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# COVID-19: Employment Update

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CORONAVIRUS  
[COVID-19]  
VACCINE RESEARCH 0034 - 234

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# Agenda

- COVID-2019 Overview
- Government Guidance & Resources
- Methods of Income Replacement
- Wage/Hour Issues
- WARN
- Q & A

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## COVID-19 Overview



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# COVID-19 – Current Understanding\*

- Pandemic declared by WHO on March 11.
- Severe in 15-20% of cases (co-morbidity triggering pneumonia).
- Cases confirmed in every state.
- Updated U.S. case numbers from the CDC:
  - 164 cases and 11 deaths one week ago.
  - 4226 cases and 75 deaths as of 3/17/20.
  - **7038 cases and 97 deaths as of 3/18/20.**
- No vaccine anticipated for 3-12 months.
- Supply chain disruption is impacting healthcare and treatment.
  - Insufficient number of respirators.

\*CDC Website (March 18, 2020); UBS: Coronavirus Update, Dr. Michael Osterholm (March 6, 2020).

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# Current Mitigation Efforts\*

- “Flatten the curve.”
- White House and CDC: Until March 31, cancel events and avoid social gatherings of 10+ people; work from home “wherever possible” except critical infrastructure.
- CDC: Community mitigation plans for Santa Clara, CA, Seattle, WA, New Rochelle, NY, Florida, and Massachusetts.
- Shelter-in-place orders in 7 counties in CA, including San Francisco, San Mateo, Alameda and Santa Clara. Except for critical or essential infrastructure and businesses.
- School closures: Over 1 billion worldwide.
- Travel restrictions: e.g., Europe, China.
- Social distancing: At least 6 feet.

\*CDC Website (March 18, 2020).

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# Government Guidance and Resources





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# CDC (Health & Human Services)

<https://www.cdc.gov/coronavirus/2019-ncov/index.html>

- Interim Guidance for Businesses and Employers
- Environmental Cleaning and Disinfection Recommendations

<https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html>

- Interim U.S. Guidance for Risk Assessment and Public Health Management of Persons with Potential Coronavirus Disease 2019 (COVID-19) Exposures: Geographic Risk and Contacts of Laboratory-confirmed Cases

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# CDC: Interim Guidance for Businesses and Employers

- CDC provides guidelines based on an assessment of risk.
- Separate sick employees (send them home).
- CDC has not mandated telework. But White House guidance and local orders are more restrictive.
- Social distancing.
- Emphasize respiratory etiquette and hand hygiene by all employees.
- Perform routine environmental cleaning.
- Additional Measures:
  - If there is a confirmed COVID-19 case, employers should inform employees of their possible exposure but maintain confidentiality as required by the ADA.
  - Employees exposed to a co-worker with confirmed COVID-19 should conduct a risk assessment per CDC.
  - Employees who are well but who have a family member with COVID-19 should notify their supervisor and conduct a risk assessment per CDC.



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# New EEOC Guidance

On March 18, 2020, EEOC issued guidance specific to COVID-19 and indicated that its prior guidance entitled “Pandemic Preparedness in the Workplace and the Americans With Disabilities Act” remains relevant.

[https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm)

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## EEOC: Pandemic Preparedness in the Workplace and the ADA

- ADA

- Prohibits disability-related inquiries or medical examinations unless:

- Employer has a reasonable belief, based on objective evidence, that:

- 1) an employee's ability to perform essential job functions will be impaired; or

- 2) an employee will pose a "direct threat" due to the condition.

- A "direct threat" is a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."

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## EEOC: Pandemic Preparedness in the Workplace and the ADA (Cont'd)

### Direct Threat:

- “If the CDC or state or local public health authorities determine that the illness is like seasonal influenza or the 2009 spring/summer H1N1 influenza, it would not pose a direct threat or justify disability-related inquiries and medical examinations. By contrast, ***if the CDC or state or local health authorities determine that pandemic influenza is significantly more severe, it could pose a direct threat. The assessment by the CDC or public health authorities would provide the objective evidence needed for a disability-related inquiry or medical examination.***”
- “During a pandemic, ***employers should rely on the latest CDC and state or local public health assessments.*** . . . [E]mployers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.”

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# EEOC: ADA, the Rehabilitation Act, and COVID-19

- “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?”
  - “During a pandemic, **ADA-covered 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. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.”
- **When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?**
  - “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.”

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## EEOC: ADA, the Rehabilitation Act, and COVID-19 (Cont'd)

- **“Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?”**
  - **“Yes.** The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.”

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## EEOC: ADA, the Rehabilitation Act, and COVID-19 (Cont'd)

- **“When employees return to work, does the ADA allow employers to require doctors’ notes certifying their fitness for duty?”**
  - **“Yes.** Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.”

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# OSHA Requirements

The Occupational Safety and Health Act (“OSH Act”) requires employers to provide ***“employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm.”***

- Employers have an obligation to keep employees safe; failure to do so may result in OSHA liability.
- Individual states: 28 states have federally-approved “state plans” that are at least as stringent as federal requirements.
- Employers should assess potential hazards and implement controls to prevent exposure, in light of federal, state, and local agency guidance.
  - Engineering and administrative controls
  - Safe work practices
  - PPE



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# OSHA Guidance (Federal) (3/10/20)

- March 10, 2020: “Guidance on Preparing Workplaces for COVID-19”  
<https://www.osha.gov/Publications/OSHA3990.pdf>
  - Includes recommendations regarding:
    - Infectious Disease Preparedness and Response Plans;
    - Basic infection prevention methods; and
    - Workplace controls.
  - Establishes “Occupational Risk Pyramid” to help employers understand worker risk and determine appropriate precautions:
    - Very High (e.g., healthcare workers performing certain aerosol-generating procedures);
    - High (e.g., healthcare generally, medical transport);
    - Medium (e.g., job requires frequent/close contact with those who may be infected, including the general public in areas with widespread community transmission); or
    - Lower (e.g., minimal occupational contact with coworkers/public).
  - Suggested controls are to be based on occupational risk.

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# OSHA Guidance (State)

## **State regulatory schemes may also be implicated.**

- For example, in California, CalOSHA has clarified that COVID-19 is subject to the Aerosol Transmissible Disease (“ATD”) standard.
  - Applicable only to certain types of work, e.g., healthcare, laboratories.
- CalOSHA recommends that other types of work follow CDC guidelines but notes certain general industry standards may apply.
  - Injury & Illness Prevention Plan
  - PPE
  - Sanitation

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# OSHA Enforcement & Recordkeeping

## Enforcement Risk

- Enforcement risk is low if following OSHA, state and local agency, and CDC guidance.
- Many employers are taking more protective steps (e.g., everybody telecommutes) than what CDC/OSHA currently requires.

## Recordkeeping

- COVID-19 is a “recordable” illness *if infection occurs at the workplace.*
  - Must be a “confirmed” case of COVID-19.
  - Workplace infection may be difficult to prove.
  - If not obvious, employer must “evaluate the employee’s work duties and environment to decide whether or not one or more events or exposures in the work environment either caused or contributed...” to the illness. 29 CFR 1904.5(b)(3).

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# Reporting, Notice, and Privacy Issues

## **Disclosure of Employees Who Test Positive or are High/Medium Risk:**

- To local and state health department;
  - Reporting requirements
  - Compliance with orders
- To other employees potentially exposed; and
- To customers/clients/others.

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# Methods of Income Replacement



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# Families First Coronavirus Response Act (H.R. 6201)

## Emergency Paid Sick Leave

- Applies to private employers with fewer than 500 employees.
  - Full-time employees: 80 hours
  - Part-time employees: the number of hours that they work, on average, over a two-week period.
- Protected absences:
  1. Employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
  2. Employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
  3. To obtain a medical diagnosis if the employee has symptoms of COVID-19;
  4. Employee is caring for an individual who is subject to an order described in subparagraph 1 or 2 above;
  5. To care for the employee's child if the child's school or place of care has been closed, or the child care provider of the child is unavailable, provided that all deductions made on written orders of the employee may be aggregated and shown as one item to do so, due to COVID-19 precautions; or
  6. Employee is 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.
- Sick time for the first three reasons identified above is at the employee's regular rate of pay, based on the number of hours the employee otherwise would be scheduled to work, capped at \$511 per day and \$5,110 total. Sick time used for reasons 4, 5, and 6 above, however, is at two-thirds of the employee's regular rate of pay, capped at \$200 per day and \$2,000 total.

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# Families First Coronavirus Response Act (H.R. 6201) (Cont'd)

- **Emergency Family and Medical Leave Expansion:**

- Applies to employers with fewer than 500 employees.
- Up to 12 weeks of leave (first 10 days unpaid, then 2/3 of regular rate of pay for the number of hours the employee would typically work during the leave period – up to \$200/day, or \$10,000 total).
- Covered leave available to those with a “qualifying need related to a public health emergency” (includes employees who are “unable to work (or telework)” because of the need to care for the employees’ child (under 18) if the child’s school or daycare has been closed, or the child’s care provider is unavailable to do so due to a public health emergency).

- **Emergency Unemployment Insurance:**

- \$1B emergency UI relief to eligible states (\$500M for costs associated with increased administration of each state’s UI program; \$500M held in reserve to assist states with a 10% increase in UI claims).



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# Other Methods of Income Replacement

## **Paid Leave Banks**

- Vacation and PTO
- State and local paid sick leave
- Can you force employees to use paid vacation or sick leave?
  - In most states, yes, but check local law.
    - Federal DOL FAQs: “[A] private employer may direct exempt staff to take vacation or debit their [sick] leave bank account in the case of an office closure . . . .” <https://www.dol.gov/agencies/whd/flsa/pandemic>.
    - CA Labor Commissioner FAQs: “The employer cannot require that the worker use paid sick leave; that is the worker’s choice.” <https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm>.
  - However, as a practical matter, most employees will elect to use Vacation or PTO so they receive pay.

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# Other Methods of Income Replacement (Cont'd)

## State Disability, Unemployment, and Paid Family Leave Benefits

- CA Employment Development Department Benefits for Coronavirus.
  - Self-Care: Short-term disability benefits available (60-70% up to \$1,300/week).
  - Family Care: Paid Family Leave benefits available (60-70% up to \$1,300/week).
  - Unemployment Insurance available for reduced hours/close of operations due to COVID-19.
- NY
  - Self-Care: Short-term disability benefits available (50% up to \$170 per week).
  - Family Care: Paid Family Leave benefits available (60% up to \$840 per week).
- IL Unemployment Benefits for Coronavirus.
  - Unemployment benefits may be available if unemployment is attributable to COVID-19 (up to \$471/week (individuals), up to \$645/week (w/ dependents)).
- DC
  - Self-Care: Short-term disability benefits (2/3 of pay up to \$1,154/week).
  - Paid Family Leave (starting July 1, 2020).

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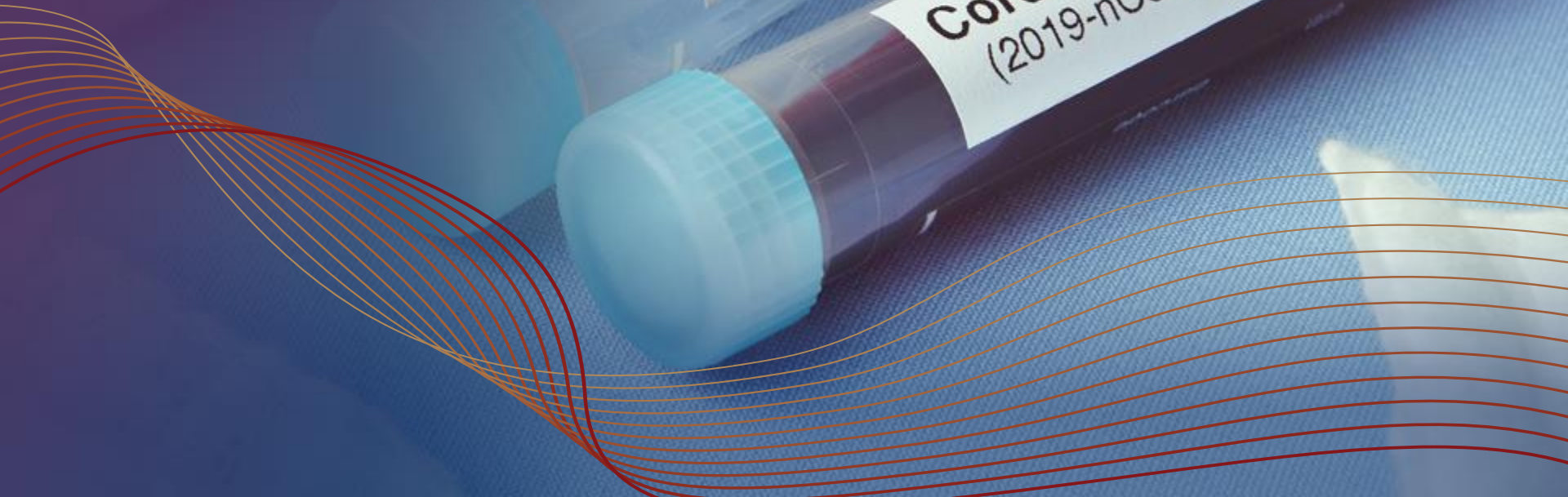
# Work Share Programs

- State-sponsored work share programs (also called short-term compensation programs) may allow companies to temporarily reduce the hours of their employees as an alternative to layoffs.
- Participating employees receive the percentage of their weekly Unemployment Insurance (“UI”) benefit amount that equals the percentage of the reduction in normal hours and wages for that week due to work sharing.
  - For example, an employee whose hours are cut by 10 percent would qualify for 10 percent of the state’s established weekly UI amount.
- Potential employer benefits: (1) reduce payroll obligation, (2) retain a skilled workforce, (3) minimize/eliminate need for layoffs, (4) avoid the expense of recruiting, hiring, and training, and (5) immediately meet fluctuating business needs.
- Employee benefits: (1) job retention, (2) can still work for employer, (3) not required to seek work, and (4) partial UI compensation.
- Approximately two dozen states, as of June 2019, have work share programs (e.g., CA, MA, NJ, NY, TX).

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## Wage / Hour Issues



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# Deductions

## Deductions from Exempt Employee Salaries

- What if an exempt employee has no vacation or sick leave to use, and works a portion of the week?
- If exempt employee is directed to stay home:
  - Exempt employees do not need to be paid for any complete “workweek” in which they perform no work. See 29 CFR 541.602(a)(1).
  - “[A]n employee will not be considered paid ‘on a salary basis’ if deductions . . . are made for absences occasioned by the office closure during a week in which the employee performs any work.” <https://www.dol.gov/agencies/whd/flsa/pandemic>.
- If exempt employee is ill, and has exhausted his/her PTO or paid sick leave balance, or requests time off:
  - Can make deductions from salary for full day absences, but not partial day absences.

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# Other Wage/Hour Issues

## Reduction to Exempt Employee Salaries

- Across-the-board salary reduction:
  - Prospective only. Check state laws regarding advance notice.
- Reduction in pay and hours to avoid layoffs:
  - In a series of opinion letters, the federal DOL has advised that temporary reductions to exempt employees' salaries and hours do not violate the salary basis test when done during severe economic conditions to avoid layoffs. See 1970 WL 26462 (Nov. 13, 1970); 1997 WL 998010 (Mar. 4, 1997); 1998 WL 852696 (Feb. 23, 1998).
  - CA: The DLSE has advised the same rule applies under California law. See DLSE Opn. Ltr. (Aug 19, 2009), available at <https://www.dir.ca.gov/dlse/opinions/2009-08-19.pdf>.

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## Other Wage/Hour Issues (Cont'd)

### Expense Reimbursement for Remote Work:

- If employees are required to work remotely, the employer may have an obligation to reimburse for home internet or other expenses associated with remote work.
- Some states, including CA and IL, require employers to reimburse for reasonable and necessary business expenses.
- Federal law: “Employers may not require employees who are covered by the FLSA to pay or reimburse the employer for [additional costs that employees incur if they work from home] . . . if doing so reduces the employee’s earnings below the required minimum wage or overtime compensation.” <https://www.dol.gov/agencies/whd/flsa/pandemic>.



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**WARN**

The background features a dark blue-to-purple gradient. Scattered throughout are numerous spherical virus-like particles, some in sharp focus and others blurred. In the bottom left corner, there is a series of overlapping, wavy lines in shades of orange and red, creating a sense of motion or a signal.

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# Warn Act Overview

- Federal and state WARN Acts generally require 60 days' advance notice of plant closings, mass layoffs, and similar events, counting employment losses toward the thresholds.
  - Almost half of the states have mini-WARN Acts or statutes requiring some form of notice.
  - California's triggering events are terminations, mass layoffs, and relocations.
  - New York requires 90 days' advance notice.
- The Federal WARN Act applies to employers with 100 or more full-time employees or 100 or more employees who work at least 4,000 hours per week.
  - Some states, like California, look only to the employment numbers at the affected location.
  - Some states, like New York, have lesser thresholds.

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## Warn Act Overview (Cont'd)

- Employment loss is:
  - An employment termination, other than discharge for cause, voluntary departure or retirement,
  - A layoff exceeding 6 consecutive months, or
  - A reduction in hours of more than 50% during each month of any 6-month period.
- A plant closing is at least 50 employment losses for full-time employees at a single site of employment as a result of a permanent or temporary shutdown of the single site of employment or one or more facilities or operating units within the single site.
  - California and New York rules
- A mass layoff is employment losses for full-time employees of at least 33% totaling at least 50 at a single site of employment.
  - California and New York rules

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## Warn Act Overview (Cont'd)

- Employment losses generally are aggregated over a 90-day period, unless the employment losses are for separate and distinct reasons or there is a WARN Act event, in which case employment losses in a 30-day rolling period are aggregated with the WARN Act event.
  - California rule
- Damages generally are 60 days' (less proper notice) of back pay and benefits.
  - California and New York rules
- Possible alternatives to employment losses.

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# Special Rules

- Government mandated closures.
- Unforeseeable business circumstances.
- Natural disasters.
- Actively seeking business or capital.

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# Unforeseeable Business Circumstances

- Fewer than 60 days' advance notice may be given due to unforeseeable business circumstances:
  - Caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. An unanticipated and dramatic major economic downturn might be considered a business circumstance that is not reasonably foreseeable.
  - A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.
  - The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately predict general economic conditions that also may affect demand for its products or services.
- Must still give as much notice as is practicable and explain the reason for the shortened notice.
- Not all states have similar rules:
  - California's new rule (Executive Order N-31-20).

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# Natural Disaster Rule

- Notice requirement is shortened for employment losses that are the direct result of natural disasters:
  - Floods, earthquakes, droughts, storms, tidal waves or tsunamis, and similar effects of nature.
  - Natural disasters that indirectly cause employment losses are insufficient, although the unforeseeable business circumstances rule may apply.
- Still required to provide as much notice as is practicable, either before or after the fact, and need to include as much of the otherwise required information as is available.

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# Actively Seeking Business or Capital

- Applies to plant closings, not mass layoffs.
- Can provide shortened notice if:
  - Employer was actively seeking business or capital at the time of notice, otherwise it would have been required.
  - Obtaining the business or capital would have permitted the employer to avoid or postpone the plant closing.
  - Employer reasonably believed that giving the WARN act notice would have prevented it from obtaining the needed capital or business.
- Exception applied on a company-wide basis.
- Must be a causal connection between failure to obtain business or capital and the shutdown.
- Still must give as much notice as is practicable and explain the reasons for the shortened notice.



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Questions?



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# Summary of Key Resources

## Federal:

- CDC:  
<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>  
<https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html>
- EEOC:  
[https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm)
- OSHA:  
<https://www.osha.gov/SLTC/covid-19/>  
<https://www.osha.gov/Publications/OSHA3990.pdf>
- DOL:  
<https://www.dol.gov/coronavirus>

## State:

- CA Labor Commissioner: <https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm>
- CA EDD: [https://edd.ca.gov/about\\_edd/coronavirus-2019.htm](https://edd.ca.gov/about_edd/coronavirus-2019.htm)
- NY Attorney General: <https://ag.ny.gov/coronavirus#ep>
- NY Dept. of Health: <https://health.ny.gov/diseases/communicable/coronavirus/>

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# For Additional Guidance

**GOVERNMENT GUIDANCE AND SARS-CoV-2 INFORMATION  
ARE RAPIDLY EVOLVING**

**VISIT PH COVID-19 PAGE: [PAULHASTINGS.COM/CORONAVIRUS](https://paulhastings.com/coronavirus)**

**CONTACT YOUR PH LAWYER**

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