COVID-19

TOOLKIT FOR PHYSICIAN EMPLOYERS

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CMA COVID-19 TOOLKIT FOR PHYSICIAN EMPLOYERS

As the COVID-19 pandemic continues to have a profound economic impact nationwide, many physicians are facing important questions related to their practices and employment. Physician employers especially must be ready to address evolving circumstances related to the health and safety of their personnel. Many employers must contend with the prospect of reducing workforces, closing businesses and adjusting to new working environments in response to the statewide stay-at-home order. In recent weeks, new laws have been quickly enacted at the federal, state, county and city level that have expanded unemployment benefits, sick leave provisions, and family medical leave laws to help both employers and employees affected by this public health crisis. CMA has developed this resource to address rapidly evolving personnel and other employment-related issues.

NOTE: Substantive changes from our last update will be highlighted in orange.

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While this guide covers frequently asked questions about the laws governing physician employers, it is not a substitute for a lawyer. This guide does not constitute legal advice to any individual and the use of or reliance on the information contained in this guide does not establish an attorney-client relationship. For a legal opinion concerning your specific situation, please consult your personal attorney.

Effect of California's Stay at Home Order on Physician Employers

On March 19, 2020, Governor Newsom issued Executive Order N-33-20, directing all residents to immediately stay at home in order to protect public health, except as needed to maintain continuity of operations of essential critical infrastructure sectors and additional sectors as the State Public Health Officer may designate as critical to protect the health and well-being of all Californians. Health care workers were among the essential groups of workers identified by the State Public Health Officer as exempt from Gov. Newsom’s statewide order. The list of essential health care workers was expansive and includes, among others, physicians, nurses and assistants, pharmacists, and physical and occupational therapists and assistants. Please visit the link above for the complete list of essential workers who are exempt from Executive Order N-33-20.

On May 4, 2020, Governor Newsom issued Executive Order N-60-20, which informed local health jurisdictions and industry sectors that they may gradually reopen under new modifications and guidance provided by the State Public Health Officer. On May 8, 2020, pursuant to the Executive Order, CDPH issued guidance that allowed certain businesses to begin operating again (in addition to essential services). This means that workers can now leave home to work at any business or other entity that is allowed to open. However, workplace safety remains a concern, and employers and workers should continue to follow CDC, OSHA and Cal/OSHA safety guidelines.

Q Can an employee refuse to come to work because of fear of infection?

A Even as businesses continue to reopen, employees can generally refuse to work if they believe they are in imminent danger. Section 13(a) of the Occupational Safety and Health Act (OSHA) defines “imminent danger” to include “any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.” OSHA further clarifies “imminent danger” to exist in situations where “threat of death or serious physical harm,” or “a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency.”

Cal/OSHA also provides protection to employees who refuse to work under hazardous conditions. Generally, it is illegal for an employer to retaliate against an employee who refuses to perform hazardous duties, if performing the work would violate a Cal/OSHA health or safety regulation, and the violation would create a “real and apparent hazard.”
While neither OSHA nor Cal/OSHA have addressed the existence of “imminent danger” or hazardous duties as they pertain to health care workers’ exposure to COVID-19, OSHA has classified health care workers and support staff as having “very high” to “high” exposure risk to the disease. Thus, an employer’s failure to implement safety control measures, or abide by state and federal standards designed to protect health care workers against transmission of infectious agents (such as failure to provide appropriate PPE), may create a situation that rises to the threshold of an “imminent danger” or “real and apparent hazard.” Because the duties of most health care workers necessarily involve potential exposure to COVID-19, employers should strive to ensure that they adhere to all workplace health and safety regulations and address the concerns of individual employees.

If an employee expresses reservations about coming to work, the employer must evaluate the danger and the existence of the risk to the employee. Given that an employee may refuse to show up for work despite an employer’s opinion that the risk does not justify the employee’s refusal, care should be taken from disciplining the employee. It is possible for an employer to face a retaliation and/or wrongful termination if the employer disciplines or fires an employee who refuses to show up for fear of contracting COVID-19.

It should be noted that this guidance is general, and employers must continually review the facts and circumstances in their workplace before determining whether it is permissible for employees to refuse to work.

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**Special Considerations for Remote Workers**

To mitigate exposure to and transmission of COVID-19, many employers, including physician practices, have been able to move certain operations and employees to remote work environments. While this allows practice operations to continue, employers need to be aware of several key considerations with regard to remote employees.

**Hourly/Non-Exempt Employees**

Non-exempt (hourly) employees generally are entitled to compensation for actual time worked, whether the work is done in the office or elsewhere. Any employee who is permitted to work remotely, must be told what the expectations are with respect to work product and any supervision. A signed policy indicating the types of activities that require supervisor approval and the company’s expectation for recording any time spent on such activities is something employers should seriously consider. Employers should also consult applicable company policies, employment contracts, and collective bargaining agreements for potential contractual obligations to pay an employee during periods where the employee does not report to work.

**Exempt Employees**

Federal and state law requires that exempt employees who perform any work during a week must be paid their full weekly salary, even if they cannot work the full week because their employer failed to
make work available. However, if an exempt employee performs no work at all during a week, they may have their weekly salary reduced.

Employers cannot reduce an exempt employee’s salary for absences of less than a full day for personal reasons or for sickness. If an exempt employee works any portion of a day, there can be no deduction from salary for a partial day absence for personal or medical reasons.

**Meal Breaks and Rest Periods**

If a nonexempt employee works remotely, the employer must ensure that they must comply with state laws regarding meal breaks and rest periods. Employers should clearly communicate to their employees working remotely that normal policies regarding meal breaks and rest periods still apply.

**Reimbursement of Expenses**

All employees working remotely will need access to computers, telephones and the means to connect via the internet and cellular service. Generally, the California Labor Code §2802 requires employers to reimburse employees for “all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer.” The cases interpreting this provision make clear that employees are entitled to be reimbursed for the “actual” expenses.

An employee’s use of a personal cell phone and internet directly related to their employment falls under this provision. Similarly, the employee may use their personal computer, routers, modems, and other equipment to communicate and work remotely. Thus, employers should reimburse their employees for a reasonable percentage of their cell phone, internet service bills, and wear and tear for any equipment for work-related expenses. Because it is difficult to determine actual expenses, employers generally determine (with the agreement of the employee, if possible) to reimburse a reasonable flat rate for those expenses. Notably, California courts have said that employers may be required to reimburse employees for expenses, such as a portion of a personal cell phone bill, even if the employee was already planning to pay for those services for their personal use.

**Q** How do employers calculate "reasonable expenses" for remote workers? Do employees need authorization before incurring expenses?

**A** The California Labor Code requires employers to reimburse remote workers for reasonable expenses but does not specify how those expenses should be calculated or how the employee should be reimbursed. An employer may, for instance, pay employees a fixed amount via a stipend. However, the employer’s policy should also allow an employee to submit for reimbursement of expenses in excess of the stipend amount. The employer may then decide whether to pay additional reimbursement or decline the claim. It should be noted that the law requires the employer to reimburse for actual costs, and this right cannot be waived. Therefore, even if an employee agrees to an amount, the employee has a right to seek more if the actual amount is more than any amount agreed between the employee and employer.
Employers should endeavor to create a reimbursement policy that explains what expenses are reimbursable, and the process for obtaining reimbursement. Such policies can provide that reimbursement is subject to approval. However, California Labor Code §2802 says that an employee may not enter into any contract or waive their right to reimbursement of expenses.

Q My practice is considering continuing remote work for some of our employees. What do we need to consider?

A While many practices are in the process of resuming onsite business operations, some physician employers may wish to continue to allow certain operations and employees to work remotely. Given the rapid onset of the pandemic, some employers may have allowed remote work without a formal policy or procedure. As practices begin to reopen, employers who wish to continue to allow employees to work remotely should evaluate whether they have the proper technological infrastructure (to include sufficient privacy and security protocols), equipment, and technical support to maintain remote work capabilities. Employers should also develop an appropriate standardized remote work plan that addresses the specific needs of their practice, or review their existing policies to determine whether they should be updated to reflect current circumstances.

State and Federal Financial Supports for Employees and Employers

As a result of a variety of factors - postponement of non-essential visits and procedures, lack of personal protective equipment (PPE) and other supplies, cancellation of appointments due to patient isolation and concerns about COVID-19 transmission, and medical office staff being self-isolated/quarantined or unable to come to work because of childcare issues – many physician offices are considering reducing staff, reducing hours, or closing altogether while they navigate the COVID-19 pandemic. This section of the guide discusses the income supports available to employees who are laid off, furloughed, or whose hours are reduced as well as some of the financial supports and other programs available to employers.

Unemployment Benefits for Employees

State and federal agencies have issued guidance for employees who may be eligible for unemployment benefits due to COVID-19. This section provides an overview of the criteria for unemployment benefits as the result of a COVID-19-related job loss or reduction in hours as well as the scope of benefits available.

California's Unemployment Benefits Program

The California Employment Development Department (EDD) encourages employees to apply for Unemployment Insurance (UI) benefits if they are unemployed or had their hours reduced, which includes, but is not limited to, the following circumstances:

+ Employees who are furloughed or experience reduced work hours due to the quarantine.
+ Employees who were separated (e.g., terminated, laid off, place of employment shut down, etc.) from their employer during the quarantine.
+ Employees who are subject to a quarantine required by a medical professional or state or local health officer.
+ Employees who are now eligible for UI benefits under recent federal legislation.

Generally, under California law, employees are eligible for benefits if they have enough earnings over the past 12-18 months and meet other eligibility criteria.

Employees who wish to file for UI benefits should visit the EDD's online portal to begin the process. Given the unprecedented number of UI claims in since the onset of the pandemic, the EDD recommends that applicants file their claims online.

Pursuant to the Governor’s March 12, 2020 Executive Order, the state has removed the one-week waiting period for unemployment and disability insurance for Californians who lose work as a result of the COVID-19 outbreak. The EDD will process and issue payments within a few weeks of receiving a claim.

Under Stage 2 of the state's reopening plan, certain lower-risk workplaces can gradually reopen with adaptations. However, workers are still subject to the statewide stay-at-home order, and thus should not be required to return to work, if their employment does not belong to an essential service or a business permitted to reopen under Stage 2, until further notice by the state or local jurisdictions. A worker in this situation would not be disqualified from receiving UI benefits.

However, a worker whose workplace is reopening under Stage 2, and who refuses to return to work because of fear of contracting COVID-19 may be ineligible for further UI benefits. According to the EDD, “an individual is disqualified for UI if they refuse to accept ‘suitable’ employment when offered. Under California law, the EDD will consider whether the particular work is ‘suitable’ in light of factors such as the degree of risk involved to the individual's health and safety” and whether the individual has “good cause” for refusing the work.

The EDD has developed an extensive COVID-19 FAQ page to provide individuals with guidance on what programs are available under various circumstances.

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

Signed into law on March 27, 2020, the CARES Act provides the following expanded UI benefits to workers impacted by the COVID-19 pandemic:

+ Extends benefits to individuals who are not ordinarily eligible for regular UI benefits, including self-employed workers, independent contractors, those with limited work history and those who have exhausted their state UI compensation.
+ Extends UI benefits from 26 weeks to 39 weeks and provides for an additional $600 per week benefit to each recipient of UI benefits for up to 4 months (expires July 31, 2020).
+ Provides an additional 13 weeks of UI benefits to those who are still unemployed after their state UI benefits have been exhausted (expires on December 31, 2020). In California, this extends UI benefits.
from 26 weeks to 39 weeks for eligible workers. This benefit is generally available to those who are able and available to work and are actively seeking work.

“Covered individuals” under the CARES Act include those who provide self-certification that they are able and available to work, but are unemployed or partially unemployed because:

+ They have been diagnosed with COVID-19 or have symptoms of COVID-19 and are seeking a diagnosis;
+ A member of their household has been diagnosed with COVID-19;
+ They are providing care for a family or household member who has been diagnosed with COVID-19;
+ They have a child or member of their household for whom they have primary caregiving responsibility, who cannot attend school or another facility that is closed as a direct result of COVID-19, and the child’s or household member's attendance at such school or facility is required for them to work;
+ They cannot reach their place of employment because of a quarantine imposed as a direct result of COVID-19;
+ They cannot reach their place of employment because they have been advised by a health care provider to self-quarantine due to COVID-19;
+ They were scheduled to begin employment and do not currently have a job or they are unable to reach the job as a direct result of COVID-19;
+ They have become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19;
+ They had to quit their job as a direct result of COVID-19;
+ Their place of employment is closed as a direct result of COVID-19; or
+ They meet any additional criteria established by the Secretary of Labor for assistance.

Individuals are not eligible for UI benefits under the CARES Act if they are able to work remotely, or are already receiving other paid leave benefits, regardless if they meet any of the qualifications listed above.

Under the CARES Act, states have the opportunity to enter into an agreement with the federal government in which the state would receive funding for “short term compensation” programs, which would subsidize employees who experience reduced work hours due to COVID-19, but have not been laid off.

The EDD is responsible for administering UI benefits under the CARES Act. Claimants who have filed or are filing for UI benefits with the EDD do not need to take any additional steps to receive the extra $600 per week in federal benefits. The EDD will automatically add the full $600 to each week of current benefits that are paid every two weeks, so long as the claimant is eligible for at least $1 in regular UI payment each week. For more information, please visit the EDD’s COVID-19: Worker Resources webpage.
Pandemic Unemployment Assistance (PUA)

Workers who do not qualify for regular unemployment insurance may be eligible for benefits under the new Pandemic Unemployment Assistance (PUA) program, implemented as part of the federal CARES Act. Eligible individuals include business owners, independent contractors, self-employed workers, freelancers, and gig workers. Additionally, employees who don’t have sufficient work history to establish a regular UI claim, and individuals who have collected all UI benefits for which they were eligible and remain unemployed or partially unemployed as a direct result of a COVID-19 related reason may also be eligible.

COVID-19 related reasons for being out of work include the following:

- Individuals who are diagnosed with COVID-19 or are experiencing symptoms of COVID-19 and are seeking a medical diagnosis.
- Individuals who are unable to work because a health care provider advised them to self-quarantine due to concerns related to COVID-19.
- Individuals who have a member of their household who has been diagnosed with COVID-19.
- Individuals who are providing care for a family member or a member of their household who has been diagnosed with COVID-19.
- Individuals who have a child or other person in the household for whom they have primary caregiving responsibility, where the child is unable to attend school or another facility that is closed as a direct result of the COVID-19 and the school or facility care is required for the caregiver to work.
- Individuals who became the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19.
- Individuals who have to quit their job as a direct result of COVID-19.
- Individuals whose place of employment is closed as a direct result of COVID-19.
- Individuals who were scheduled to start a job that is now unavailable as a direct result of the COVID-19 public health emergency.
- Individuals who are unable to reach the place of employment as a direct result of the COVID-19 public health emergency.
- Those who work as an independent contractor with reportable income may also qualify for PUA benefits if they are unemployed, partially employed, or unable or unavailable to work because the COVID-19 public health emergency has severely limited their ability to continue performing their customary work activities, and has thereby forced them to stop working.

Payments will be issued in phases. Individuals who qualify for initial payments under PUA will receive:

- $167.00 per week, for each week from February 2, 2020 to March 28, 2020 that the individual was unemployed due to a COVID-19 related reason.
- $167.00 plus $600 per week, for each week from March 29, 2020 to July 25, 2020, that the individuals is unemployed due to a COVID-19 related reason.
$167.00 per week, for each week from July 26, 2020 to December 26, 2020, that an individual is unemployed due to a COVID-19 related reason, up to a total of 39 weeks (minus any weeks of regular UI and certain extended UI benefits that the individual has received).

After these initial payments, depending on prior earnings, the weekly amount of $167.00 per week may be increased. Finally, individuals receiving PUA benefits will be required to certify for benefits with the EDD every two weeks.

Importantly, individuals who are already receiving regular UI benefits do not qualify for benefits under PUA. See the EDD’s FAQs on PUA for additional information on eligibility and instructions on how to apply.

**Pandemic Emergency Unemployment Compensation**

Workers who have exhausted their regular UI benefits (26 weeks within a one-year timeframe in California) may be eligible for an additional 13 weeks of extended benefits as part of the federal CARES Act.

The Pandemic Emergency Unemployment Compensation (PEUC) program became operational on May 27, 2020, and will roll out the extension in two phases. Starting on May 27, the EDD began automatically filing PEUC extensions for those who have exhausted all available benefits with a benefit year that started on or after June 2, 2019, and expects the first phase to be completed in early June. The second phase will begin in early July, with further details forthcoming.

**Q** Are physicians eligible for unemployment benefits?

**A** Yes. Employed physicians who are facing layoffs or reduction in hours would be eligible for unemployment benefits if they meet the criteria discussed above. Additionally, under the CARES Act, self-employed individuals, including physicians, who would not normally be able to receive UI benefits are now eligible, subject to the state cap on wage replacement (in addition to the temporary $600 per week benefit under the CARES Act).

**Q** Will getting paid for telehealth or other consults impact a physician’s eligibility for unemployment benefits?

**A** Potentially, yes. Generally, individuals who are able to work remotely are not eligible for UI benefits, even under the expanded eligibility criteria under the CARES Act. However, health care workers who experience reduced work hours due to COVID-19 may be eligible for partial benefits, even if they are able to continue providing some care via telehealth. Federal and state agencies have not weighed in on this exact scenario, and it is likely that such UI benefits claims will be considered by the EDD on a case-by-case basis.

Physicians should be mindful of the telehealth flexibilities resulting from federal and state waivers that may impact the volume of their practice, and ability to provide care to patients not previously available under the telehealth modality. CMA’s COVID-19 Telehealth Toolkit for Medical Practices and COVID-19 Telehealth FAQs contain further details on telehealth services during the COVID-19 public health emergency.
Supports for Employers

To mitigate the devastating impacts of the COVID-19 pandemic on physician practices, a number of financial supports have been made available for practices from federal, state, local and private sources, including a various directed payment and loan programs. This section provides a brief overview of those state and federal programs available to physicians for the specific purpose of employee retention during the COVID-19 pandemic. For a detailed description of the programs mentioned here, as well as all of the various assistance financial assistance options available to practices, physicians should review CMA's COVID-19 Financial Toolkit for Medical Practices.

California's Unemployment Insurance Work Sharing Program

Physician employers experiencing a slowdown in their practices as a result of the COVID-19 impact on the economy may apply for the Unemployment Insurance (UI) Work Sharing Program. This program allows employers to seek an alternative to layoffs — retaining their trained employees by reducing their hours and wages that can be partially offset with UI benefits. Workers of employers who are approved to participate in the Work Sharing Program receive the percentage of their weekly UI benefit amount based on the percentage of hours and wages reduced, not to exceed 60 percent.

Employers interested in utilizing the Work Sharing Program can visit the EDD's Working Sharing Program page to learn more about its benefits for employers and employees, and how to apply.

Federal Paycheck Protection Program

Part of the Coronavirus Aid, Relief and Economic Security (CARES) Act enacted on March 27, 2020, the Paycheck Protection Program is a new forgivable loan program to help small employers pay their expenses and retain their employees during the COVID-19 pandemic. Changes to the program were made in the Paycheck Protection Program Flexibility Act of 2020, signed on June 5, 2020.

The program provides small businesses (500 or fewer employees) with funds of up to 24 weeks of payroll costs, including benefits, and can also be used to cover rent, utilities, and other specified expenses. Payments on Paycheck Protection loans are deferred for 6 months and will be forgiven if the employer maintains its workforce for the period of February 15, 2020 through December 31, 2020. If the employer reduces its workforce during the covered period relative to the same period last year, or reduces the salary or wages paid to an employee by more than 40%, the loan forgiveness will drop by the same percentage. If an employer has already laid off employees or reduced their salaries, an employer can avoid any reduction by rehiring employees or restoring their salaries. If the employer rehires all employees laid off since February 15, 2020, or increases employees’ previously reduced wages by December 31, 2020, it would potentially be eligible for full forgiveness.

For more information about the Paycheck Protection Program, visit the Small Business Administration's website.
**Employee Retention Tax Credit**

The CARES Act offers tax credits to employers that have seen their operations closed or partially closed during any quarter in 2020 because of COVID-19 or who have experienced a significant decline in gross receipts during 2020.

The credit is equal to 50 percent of qualified wages (including health plan expenses) that an eligible employer paid to an employee in a calendar quarter between March 13, 2020 and December 31, 2020. The maximum amount of wages is $10,000 per employee, so the maximum credit is $5,000 per employee. Qualifying employers with 100 employees or fewer can take a credit for all qualifying wages. Employers with more than 100 employees can also take a credit, but only for wages paid to employees who are not working because of a closure or decline in gross receipts.

For more about the Employee Retention Credit, visit the [Internal Revenue Service's website](https://www.irs.gov/).

**Delay of Payment of Employer Payroll Taxes**

Allows employers or self-employed individuals to defer payment of the employer share of the Social Security tax (6.2%) they otherwise are responsible for paying to the federal government for their employees. It allows the deferred employment tax to be paid over the next two years. Fifty percent of the deferred amount of payroll taxes are due December 31, 2021, and the remaining amount due December 31, 2022. It is important to note that employers who receive Small Business Administration 7(a) Paycheck Protection Program loans that are forgiven are not eligible to defer payroll taxes.

For more details about the deferral of employer payroll taxes, visit the [Internal Revenue Service's website](https://www.irs.gov/).

**Covered CA Deferred Employee Health Insurance Premiums for Small Business**

On April 30, 2020, Covered California for Small Business [announced a program](https://www.coveredca.com/small-business/health-care-costs/premium-deferral-program) aimed at helping hundreds of small businesses continue to provide insurance to their employees during the current COVID-19 pandemic. The program will allow employers, who provide coverage to their employees and were unable to pay their premiums for the month of April, an extra 30 days to make their payments for the months of April and May and a way to spread the costs of those premiums over the balance of the year.

The Premium Deferral Program is offered to employers who have not yet paid their premiums for April or May. The program will allow affected businesses the flexibility to pay just 25 percent of their premium payments for those two months and defer the remaining amount across the rest of the year. Covered California will continue to monitor the pandemic and determine if further actions are needed to protect small businesses seeking to keep their employees covered. Employers who would like to participate must contact the Covered California for Small Business service center at (877) 777-6782 or [CCSB@covered.ca.gov](mailto:CCSB@covered.ca.gov), within 10 business days of being notified of their eligibility.
Practices Facing Closure

Given the loss of demand for certain services and challenges many practices are facing during the COVID-19 pandemic, CMA understands that a number are considering closing for some period. The section of the toolkit discusses alternatives to practice closure, obligations to existing patients in the event of closure, and the requirement to notify employees in prior to layoffs.

Alternatives to Closing a Practice

Practices facing a reduced demand for certain medical treatments and services or challenges with office staffing as the result of the COVID-19 pandemic, may find alternatives to office closure in the resources discussed below.

TELEHEALTH. Physician employers should also consider use of telehealth and remote work as an alternative to office closure. CMA has extensive resources on telehealth and COVID-19 on its website, including a CMA’s COVID-19 Telehealth Toolkit for Physician Practices.

EDD'S RAPID RESPONSE. Employers planning a closure or major layoffs as a result of COVID-19 can get help through the EDD's Rapid Response program. Rapid Response teams will meet with employers to discuss specific needs, help avert potential layoffs, and provide immediate on-site services to assist workers facing job losses. Services can include upgrades to current workers' skills, customized training, career counseling, job search assistance, help with filing unemployment insurance claims, and information about education and training opportunities.

OTHER FINANCIAL ASSISTANCE. Both the state and federal government have developed legislation focused on economic relief for small businesses. Refer to CMA's COVID-19 Financial Toolkit for Medical Practices, for a list of funding programs that could assist physicians in maintaining financial viability.

Office Closures and Patient Abandonment

Physicians who choose to temporarily close their practices should keep in mind their ethical and legal obligation not to abandon their patients. While no specific statute defines patient abandonment, it is considered unprofessional conduct by the Medical Board. Courts interpreting the parameters of the obligation have upheld patient abandonment claims where: 1) the patient proves that a physician-patient relationship exists; 2) the patient held a reasonable expectation that care would be provided; 3) that the physician failed to carry out their obligation and; 4) that the patient was harmed as the result of the physician not providing care to the patient.

Accordingly, physicians considering closing their practice temporarily will need to notify existing patients of the closure and communicate with patients, in particular those patients who may have an immediate care need, with regard to how they can access alternative care. In general, simply directing patients to the emergency room is not recognized as sufficient coverage for patients, particularly in light of potential exposure to COVID-19. Practices will also need to inform patients of how they can access their medical records in the event the office is closed.
For additional information that about these obligations, see CMA On Call #3503, "Termination of the Physician-Patient Relationship." CMA's health law library is free to members. Nonmembers can access documents for $2 per page. For specific advice about to best communicate with and provide coverage for the patients in their particular practice, physicians should contact their professional liability carrier or personal attorney.

**Notification Requirements**

On March 17, 2020 Governor Newsom issued Executive Order N-31-20, which temporarily suspends the existing 60-day notice requirement in the California WARN Act (Cal/WARN) for employers to give written notice to employees of a mass layoff or closure of an establishment. The suspension was intended to permit employers to act quickly in order to mitigate or prevent the spread of COVID-19.

Notably, the Executive Order does not suspend Cal/WARN in its entirety, nor does it suspend Cal/WARN for all covered employers. Rather, it suspends Cal/WARN's 60-day notice requirement for those employers that satisfy the Order’s specific conditions, and now requires those employers to provide notice as soon as practicable. The Labor Commissioner's Office has provided further guidance on the conditional suspension of the Cal/WARN notice requirements on its website.

**Q** In the event I lay off staff temporarily, must I pay out vacation or other pay?

**A** Yes, the Labor Commissioner has taken the position that if anyone is laid off beyond a pay period, the employee is entitled to be paid any accrued wages as if terminated. This means that any accrued vacation must be paid, as any other wages upon the employee being laid off.

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**Emergency Paid Sick Leave and Family Medical Leave**

On March 18, 2020, the Families First Coronavirus Response Act (FFCRA) was signed into law to expand paid sick leave and family leave benefits for employees and to provide employers refundable tax credits to reimburse them for the cost of providing the expanded leave. This section outlines the sick leave and family medical leave provisions of the FFCRA, including its exemptions, employer notification requirements and tax credits available under the FFCRA for employers.

**Emergency Paid Sick Leave**

Beginning on April 1, 2020, the Emergency Paid Sick Leave provisions of the FFCRA requires covered employers (those with fewer than 500 employees) to provide employees with paid sick leave if they are unable to work or telework because the employee is:

+ Subject to an isolation order
+ Advised by a health care provider to quarantine
+ Experiencing COVID-19 symptoms (and seeking diagnosis)
+ Caring for an individual under order or advised to quarantine
+ Caring for a child under 18 whose school or childcare is unavailable due to COVID-19
Covered employers are required by the FFCRA to provide employees with 80 hours of paid sick leave. Employees who take leave because they are subject to an isolation order, have been advised to quarantine, or who are experiencing COVID-19 symptoms are eligible for their full wages (up to $511/day) while employees who are caring for another are eligible for 2/3 of their wages (up to $200/day). This leave is in addition to any pre-existing paid leave.

Note that the FFCRA allows employers to exclude healthcare providers and emergency responders from these provisions. Under the FFCRA, a “health care provider” is broad and includes anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity.

The FFCRA has been in effect since March 2020, and continues to present practical challenges regarding interpretation and implementation. On April 1, the Department of Labor posted a temporary rule that issued regulations to implement the provisions of the FFCRA. Employers may also refer to the Department of Labor's FFCRA FAQ website, which is updated regularly and contains additional information and guidance on what benefits are available under various circumstances.

**Q Can an employer require an employee who is quarantined to exhaust paid sick leave?**

**A** No. The California Labor Commissioner has indicated that an employer cannot require that a quarantined worker use state paid sick leave. California Labor Code §246 provides that the employee has the right to decide whether to use paid sick leave. However, if the employee decides to use paid sick leave, the employer may require the employee take a minimum of two hours of paid sick leave. The determination of how much paid sick leave will be used is once again up to the employee.

In the event that accrued sick leave is exhausted, other leave may be available. If the employer has a vacation or paid time off policy, an employee may choose to take such leave and be compensated provided that the terms of the vacation or paid time off policy allows for leave in this circumstance.

**Q May an employer ask an employee who calls in sick if they are experiencing symptoms of COVID-19?**

**A** Yes. The U.S. Equal Employment Opportunity Commission has indicated that during a pandemic such as COVID-19, an ADA-covered employer may ask an employee that calls in sick if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Additionally, the employer may ask if the employee has been tested for COVID-19, and the results. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

As medical practices begin to reopen, physician employers should strategically plan how to ensure workplace safety for clinicians and staff, to include screening workers for COVID-19, implementing reasonable accommodations for high-risk workers, and adopting other precautionary measures. The
EEOC has additional guidance on maintaining workplace safety in accordance with equal employment opportunity laws.

Q  Much of California in Stage 2 of Governor Newsom’s Reopening Roadmap. How does this affect whether employees have a qualifying reason to utilize Emergency Paid Sick Leave?

A  While certain shelter-in-place restrictions have been lifted under Stage 2 of Governor Newsom’s statewide reopening plan, individual counties may have kept more restrictive orders in place. Employers and employees should review both state and local guidance when determining if employees are eligible for emergency paid sick leave solely because they are subject to an isolation order. Importantly, even in counties who are safely reopening under Stage 2, employees at businesses that are allowed to reopen may still be eligible for emergency paid sick leave for other reasons (for instance, they have been advised by a health care provider to quarantine). Additionally, even if an employee returns to work, they remain eligible for FFCRA benefits until December 31, 2020 if they subsequently qualify for any of the reasons specified in the Act (see above).

It should be noted that health care workers have always been among the essential groups of workers identified by the State Public Health Officer as exempt from Gov. Newsom’s statewide order. The list of essential health care workers is expansive and includes, among others, physicians, nurses and assistants, pharmacists, and physical and occupational therapists and assistants. Please visit the link above for the complete list of essential workers who are exempt from Executive Order N-33-20.

Additionally, the FFCRA permits employers to exclude “health care providers” from its paid sick leave provisions. Under the FFCRA, a “health care provider” is broad and includes anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity.

However, essential employees who become infected, must care for a loved one, or have become exposed would satisfy the rules, and other statutes, that would grant them protection for a leave. This is because the FFCRA allows a leave for anyone under the local stay at home orders, but an employee may satisfy the other reasons under the FFCRA to permit the leave, such as being exposed or contracting COVID-19, caring for someone who has contracted COVID-19, or satisfy the other reasons.

Emergency Family and Medical Leave

In addition to expanding sick leave for certain employees, the FFCRA expands certain provisions of Family Medical Leave Act (FMLA). FMLA traditionally entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons while continuing to retain their group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Under the FMLA, an employee is able take up to twelve (12) weeks of leave in a 12-month period for:
+ The birth of a child and to care for the newborn child within one year of birth
+ The placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement
+ To care for the employee’s spouse, child, or parent who has a serious health condition
+ A serious health condition that makes the employee unable to perform the essential functions of his or her job
+ Any qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on “covered active duty”

On April 1, 2020, the FFCRA extended FMLA protections to employees for up to twelve weeks for a “qualifying need.” A “qualifying need” is limited by the FFCRA to caring for a child under 18 whose school is closed or whose “childcare provider” is unavailable due to COVID-19. This emergency provision is extended to employees who have worked for an employer for at least 30 days and applies only to employers with fewer than 500 employees. While FMLA is traditionally unpaid leave, under the FFCRA, after their first 10 days of emergency family leave, employees who take leave for a "qualifying need" are eligible for two thirds of their regular pay (up to $200/day).

Note that the FFCRA allows employers to exclude healthcare providers and emergency responders from these provisions. Under the FFCRA, a “health care provider” is broad and includes anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity.

On April 1, 2020, the Department of Labor posted a temporary rule that issued regulations to implement the provisions of the FFCRA. Employers may also refer to the Department of Labor’s FFCRA FAQ website, which is updated regularly and contains additional information and guidance on the availability of extended FMLA protections under various circumstances.

Q Can an employer ask for proof of the employee having dependents whose school has closed or medical certification for an employee needing to care of an ill family member related to COVID-19?
A Yes. An employer may require an employee to provide documentation of their need to take emergency family and medical leave. The U.S. Department of Labor’s website has additional guidance as to the extent of the inquiry.

Q Can employee apply for both Emergency Family and Medical Leave under the FFCRA and Unemployment Benefits?
A An employee is not eligible to collect unemployment benefits while being covered under an approved FMLA leave because the employee is still employed, he or she is just not working any hours with their employer. To receive unemployment benefits, an individual generally has to be
"able and available" to work. An employee on FMLA is still employed and not available for other work. Additionally, the FFCRA's expanded family leave benefit will now be paid after the first 10 days.

**Q** If I had to lay off an employee due to COVID-19 and have subsequently rehired that employee, do they need to work for 30 days before becoming eligible for extended FMLA benefits?

**A** Not necessarily. If the employee was laid off on or after March 1, 2020, and rehired or otherwise reemployed by the employer on or before December 31, 2020, they will be entitled to emergency FMLA benefits under the FFCRA so long as they were on the employer’s payroll for 30 or more of the 60 calendar days prior to being laid off.

**Notice Requirements**

The FFCRA requires that each employer must post a notice of the FFCRA leave requirements in a conspicuous place on the employer’s premises. An employer may satisfy this requirement by emailing or direct mailing the notice to employees or posting the notice on an employee information internal or external website. Given the current stay-at-home orders, employers may wish to email the notice to all employees who are working remotely. The Department of Labor has posted a [model notice](#) on its website.

There is no specific guidance that provides for an exception to the posting requirement, for those employers who are exempted; however, [Department of Labor guidance](#) indicates that only "covered" employers must provide notice.

**Tax Credits**

The FFCRA provides employers with a refundable tax credit to reimburse them for the cost of providing the paid sick and family leave wages required by the Act. For purposes of claiming the tax credit, the cost of proving leave includes the cost of providing group health insurance and any Medicare taxes attributable to the employee’s wages in addition to an employee's wages. Eligible employers are entitled to quarterly refundable tax credits, allowed against the employers’ portion of Social Security taxes. If the cost of leave exceeds the employer’s entire federal employment tax bill, the employer can request an advance refund. For more information about the FFCRA tax credit, visit the [Internal Revenue Service's website](#).

**Q** Can an employer get both the FFCRA tax credit and the Employee Retention Credit under the CARES Act?

**A** Yes, if an employer meets the requirements for the retention credit, it may receive both credits, but not for the same wages. The amount of qualified wages for which an employer may claim the Employee Retention Credit does not include the amount of qualified sick and family leave wages for which the employer received tax credits under the FFCRA.
COVID-19 in the Workplace

The proliferation of COVID-19 cases and the reopening of medical practices that may have temporarily closed has raised a number of questions for physician practices with regard to how to deal with employees who are either at risk for contracting or who have contracted COVID-19. This section of the guide addresses a few of the most frequently asked questions from CMA's physician members.

Q As physicians begin to reopen their practices, what issues should physician employers consider prior to resuming operations?

A There are many factors that physicians should consider when reopening their practices, particularly with respect to employment issues. Physicians should first review state and local governmental guidance on the rules related to reopening, and what precautionary measures should be in place before resuming operations. Physician employers, in consultation with their professional liability carrier or practice attorney, should also develop and institute plans for workplace and patient safety, to include office space and workflow measures to ensure social distancing, the wearing of universal face coverings, and quarantine policies.

In addition to considerations regarding employee safety, practices will need to consider patient safety as they reopen. CMA has developed numerous resources on reopening health care that contain additional considerations and workplace policy recommendations for physician employers, including "CMA Best Practices for Reopening."

Q Can an employer ask staff to leave the office to self-quarantine if the employer suspects them to be sick?

A Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The Americans with Disabilities Act does not prohibit employers from asking staff to leave the workplace to self-quarantine when based on the CDC’s guidance.

Q How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?

A The U.S. Equal Employment Opportunity Commission has indicated that during a pandemic such as COVID-19, employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. An employer may also ask an employee who has exhibited symptoms of COVID-19 whether that employee has been tested for the disease, and the results of the test. Employers must maintain all information about employee illness as a confidential medical record in compliance with the Americans with Disabilities Act.

Q Can an employer inquire whether or not an employee has travelled to areas that might be considered high-risk areas for exposure to COVID-19?

A Yes. The U.S. Equal Employment Opportunity Commission has stated that when an employee returns from travel during a pandemic an employer is not obligated to wait for symptoms to
develop before asking questions about potential exposures. As a result, an employer is permitted to inquire whether employees traveled to known locations that might have resulted in exposure, even if the travel was personal.

Q **Should practices disclose to the local health authority the identities of employees who have tested positive for COVID-19?**

A Physician employers should disclose the identities of staff they know who have tested positive for COVID-19 to the local health authority. California Health & Safety Code §120250 broadly requires physicians to report the name and location of a person with any infectious, contagious, or communicable disease to the local health authority, along with the nature of the disease. COVID-19 is listed as a reportable disease under the highest risk category under applicable state law, and therefore must be reported immediately by telephone in each instance.

Q **Should practices disclose to patients and other employees the identities of employees who have tested positive for COVID-19?**

A Physicians should not disclose the identities of any staff known to have tested positive for COVID-19 to the general public. The CMIA and HIPAA contain explicit exceptions for disclosures required by law, including for the purposes of containing communicable diseases. However, no California or federal law requires or permits a disclosure of an individual’s health information to the public at large.

The CDC has advised that if an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (e.g., not disclosing the name of the infected employee(s) to coworkers).

Q **What if I find out that one of my employees has been exposed to COVID-19? Can the employee continue to work?**

A The Centers for Disease Control and Prevention has issued guidance concerning best practices for those employers whose operations are part of critical infrastructure, including the healthcare sector, in the event an employee may have had exposure to a person with COVID-19. The guidance suggests that workers who have been exposed but remain asymptomatic adhere to the following before and during their shifts:

+ Employers should take the employee’s temperature and assess symptoms prior to them starting work. Temperature checks should happen before the individual enters the facility.
+ As long as the employee doesn’t have a temperature or symptoms, they can self-monitor under the supervision of their employer’s occupational health program.
+ The employee should wear a face mask at all times while in the workplace for 14 days after last exposure. Employers can issue facemasks or can approve employees’ supplied cloth face coverings in the event of shortages.
+ The employee should maintain 6 feet and practice social distancing as work duties permit in the workplace.
+ Clean and disinfect all areas such as offices, bathrooms, common areas, and shared electronic equipment routinely.

+ Should the employee become sick during the day, they should be sent home immediately and their workspace should be cleaned and disinfected.

Given their close contact with patients, CDC has issued additional guidance specific to healthcare professionals who have been exposed to COVID-19. That guidance provides that, consistent with state and local guidance and circumstances:

+ Symptomatic healthcare professionals suspected to have or confirmed to have COVID-19 should be excluded from work until either:
  - 3 days have passed since recovery and 10 days have passed since the first symptoms appeared; or
  - Fever has resolved without medications, respiratory symptoms have improved, and the employee has had 2 negative tests at least 24 hours apart.

+ Asymptomatic healthcare professionals who are confirmed to have COVID-10 should be excluded from work until:
  - 10 days have passed since the first positive test; or
  - The employee has had 2 negative tests at least 24 hours apart.

While the CDC guidelines provide general guidance, physician practices with specific concerns about an employee who has been exposed or the evaluation of their risk mitigation plan should speak with their professional liability carrier or attorney.

**Q** Can I require my employees to take a COVID-19 antibody or serology test to determine whether they have had COVID-19?

**A** No. Recent EEOC Guidance makes clear that an antibody test constitutes a medical examination under the Americans with Disabilities Act. Because the CDC’s interim guidelines indicate that antibody test results should not be used to make determinations of whether an employee can return to work, the EEOC has stated that an antibody test is therefore not job related and consistent with business necessity. Accordingly, such a test would not meet the ADA’s requirements for medical examinations or inquiries for employees. The EEOC has, however, indicated that temperature checks and other screening measures are permissible.

**Q** Are employees who are exposed to COVID-19 eligible for Workers’ Comp benefits?

**A** Yes. The California Department of Labor has indicated that an employee may be eligible for Workers’ Compensation if they are unable to do their usual job because they were exposed to and contracted COVID-19 during the regular course of their work. Workers’ Compensation law would allow an employee access to medical treatment as well as wage replacement.

**A** On May 6, 2020, Governor Newsom issued Executive Order N-62-20 to clarify the availability of workers’ compensation benefits for COVID-19 related illness. The Order also created a rebuttable
presumption that the illness arose in the course of the employment for purposes of awarding workers’ compensation benefits. The presumption will remain in effect through July 5, 2020. For the presumption to apply, all of the following conditions must be present:

+ The employee tested positive for or was diagnosed with COVID-19 within 14 days after a day that the employee performed labor or services at the employee’s place of employment at the employers direction;

+ The day of employment was on or after March 19, 2020;

+ The employee’s place of employment was not the employee’s home or residence; and

+ The diagnosis of COVID-19 was done by a physician who holds a physician and surgeon license issued by the California Medical Board and that diagnosis is confirmed by further testing within 30 days of the date of the diagnosis.

For more information about COVID-19 and Workers’ Compensation, visit the California Division of Workers Compensation.

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**Additional Resources for Employers**

+ CMA COVID-19 Resource Center: [CMAdocs.org/covid-19](http://CMAdocs.org/covid-19)
+ California Department of Industrial Relations: [dir.ca.gov/dlse/2019-Novel-Coronavirus.htm](http://dir.ca.gov/dlse/2019-Novel-Coronavirus.htm)
+ California Employment Development Division: [edd.ca.gov/about_edd/coronavirus-2019.htm](http://edd.ca.gov/about_edd/coronavirus-2019.htm)
+ California Coronavirus Response: [covid19.ca.gov](http://covid19.ca.gov)
+ United States Department of Labor: [dol.gov/agencies/whd/pandemic](http://dol.gov/agencies/whd/pandemic)