resources Question with Candice Weaver THE MONTH'S BEST QUESTION Exempt Vs. Non-Exempt Q: “What is the difference between an exempt and a non-exempt employee?”

A: There are multiple parts to answering this question.

Comparing Exempt vs. Non-Exempt:

- Exempt employees are salaried;
- Exempt employees must meet a certain criteria to qualify as exempt;
- Exempt employees are exempt from overtime, but there are limited instances in which deductions from salaries can be made.

Non-Exempt:

- This is an hourly employee that is required to clock in and out, and is required to maintain their time keeping;
- This employee must be paid for every minute they are working, and the must be paid overtime and double time when those thresholds have been met.
- Non-Exempt employees are paid when they are at work, and you do not need to pay the employee for time they are not at work unless they have available paid sick leave or other paid time off that they would like to use in place of an absence.

Understanding the Difference and Potential Liability

Exempt employees must qualify as exempt. Many employers think they can have any employee be exempt as long as they pay them enough, and that just isn't the case. An exempt employee must meet a set criteria for the exemption they are trying to be categorized under.

For example, an exempt employee who qualifies under the administrative salary exemption must pass the salary test under the conditions listed below:

- The performance of office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers, OR The performance of functions in the administration of a school system, or educational establishment or institution, or of one of its departments or subdivisions; in work directly related to its academic instruction or training.
- Customarily and regularly exercises discretion and independent judgment.

Must also be one who:

- (a) regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity;
 - (b) performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or
 - (c) executes under only general supervision special assignments and tasks.
- Is “primarily engaged” in duties that meet the above tests. “Primarily engaged in” means that more than one-half of the employee's work time must be spent engaged in exempt work.
 - Earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment.

The potential liability for misclassifying a non-exempt employee as an exempt employee can be largely detrimental as no time is being tracked, an employee could claim they should have been paid overtime across different times, or that they were not provided with timely meal and rest periods, and the wage and hour claims among others could amount to astronomical numbers.

If you feel as though you are misclassifying your exempt employees, please take the steps to remedy it. The example given above is the qualifiers for the administrative exemption, but there's others as well. These include the computer professional exemption, executive managerial exemption, professional exemption, and salesperson exemption. [PE]

LABOR SEMINAR SERIES!

Pacific Employers sponsors a seminar series on employee labor relations topics for all employers.

2021 Topic Schedule

◆ **COVID-19** - Where are we now? We will be discussing the current state of the pandemic, and some things to take note of in terms of your business and its operations.

Thursday, September 16th, 2021, 10 - 11:30am

◆ **Labor Law Update** - Susan Hatmaker will provide us with the interpretation of recent law changes and how they impact employers

Thursday, October 21st, 2021, 10 - 11:30am

◆ **Customer Service** - How to keep customers happy, and maintain a healthy and happy work atmosphere.

Thursday, November 18th, 2021, 10 - 11:30am

◆ **Favorite Things Table Talk** - The holiday season makes us want to give you the gift of our Favorite HR things. These tools, tips, and tricks may make your daily HR life a little easier.

Thursday, December 16th, 2021, 10am - 11:30am



Dinner for 2 at the *Vintage Press!*
That's right! When a business that you recommend joins Pacific Employers, we treat you to dinner for two at the *Vintage Press.*

SEXUAL HARASSMENT PREVENTION TRAINING WEBINAR

Pacific Employers will be hosting sexual harassment prevention training webinars for employees who need 1 hour of training and supervisors who need 2 hours of training. Call to Reserve a spot and get additional information. Scheduled dates/times are listed below:

Where: Webinar
When: October 4th From 3:00 PM-5:00 PM
November 10th From 10:00AM-12:00PM
December 2nd From 3:00PM-5:00PM