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COVID-19 Issues in the Agricultural Workplace

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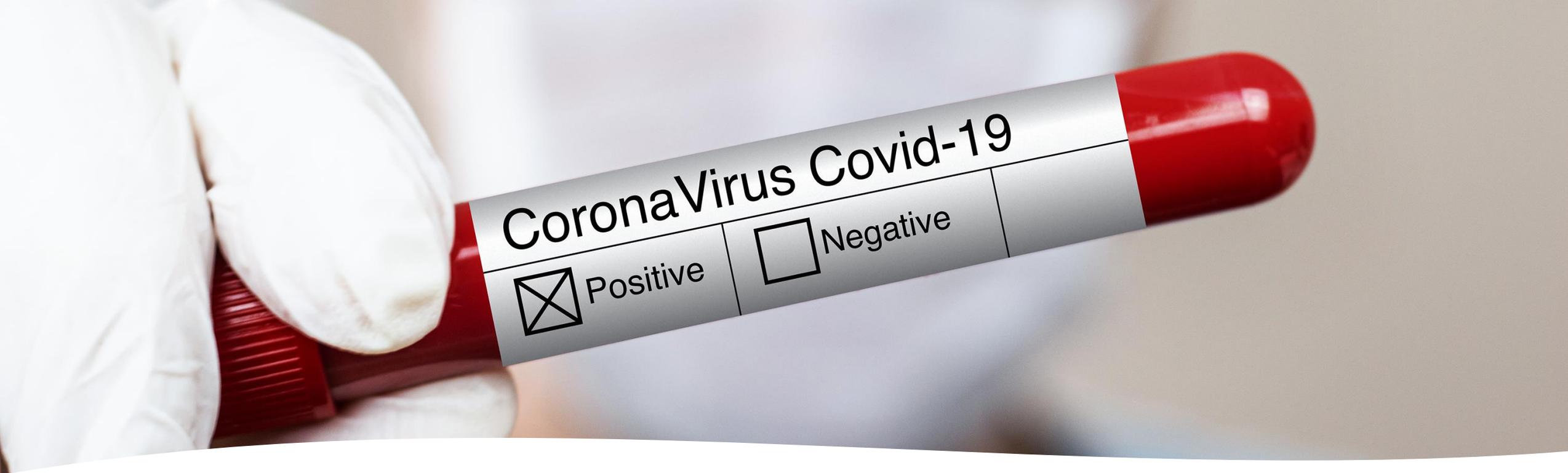
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Agenda

- Wage and Hour Issues
- Workplace Safety Issues
- Immigration Issues
- Questions and Answers

Wage and Hour Issues



Compensation for Medical Inquires

- Types of Medical Inquiries
 - Temperature Checks
 - Symptom Inquiries
 - Testing (on and off site)

What Is the *De Minimis* Doctrine?

- The federal doctrine under the Fair Labor Standards Act (FLSA) that insubstantial or insignificant amounts of work time, beyond scheduled or regular working hours, which as a practical matter cannot be recorded for payroll purposes, may be disregarded.
- Under federal law, daily periods of up to 10 minutes can be considered de minimis even though otherwise compensable. However, there is no bright line rule – it is highly fact specific.
- There is NO *De Minimis* Doctrine in California
- Temperature and symptom checks must be compensated.



What about compensation for COVID-19 Testing? Vaccination?

California's labor commissioner has stated if an employer requires an employee to obtain a COVID-19 test or vaccination must pay for the time it takes for testing or vaccination, including travel time.



Reporting Time Pay, Generally

- Compensation owed when an employee “**reports to work**” and is furnished less than half of the employee’s **usual** or **scheduled day’s work**.
- Reporting Time Pay owed:
 - No less than 2 hours or more than 4 hours if scheduled over 2 hours.

Reporting Time Pay

- The reporting and call back time pay provisions are not applicable when:
 - Threats to employees or property or recommended by civil authorities.
 - Public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system.
 - The interruption of work is caused by an Act of God or other cause not within the employer's control.
 - Employer requires employees to work for periods of less than two hours, and pay them only for time actually worked, as long as these work periods are scheduled in advance.

California Labor Commissioner on Reporting Time & COVID-19

- Reporting Time due if the employee reports for their regularly scheduled shift but is required to work fewer hours or is sent home, the employee must be compensated reporting time.
- If a state of emergency, reporting time does not apply.



Reimbursements

- Face coverings vs. masks
 - Masks = PPE
 - Face coverings = Probably PPE at this juncture
- Other safety items
 - Is it needed to perform the employee's job duties?



Healthy Workplace, Health Family Act

- Employees may use paid sick leave under the Act for the following COVID-19 related reasons:
 - Illness due to COVID-19
 - Seeking diagnosis of COVID-19
 - Self-quarantining due to potential exposure
 - Caring for a family member who has COVID-19

Workplace Safety Issues

COVID-19 Prevention Program

- Communicate to employees about the employer's COVID-19 prevention procedures.
- Identify, evaluate and correct COVID-19 hazards.
- Require and provide face coverings and respirators in the manner and in the circumstances specified in the ETS.
- Advise employees they can wear face coverings at work, regardless of their vaccination status, without fear of retaliation by the employer.
- Use engineering controls, administrative controls and personal protective equipment under certain circumstances.
- Follow procedures to investigate and respond to COVID-19 cases in the workplace.
- Provide COVID-19 training to employees.
- Make testing available at no cost to employees who have had a “close contact” (as defined in the ETS) with a person with COVID-19, and in the case of multiple infections or a major outbreak, make testing available at no cost on a regular basis for employees in the exposed work areas. This requirement does not apply to exposed employees who are fully vaccinated and have no symptoms, except during major outbreaks.
- Exclude COVID-19 cases and exposed employees from the workplace until they are no longer an infection risk. Exposed employees who are fully vaccinated and have no symptoms do not need to be excluded.
- Follow return to work criteria.
- Maintain records of COVID-19 cases, and report serious illnesses to Cal/OSHA and to the local health department when required.

Face Coverings

- **Ca/OSHA**
 - Unvaccinated Employees Must Wear Masks
 - indoors or in vehicles
 - If exempted due to medical condition from vaccination the employee shall be at least six feet apart from all other persons and tested at least weekly.
 - Employees who have been exposed to a covid case, shall wear masks in doors and outdoors unless 6 feet away.
- **CDPH**
 - All employees must wear masks in indoor settings regardless of vaccination status until February 15, 2022.

Quarantine and Isolation & Return to Work

<p>An individual who tests positive for COVID-19</p>	<ul style="list-style-type: none"> • Individuals should stay home for at least 5 days. • Isolation can end after day 5 if symptoms are not present or are resolving and a diagnostic specimen collected on day 5 or later tests negative. • If unable to test or choosing not to test, and symptoms are not present or are resolving, isolation can end after day 10. • If fever is present, isolation should be continued until fever resolves. • If symptoms, other than fever, are not resolving continue to isolate until symptoms are resolving or until after day 10. • Wear a well-fitting mask around others for a total of 10 days, especially in indoor settings.
<p>Unvaccinated individuals and vaccinated individuals who are eligible for a booster but have not received the booster who are exposed to a COVID-19 Positive Individual</p>	<ul style="list-style-type: none"> • Individuals should stay home for at least 5 days, after their last contact with a person who has COVID-19. • Individuals should test on day 5. • Quarantine can end after day 5 if symptoms are not present and a diagnostic specimen collected on day 5 or later tests negative. • If unable to test or choosing not to test, and symptoms are not present, quarantine can end after day 10. • Wear a well-fitting mask around others for a total of 10 days, especially in indoor settings. • If testing positive, follow isolation recommendations for positive individuals. • If symptoms develop, the individual should test and stay home.
<p>Vaccinated individuals who have received booster or are not booster eligible who are exposed to a COVID-19 Positive Individual</p>	<ul style="list-style-type: none"> • Individuals does not need to stay home. • Individuals should test on day 5. • Wear a well-fitting mask around others for 10 days, especially in indoor settings • If testing positive, follow isolation recommendations above. • If symptoms develop, test and stay home.

Employer Provided Housing Requirements

- To the extent feasible, employers shall reduce exposure to COVID-19 hazards by assigning employee residents to distinct groups and ensuring that each group remains separate from other such groups during transportation and work.
- Ventilation. In housing units, employers shall maximize the quantity and supply of outdoor air and increase filtration efficiency to the highest level compatible with the existing ventilation system.
- Face coverings. Employers shall provide face coverings to all residents and provide information to residents on when they should be used in accordance with state or local health officer orders or guidance.
- Regular cleaning and disinfecting
- Screening. The employer shall encourage residents to report COVID-19 symptoms to the employer.
- COVID-19 testing. The employer shall establish, implement, and maintain effective policies and procedures for COVID-19 testing of residents who had a close contact.

Notice Requirements

Single Employee states they have had close contact with a person who has tested positive for COVID-19 outside the workplace.

- No notice is required to others in the workplace.

Single Employee tests or is confirmed positive for COVID-19.

Determine if the employee was onsite during a period of time that they may have been infectious and notify all employees in writing who were at the worksite at the same time as the employee.

Notify third parties, such as employers of subcontracted employees, who were at the worksite the same time as the employee during a period they may have been infectious in writing of the COVID-19 case.

Notice Requirements Continued

Three or more confirmed positive COVID-19 cases among workers in the workplace within a 14-day period.

- Follow steps outlined above for each employee that has tested or confirmed positive for COVID-19 noted above.
- Report to the local public health department within 48 hours.
- Provide employees at the workplace of outbreak conditions and inform them of any testing needs, as well as options for getting tested during their normal working hours at no cost to them.



Department of Fair Employment & Housing Guidance

- **May an employer require its employees to be vaccinated against COVID-19?**

Short Answer: Under the FEHA, an employer may require employees to receive an FDA-approved vaccination against COVID-19 infection so long as the employer does not discriminate against or harass employees or job applicants on the basis of a protected characteristic, provides reasonable accommodations related to disability or sincerely-held religious beliefs or practices, and does not retaliate against anyone for engaging in protected activity (such as requesting a reasonable accommodation).



DFEH on Reasonable Accommodation – For Disability

- If an employee cannot be vaccinated because of a disability an employer must engage in the interactive process and reasonably accommodate.
- Do not have to accommodate if:
 - The employer can show the accommodation imposes an undue hardship
 - The employee is unable to essential job functions even with accommodation
 - The employee cannot perform those duties in a manner that would not endanger the employee's health and safety or the health and safety of others.



DFEH on Reasonable Accommodation – Sincerely Held Religious Belief

- Engage in Interactive Process and accommodate if possible.
- A reasonable accommodation is one that eliminates the conflict between the religious practice and the job requirement and may include, but is not limited to, job restructuring, job reassignment, modification of work practices, or allowing time off in an amount equal to the amount of non-regularly scheduled time the employee has worked in order to avoid a conflict with his or her religious observances.
- Unless expressly requested by an employee, an accommodation is not reasonable if it requires segregation of an employee from customers or the general public.

Challenges to Employer Vaccine Mandates

- Many challenges by employees of public employers such as police departments.
- Also challenges to private employer mandates.
- Grounds for Challenges:
 - How accommodations are handled.
 - Constitution claims – but commonly have failed
 - Individuals who previously had COVID-19 and state the vaccine is not necessary for them.

DFEH On Proof of Vaccination

- May ask for proof of vaccination if using a third-party administrator
- Requests should instruct employees or applicants to omit any medical information from such documentation.
- Information on regarding vaccination status must be kept confidential.

Immigration Issues

Travel Restrictions

- The 14-day travel restrictions on southern African countries will be lifted as of midnight on December 31, 2021.
- The requirements that all travelers to the United States, unless otherwise excepted, must be fully vaccinated and present a negative COVID-19 test taken within one day of travel remain in effect.

Waivers for In-Person Visa Interviews

- On December 23, 2021, that it will be extending the discretionary authority of U.S. Consular Officers to waive in-person interviews for some nonimmigrant visa applicants.
 - This includes H-2A Visas for Temporary Agricultural Workers
- The eligibility requirements for those who were previously issued a visa in the same category are:
 - No visa refusals, unless the refusal was overcome or waived
 - No apparent or potential ineligibility
 - Must be applying in their country of nationality or residence
- For those applying for the first time for the visa category:
 - Must be a citizen or national of a Visa Waiver country
 - No apparent or potential ineligibility
 - Previously travelled to the U.S. on ESTA





**Questions &
Answers**

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Thank **you.**