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What Employers Should Know
COVID-19 Employment Law Update

April 1, 2020

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Disclaimer: Every Lawyer Must Have One Right?

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COVID-19 Basics



- On March 11, 2020, the World Health Organization (WHO) declared the COVID-19 coronavirus outbreak a pandemic.
- On March 13, 2020, it was declared a national emergency.
- Every day brings new facts and guidance from federal, state and local governments. Employers must be adaptable in these unprecedented changing times.
- As to many questions, there are no quick answers as there is no legal opinions on point so we have to rely upon our Coronavirus Task Force and similar situations in the past.

Government-Imposed Shutdowns and Shelter in Place Orders



- On March 19, 2020, California Governor Gavin Newsom issued Executive Order N-33-20 directing all residents to immediately heed to current state public health directives to stay home.
 - This order includes exceptions for “essential critical infrastructure operations” to remain open.
 - Persons who flout the Executive Order can face criminal prosecution for a misdemeanor punishable by up to \$1,000 and/or six months imprisonment. Police are stopping employees and issuing tickets!
- Several counties and cities have also issued their own individual mandates, so be sure to check all orders in your jurisdiction.
 - THE STRICTER RULES/ORDER WILL CONTROL. CA’s Order will remain controlling under the current Federal v. State guidance.

What we plan to cover:



- New Federal Laws
- Furloughs versus Layoffs
- California WARN Notices
- Best Practices for Increasingly Common Problems
- New Leave Benefits under Coronavirus Response Act
- Remote Work Policies
- FAQs (employee temperature, permanent layoffs, etc.)



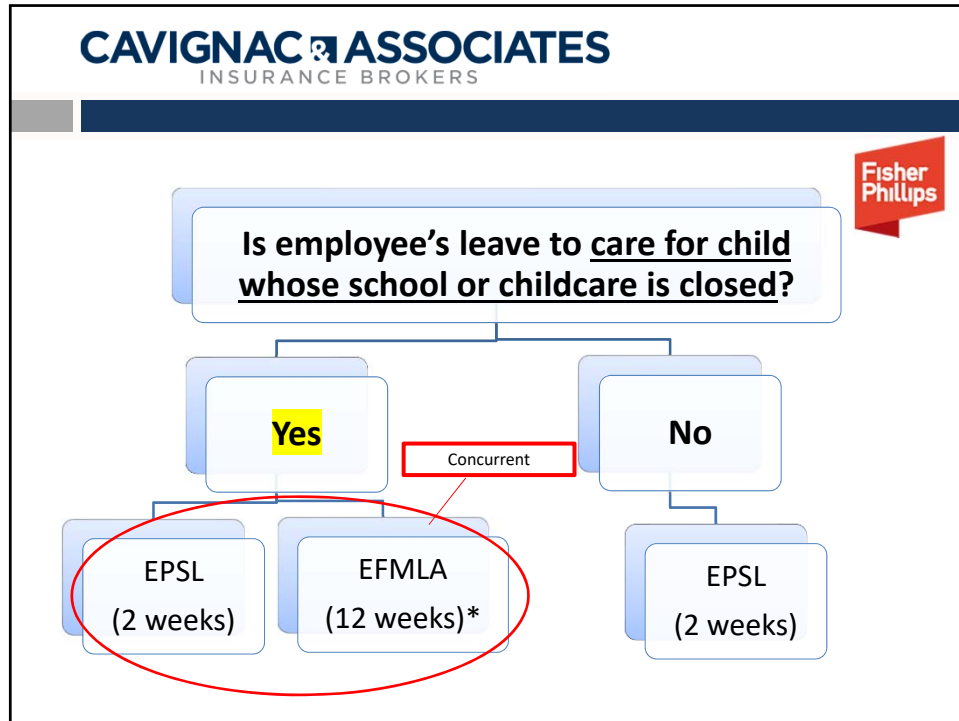
Federal Legislation

- Emergency Paid Sick Leave (EPSL)
- Emergency Paid Federal Medical Leave Act (EPFMLA)
- Both Laws only apply to Companies with 1 – 499 Employees.



EPSL and EPFMLA

General Uses	
Emergency Paid Sick Leave	Emergency Paid FMLA
<p><u>Symptom or care related.</u> Employee is experiencing symptoms, is subject to a quarantine or isolation order, or is caring for someone who is.</p> <p><u>School and childcare unavailability.</u> Can also be used for school or childcare closure</p>	<p><u>School and childcare unavailability.</u> Employee has a child whose school has been closed or child care is unavailable.</p> <p>Only available where employee is unable to work <u>and unable to telework.</u></p>
80 hours	Up to 12 weeks <u>concurrent with</u> EPSL)



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Leave Due to School or Child Care Closing

In virtually all cases, if not all cases, leave for an employee to care for a child whose school or child care closed will be as follows:

- 2 weeks under EPSL, plus 12 weeks under EPFMLA.
- The first 10 days (two weeks) of EPFMLA are unpaid *under that law*, but are paid under EPSL.
- The first 10 days (two weeks) of E-PFMLA will run concurrently with the EPSL.
- Result: 12 total paid weeks (2 from EPSL, 10 from EPFMLA)

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Employee Leave To Care For Child With School Or Childcare Closed: Leave Entitlement

Day 1 of Leave

EPFMLA <i>2 unpaid weeks</i>	EPFMLA <i>10 paid weeks</i>
EPSL <i>2 paid weeks</i>	

12 Weeks Total

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Employee Leave To Care For Child With School Or Childcare Closed

	E-PSL 2 Weeks	E-PFMLA 12 weeks, 10 weeks paid
Employee Eligibility	All employees, on day 1	Employees employed at least 30 calendar days , and cannot work or telework due to need to care for child due to school or childcare closing related to COVID-19
Duration – Full Time	Up to 80 hours	12 weeks total (first 2 unpaid & concurrent, 10 paid)
Duration – Part Time	Based on hours EE would normally work in 2 weeks	Based on hours EE normally scheduled to work.
Pay Rate:	2/3 Regular Rate (Or 2/3 MW)	2/3 Regular Rate (Or 2/3 MW)
Daily Max /Total Max	\$200 / \$2,000	\$200 / \$10,000
Start date:	April 1, 2020	April 1, 2020
Reinstatement required	Yes	Yes, but companies under 25 EEs may have limited reinstatement obligations.

Exemptions from EPFMLA



- DOL may issue guidance exempting employees who are health care providers and emergency responders.
- DOL may issue guidance exempting employers under 50 employees if imposing these requirements would jeopardize the business as a going concern.

Some Questions

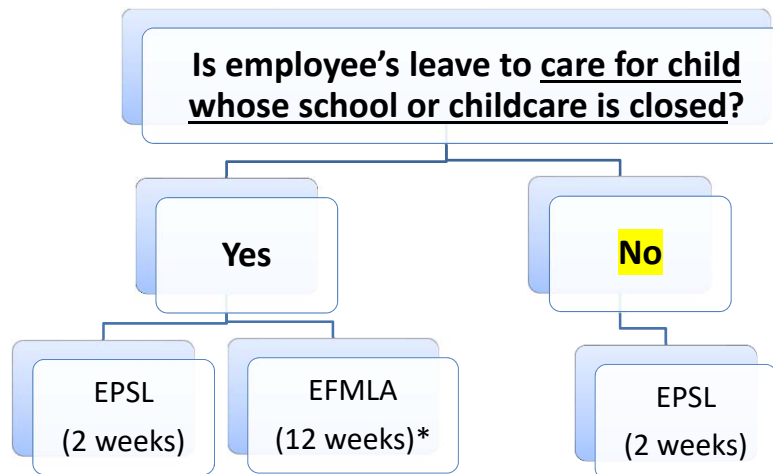


- Does EPSL replace the normal PSL we provide under CA law? **No.**
- Can an employer require an employee to use normal PSL or PTO first? **No.**
- Can an employer prohibit use of PTO when starting EPFMLA? **No.**
- If the employee's child's school is closed, but the employee can work from home, are we still required to provide the leave? **No.**
- If an employee uses EPSL and 12 weeks of EFMLA, does that employee still have 12 weeks of protected leave under regular FMLA and/or CFRA leave laws? **No.**

Some Questions



- I hired an employee three weeks ago. That employee’s child had their school closed indefinitely. What is this employee entitled to?
 - At this time, this employee is only entitled to receive the 2 weeks of EPSL, not the additional 12 weeks of EPFMLA. However, by the time the employee completes the two weeks of PSL, what has occurred? The employee has been employed 30 days and will be entitled to EPFMLA.



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Employee Leave For Medical or Quarantine Related Reason of Either Employee or Family Member

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Day 1 of Leave

EPSL
2 paid weeks

2 Weeks (80 hours) Total

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Emergency Paid Sick Leave: 6 Qualifying Reasons

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1. The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order or self-quarantine as described above.
5. The employee is caring for a son or daughter if school or child care is closed/unavailable [*already covered*].
6. The employee is experiencing “any other substantially similar condition” specified by HHS (catch all).

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Employee Leave For Medical-Related Reasons



	Employee's Own Condition or Quarantine Order (#1 – 3)	To Care For Another (#4), (#5) Catch-all "other" reasons (#6)
EE Eligibility	All employees, on day 1	All employees, on day 1
Duration – Full Time	Up to 80 hours	Up to 80 hours
Duration – Part Time	Hours employee would have over 2 weeks	Hours employee would have over 2 weeks
Pay Rate:	Full regular rate	2/3 Regular Rate (Or 2/3 MW)
Daily Max Pay:	\$511 per day	\$200
Max Amount Total:	\$5,110 total	\$2,000
Start date:	April 1, 2020	April 1, 2020
Reinstatement required	Yes	Yes

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Some Questions



- Does this replace the normal PSL we provide under CA law? **No.**
- Can an employer require an employee to use normal PSL or PTO first? **No.**
- The new law mentions "isolation." The Governor issued a "Stay-at-Home" order. Is this an "isolation" order permitting employees to take paid sick leave? **This is unclear, but conservative view is to assume it does, at least for non-essential positions.**

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Some Questions



- If an employee uses EPSL, does that employee still have 12 weeks of protected leave under regular leave laws? **Yes.**
- Can employers require doctor notes? **Probably not.**
- Are there posting requirements for EPSL? **Yes. The DOL is issued two posters. Make sure you have the current poster posted.**

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Tax Credits for EPSL and EPFMLA



Framed as “cash neutral” tax credit.

Each quarter, private employers receive a dollar-for-dollar tax credit equal to the amount of paid sick leave and paid E-PFMLA wages paid by the employer.

Families First Coronavirus Response Act



- The Families First Coronavirus Response Act (FFCRA) applies to all employers with fewer than 500 employees.
- FFCRA provides employees:
 - 1) Emergency Paid Sick Leave (up to 80 hours) for specified COVID-19 reasons, and
 - 2) Emergency-FMLA rights (up to 12 additional weeks, 10 weeks of paid time).
- Goes into effect on **April 1, 2020** and sunsets on December 31, 2020.
- Tax credits are available for amounts paid under the FFCRA

Families First Coronavirus Response Act



Emergency Paid Sick Leave – Must provide paid sick time to the extent the employee is unable to work (or telework) due to a need for leave because:

1. Subject to a federal, state or local quarantine or isolation order related to COVID-19;
2. Advised by a health care provider to self-quarantine due to COVID-19 concerns;
3. Experiencing COVID-19 symptoms and seeking medical diagnosis;
4. Caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
5. Caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency; or
6. Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Families First Coronavirus Response Act



Emergency Paid Sick Leave

- Employees are entitled to 80 hours of PSL
 - At employee's regular rate for qualifying reasons (1), (2), or (3)
 - At 2/3 the employee's regular rate for qualifying reasons (4, (5), or (6)
- This is in addition to any sick leave already provided
- Applies to employees who are expected to be working.
 - If employee is furloughed/temporarily laid off because employer does not have enough work, employee is not eligible for FFCRA paid leave
 - If employer shuts down or is closed, employee is not eligible for FFCRA paid leave
- FFCRA does not authorize employers to ask for doctor's certification amid health crisis

Families First Coronavirus Response Act



Emergency Family Leave

- Any employee who worked 30 days prior to leave is eligible.
- Provides up to 12 weeks of job-protected leave **only** when:

“employee is unable to work (or telework) due to the need for leave to care for the son or daughter under 18 years of age of such employee, **if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable**, due to a public health emergency.”

Families First Coronavirus Response Act



Emergency Family Leave

- The first 10 days (2 weeks) of EFMLA are unpaid.
- An employee may elect to substitute accrued PTO, vacation, or sick leave to cover any portion of first 10 days, but cannot be required by employer to substitute leave.
- After the first 10 days, the employer must pay the employee ***2/3 of the regular rate***.

Families First Coronavirus Response Act



Employers are entitled to tax credits and other protections in the works

- **Payroll tax credits.** Designed to immediately and fully reimburse employers, dollar-for-dollar, for the full cost of providing Coronavirus-related paid leave to their employees, including health insurance costs; and
- **Relief for small businesses.** Employers with fewer than 50 employees will be eligible for an exemption from the leave requirements relating to school closings, or child care unavailability, where the requirements would jeopardize the ability of the business to continue.

**IRS Guidance is [here](#)

Families First Coronavirus Response Act



Implementation Checklist Before April 1

- [DOL Posting](#) – Post in conspicuous place, or send electronically.
- Update Employee Policies – Standalone policy or handbook addendum needed
- Self-Certification Forms – For employees to request the leave



Furloughs vs. Layoffs - Strategy

Layoffs and Furloughs



- It is lawful to reduce the number of hours worked or days worked each workweek by employees
- Employers are reducing staff in record numbers even this week and with the new stimulus packages.
 - A **Furlough** occurs when employees are required to work fewer hours, less shifts, or even zero hours for a short period of time.
 - A **Layoff** is typically a group reduction-in-force (RIF), either temporary with an expectation to return to work, or permanent.
- As each business is different, we advise that you consult with your employment attorney (Fisher Phillips) prior to enacting any furloughs or layoffs in order to ensure compliance with the law and avoid costly lawsuits and class/PAGA actions.

Furloughs vs. Layoffs



	Furloughs	Layoffs
Employment Status	Employees technically remain employed	Complete termination of employment relationship
Final Pay	<u>Final pay due if furlough extends beyond two weeks</u>	Final pay due at termination
Benefits	Benefits may remain in place subject to fine print in plan. (Most plans extend 30 to 90 days)	Benefits terminated at termination, <u>subject to COBRA</u>
Families First Act	May be able to seek benefits under Families First Act	Not eligible for benefits under Families First Act

Layoffs and Furloughs



Considerations

- FLSA – Exempt managers could lose exempt status based on pay and/or duties
- Health Benefits – Review Plan Documents / COBRA?
- Final Wages – Longer than 2 week furlough? → termination wages owed in California (final wages, vacation, etc.)
- Federal WARN Act and CA-Warn Act– (mini WARN)



WARN Act

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California WARN Act



- Applies to “covered establishments” employing 75 or more persons (including turnover) within the last year.
- Requires 60 days advance notice of any “mass layoff” of **50 or more** employees (no exception for part-time employees) at a “covered establishment.”
- No “unforeseen business circumstances” (as there is in federal law).
- Unclear if “physical calamity” exception applies.

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California WARN Act



Governor Has *softened* – *not eliminated* – requirements of California WARN Act, provided:

- On March 17, 2020, Governor Newsom issued an Executive Order to “suspend” Cal-WARN’s requirements ***if certain notices are provided.***
- As much notice is given as is practicable.
- WARN notices are given or sent to:
 - Each affected employee
 - Any union representing the employees
 - The EDD
 - Local Workforce Investment Board
 - Chief elected official of the county and city in which the layoff occurs
 - Be very careful and consult an employer lawyer. Class Actions and PAGA Actions are already being filed!!!



More Questions



Handling Potentially Sick Employees

- Do not panic. If any employee presents with a fever or difficulty in breathing, you are permitted to request that they seek medical evaluation.
- Retrain your supervisors on the importance of not **overreacting** to situations in the workplace potentially related to COVID-19 in order to prevent panic among the workforce.
- Employees should follow social distancing guidelines as much as practicable and document.
 - Guidelines from the CDC for how to protect yourself from COVID-19, including social distancing can be found [here](#).

Handling Potentially Sick Employees



- If an employee is exhibiting symptoms you may instruct them to leave the workplace as soon as is practicable.
- If you learn of a **positive test**, you should send home all employees who worked closely with that employee for a 14-day period of time to ensure the infection does not spread.
 - Before the employee departs, ask them to identify all individuals who worked in close proximity (three to six feet) with them in the previous 14 days to ensure you have a full list of those who should be sent home.
- **When sending the employees home, do not identify by name the infected employee or you could risk a violation of confidentiality laws and a “Perp Walk” lawsuit.**

If an employee has been diagnosed:



- Obviously, remove employee from the workplace.
- Notify employees and other persons with whom the employee worked in close proximity over the last 14 days; require those employees to self-quarantine for 14 days (see enclosed forms).
- Have employee’s work area deep cleaned and disinfected.
- Notify county health department for direction regarding whether whole business must be closed.

If we learn Employee was previously exposed to COVID-19:

- Send employee home for 14 day quarantine.
- Recommend testing.
- Consider sending those home who worked closely with Employee.

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Dealing with employees who come to work sick:



- Employees who come to work sick should be sent home, especially if they have fever, cough or other flu-like symptoms.
- Do not **require** employees to seek medical attention.
- You may now take the employees' temperatures - but not record the data.
- Consider waiving requirement that employees absent for illness lasting a certain period (e.g., more than 3 days) bring a doctor's note.
- Use CA Notice form (model enclosed – but please reach out to your employment counsel) to avoid class and PAGA actions.

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Can “essential workers” refuse to come to work?



- Generally, no.
- OSHA law permits employees to refuse to work where there is an imminent threat of death or serious injury.
- While this standard might be met if health care employees were required to work without adequate protective gear, it would not justify other employees in refusing to come to work out of fear of contracting COVID-19.
- Employees over age 60 or with serious health conditions might meet this standard, particularly if they must interact with members of the public (e.g., health care or hospitality).

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Recommendations for a Remote Work Policy:



- We are pleased to provide an exemplar Remote Work Policy (enclosed).
- Employees must keep an accurate record of time worked.
- No overtime unless expressly approved in advance.
- ***Employees must take compliant meal and rest breaks.*** Class and PAGA actions are going to be filed in a tidal wave.
- If data security is important, employees should be issued company computers, VPNs and not allowed to work remotely on personal computers.
- Employees should be required to work a prescribed schedule and should not be distracted by child-or elder-care issues while working.
- Employees must create a specific work space (possibly send photos) as workers' compensation injuries can occur; injuries occurring away from that work space may not be the employer's responsibility if you document.

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Recommendations for a Remote Work Policy:



- Employees may be required to come to their usual workplace as needed (if feasible).
- Employees must follow all usual work policies and procedures in the Employee Handbook, including policy against Harassment, IT policy, etc.
- Employees unable to work remotely due to illness or family-care obligations must notify their supervisor as required for a workplace absence.
- Employees provided with employer-owned equipment must return it at the conclusion of the remote work period.
- Employees who use their personal cell phones and internet must be given a stipend for business use (we have a sample form to use and highly recommend consulting employment counsel). This is another wage and class and PAGA tidal wave. Under Labor Code section 2802 and some recent Court decisions, employer and insurance may cover.

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Can we reduce the salary of an exempt employee?



- Reductions in salary are permitted but it should be de-tethered from a specific reduction in the employee's hours, although a general reduction in workload is permissible. Be mindful of discrimination claims.
- You cannot reduce the salary below the minimum salary threshold, however (\$54,080 in California).
- You have to be consistent with a reduced workweek. You can announce a reduced workweek for a discrete period (say, until May 1) or "until further notice" but you cannot go back and forth from week to week.
- You may convert a salary employee to complete non-exempt status following notice but you cannot go back and forth between exempt and non-exempt as you will face a misclassification wage and hour class and PAGA action.

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The Coronavirus Aid, Relief, and Economic Security (CARES) Act



Small Business "Paycheck Protection Loans" (SBA)

- Includes small business (less than 500 employees) loans up to \$10 million to help with normal payroll and other costs
- For "hospitality" employers, a company (with 3,000 employees) can apply as long as they do not employ not more than 500 employees "per physical location."
- Does not include costs to provide EPSL or EFMLA paid leave

Loans will be forgiven if all criteria are followed

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The Coronavirus Aid, Relief, and Economic Security (CARES) Act



Small Business Paycheck Protection Loans (SBA)

- But... amount of forgiveness will be reduced if you lay off workers or reduce compensation more than 25% year over year.
- Reduction will be completely avoided if the employer (by June 20, 2020), rehires employees that were laid off on or after February 15, 2020

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The Coronavirus Aid, Relief, and Economic Security (CARES) Act



Employee Retention Tax Credit

- Not available if you get the “paycheck protection” loan
- Employers can get a refundable payroll tax credit for 50% of wages (for first \$10,000 of compensation) for employers whose
 - (1) operations were fully or partially suspended due to COVID-19, or
 - (2) gross receipts declined by more than 50%.

Payroll Tax “Holiday”

- Employers may defer their portion of Social Security taxes over the next two years – ½ due by 12/31/2021, and the remaining ½ due 12/31/2022.

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What the future will hold?



- Employees who are terminated/laid off will contact an attorney and file claims with the State of California and new wage and hour class actions.
- 650 Private Attorneys' General Act (PAGA) cases were filed per month pre-COVID-19. Expect a huge new wave of PAGA lawsuits.
- Wage and hour class action settlements and judgment are not covered by insurance. Some policies may have wage and hour sub-limits. Please contact **CAVIGNAC & ASSOCIATES** to discuss your insurance.
- Discrimination and wrongful termination lawsuits will explode (i.e. terminated only employees over age 65 or the "problem" employees who complained too much).
- Take care of your employees and obtain Severance Agreements with any Layoffs or terminations.
- Implement ARBITRATION AGREEMENTS now and update for 2020 if not current.
- Update your Employee Handbook for 2020 and COVID-19 (new EPL and EFMLA are being included and rolled out now).
- Plan long-term and make credible employment decisions. Rapid and undocumented decisions can result in exposure and litigation later.

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Wage and Hour and PAGA Best Practices



- Implement a written Remote Work Policy now.
- "Police" employee Meal Periods to ensure they are recorded and meal period and rest break premiums are paid.
- Under Labor Code section 2802, pay your employees for use of person items and a good stipend for use of personal cell phone, internet, printer, paper costs, etc.
- Implement Essential Business Review (document, document, document).
- Prepare a letter with counsel to give to your employees now.
- Prepare a plan to handle tickets/arrests of employees.
- Remain cognizant of your employment and wage and hour obligations.
- Communicate with Cavnac and Associates, employment counsel, CPAs and other professionals.

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COVID-19 Updates



- Fast-paced updates; new changes all the time
- Fisher Phillips has most comprehensive FAQ's out there as recognized by law.com– updated hourly and daily.
<https://www.fisherphillips.com/faqs>
- If want COVID-19 updates and e-mails from me personally, send me e-mail and I will add you to our alert list.

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UP COMING WEBINAR:

Cal/OSHA Compliance Amid the COVID-19 Pandemic

Tuesday, April 7, 2020

11:00 am

Presented by Kevin Bland of Ogletree Deakins

[Click here to register](#)

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