

California's Statewide Stay At Home Order and Other Updates

Stradling continues to monitor developments related to the COVID-19 pandemic and provide guidance to clients during these challenging times. The most important issue discussed in this Alert is the statewide "stay at home" Executive Order issued by Governor Newsom last night.

In addition, while many businesses are shut down as a consequence of the Executive Order, this Alert provides further guidance for those still operating. Covered in this Alert is an update highlighting new guidance from the EEOC on monitoring employee temperatures and additional information on the recently enacted Families First Coronavirus Response Act, including how tax credits will work.

After reading this Alert you might enjoy the following reminder on the importance of good hygiene in controlling the spread of the virus. <https://www.tiktok.com/@hamstarz/video/6801990390607121670>

Finally, we hope you find some enjoyment this weekend, even if it's only on Netflix.

California Issues State-Wide "Stay At Home" Order

Yesterday Governor Gavin Newsom issued a state-wide Executive Order directing all California residents to remain at home or at their place of residence while designating business activities needed to maintain the continuity of operations of critical infrastructure.¹ The Order will remain in effect until further notice.

General Effect on Day-to-Day Life

This Order will have a widespread effect on the day-to-day lives of most California residents. Bars, dine-in restaurants, gyms, and similar establishments will be closed, and public events will be canceled. The Order does not prohibit people from leaving their homes to take a walk or to exercise and makes clear that residents can leave their homes to obtain food,

prescriptions, health care, and pet supplies. Everyone who does leave their home is advised to practice social distancing.

Specific essential services listed to remain open include:

- Gas stations
- Pharmacies
- Grocery stores, farmers markets, food banks, convenience stores
- Take-out and delivery restaurants
- Banks
- Laundromats and laundry services
- Essential state and local government

¹ <https://covid19.ca.gov/img/N-33-20.pdf>

- Law enforcement
- Offices that provide government programs and services

Effect on Business Operations

Many employers will be required to cease operations and others will be restricted to remote work arrangements. However, the Order does not apply to critical infrastructure sectors as identified by the Department of Homeland Security. The Order provides a link to the Department of Homeland Security website, which broadly lists those critical infrastructure sectors.² The sixteen sectors listed are:

- Chemical Sector
- Commercial Facilities Sector
- Communications Sector
- Critical Manufacturing Sector
- Dams Sector
- Defense Industrial Base Sector
- Emergency Services Sector
- Energy Sector
- Financial Services Sector
- Food and Agriculture Sector
- Government Facilities Sector
- Healthcare and Public Health Sector
- Information Technology Sector
- Nuclear Reactors, Materials, and Waste Sectors
- Transportation Systems Sector
- Water and Wastewater Systems Sector

In terms of identifying whether specific business operations are subject to the exemption, the Order is not a model of clarity. The Order specifies that it is “consistent with the March 19, 2020, Memorandum

on Identification of Essential Critical Infrastructure Workers During COVID-19 Response, found at <https://covid19.ca.gov/>.”³ While that Memorandum is advisory in nature, it currently seems to be the best source for evaluating whether a specific business operation is within the scope of “critical infrastructure services and functions” whose continued operations are authorized under the Order.

At this point, we suggest that employers review the Memorandum to evaluate whether a particular service or function is likely to be subject to the exemption from the “stay at home” requirements. But keep in mind that the guidance and critical services and functions listed in the Memorandum “are not intended to be the authoritative or exhaustive list of critical infrastructure sectors and functions that should continue during the COVID-19 response.” Further clarification will come from State and local officials who “should use their own judgment in using their authorities and issuing implementation directives and guidance.” The critical infrastructure industries also must “use their own judgment” in light of the Memorandum’s guidance to determine what is necessary “to ensure continued operations of critical infrastructure services and functions.” The goal is to arrive at decisions that “appropriately balance public safety while ensuring the continued delivery of critical infrastructure services and functions.”

This is not the certainty that many crave in evaluating the situation, but it does provide a framework for decision-making. Stradling will continue to provide updated information as it becomes available, and we should all stay on top of State and local developments. The members of the Stradling team listed the end of this Alert are available to discuss any questions or concerns you might have after you review this Alert and the related materials.

The Memorandum also describes “considerations for government and business,” listing “several key principles.” Those principles include:

- “Everyone should follow guidance from the CDC, as well as State and local government officials,

² <https://www.cisa.gov/critical-infrastructure-sectors>

³ <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>

regarding strategies to limit disease spread.”

- “Workers should be encouraged to work remotely when possible and focus on core business activities. In-person, non-mandatory activities should be delayed until the resumption of normal operations.”
- “When continuous remote work is not possible, businesses should enlist strategies to reduce the likelihood of spreading the disease. This includes, but is not necessarily limited to, separating staff by off-setting shift hours or days and/or social distancing. These steps can preserve the workforce and allow operations to continue.”
- “When government and businesses engage in discussions about critical infrastructure workers, they need to consider the implications of business operations beyond the jurisdiction where the asset or facility is located. Businesses can have sizeable economic and societal impacts as well as supply chain dependencies that are geographically distributed.”
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In reviewing these considerations, keep in mind that they are strongly recommended but not mandated. But for many reasons, most importantly protecting the health of employees, those strategies should be implemented to the extent possible. For example, production employees may be anxious about working in close proximity with others. Given the circumstances, they are probably anxious about working in general. Any steps to relieve that anxiety would be beneficial, such as multiple shifts with fewer workers per shift.

Another useful source of information on the scope of the Order is published on California’s COVID-19 response website. The website states: “The California State Public Health Officer and Director of the California Department of Public Health is ordering

all individuals living in the State of California to stay home or at their place of residence, except as needed to maintain continuity of operation of the federal critical infrastructure sectors, critical government services, schools, and construction, including housing construction.”

We will continue to keep you informed as significant developments occur.

EEOC Approves Taking Employees’ Temperatures

The EEOC updated its guidance and authorized an employer’s taking of an employee’s temperature in light of the developing COVID-19 pandemic. The guidance states: “Generally, measuring an employee’s body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees’ body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.” Note that if your company is subject to the California Consumer Privacy Act (CCPA), at or prior to the time an employee’s temperature is taken they must be provide a CCPA-compliant notice disclosing the category of information collected (“Biometric Data (body temperature)”) and the purpose of collection (“reducing workplace health risks during global pandemic”).

More Information On The Families First Coronavirus Response Act (FFCRA)

The following supplements and updates the information provided in our Client Alert dated March 18, 2020.

Tax Credits Under The FFCRA

The FFCRA provides paid sick leave for employees and paid leave under the Family Medical Leave Act for employees with a minor child in the event of the closure of the child’s school or place of care. The FFCRA further provides 100% tax credits for employers who are required to pay employees for these benefits. Employers will be required to pay for

the leave up front, but may claim a tax credit for 100% of the wages paid under the FFCRA for the provided benefits in a calendar quarter. The credit also offsets, uncapped, the employer contribution for health insurance premiums for the employee for the period of leave provided under the FFCRA (both sick and FMLA leaves).

A publication from the House of Representative explains the tax credit as follows:

- Employers initially front the cost of emergency paid sick leave but will be *fully reimbursed* by the federal government within three months.
- The reimbursement will cover both the wages paid and the employer's contribution to employee health insurance premiums during the period of leave.
- Employers will be reimbursed through a refundable tax credit that counts against employers' payroll taxes, which all employers pay regardless of non-profit/for-profit status.
- Employers will submit emergency paid sick leave expenses as part of their estimated quarterly tax payments. If employer's costs more than offset their tax liability, they will get a refund from the IRS.

Posting Notice Of FFCRA Benefits

Employers will be required to post notice of the requirements under the FFCRA in a conspicuous place where notices are normally posted. The law requires that the Secretary of Labor make a model notice publically available within 7 days after the enactment of the law (by March 25th).

Prohibition On Requiring Sick Leave Notes

The FFCRA does not address whether employers can require a note from a health care provider in order to take paid sick leave provided under the Act. The California Division of Labor Standards Enforcement has indicated that requesting a doctor's note as part of granting an employee paid sick leave could be viewed as an unlawful discouragement of the right to use paid sick leave.

The conservative advice is employers should not require a doctor's note to use paid sick leave unless there is a reasonable, objective basis for suspecting that the employee is misusing the sick leave. However, if the sick leave is used because the employee has or is caring for someone who has COVID-19, is suspected of having COVID-19, or has symptoms of the disease, the employer can still require clearance from a health care provider to return to work.

The order issued by the Orange County Health Officer on March 18th includes a mandate that employers may not require a note from a healthcare provider to validate an employee's illness or return to work related to an acute respiratory illness. The rationale behind the requirement is that healthcare providers and medical facilities may be too busy to provide these notes in a timely way. This is consistent with the Interim Guidance for Business and Employers issued by the Centers for Disease Control.

Similar local orders in other counties and cities should be consulted to determine if there are similar prohibitions in place.

Deferral of I-9 Review Requirements

For new employees who will be working remotely due to COVID-19 precautions, employers will not be required to review Form I-9 documents in person. Instead, Section 2 documents still must be inspected by employers over video conference, fax or email, and copies must be obtained within 3 business days and then retained by the employer. Employers should enter "COVID-19" as the reason for the physical inspection delay in the additional information field in Section 2.

However, physical document review requirements will still apply to any new employees who are physically present at a work location. "Employers that avail themselves of this option must provide written documentation of their remote onboarding and telework policy for each employee."

This exception to I-9 document review requirements are in effect until May 19th or within three business days after the termination of the national emergency, whichever comes first.

Here is the chart illustrating the tax treatment of the benefits provided under the FFPCRA:

Employee Income		Leave Benefit (Equal to Tax Credit)		
		10 Sick Days (Self)	10 Sick Days (Caregiving)	10 Weeks of Family Leave
		100% Wages up to \$511/Day	67% Wages up to \$200/day	67% Wages up to \$200/day
\$15,080 (\$58/day)	Federal Minimum Wage	\$580	\$387	\$1,933
\$26,200 (\$101/day)	Poverty Level - Family of 4	\$1,008	\$672	\$3,359
\$48,672 (\$187/day)	Median Earnings for Full-Time Workers	\$1,872	\$1,248	\$6,240
\$77,997 (\$300/day)	Income for Max Sick Leave (Caregiving) + Family Leave	\$3,000	\$2,000	\$10,000
\$132,900 (\$511/day)	Income for Max Sick Leave (Self)	\$5,110	\$2,000	\$10,000

We are available to assist

Please do not hesitate to reach out to us for assistance in dealing with the effects of the COVID-19 pandemic on your company.

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