



Welcome to the third issue of [Murphy Austin's Employment Law News](#).

After a roller coaster ride as Cal/OSHA issued, revised, and re-issued varying proposed new COVID-19 regulations, in June, California employers received a final (for now) regulation. The regulation was revised to provide rules for a workplace where many employees are now fully vaccinated against COVID-19. We'll review the highlights of what's changed, and what hasn't, below.

In addition, as always, we will share some legal updates in employment law, along with a refresher on an important topic that some employers still misunderstand: when are employees entitled to overtime pay?

We hope you find the information in this newsletter helpful as we all continue to navigate through the COVID-19 pandemic and beyond.

Sincerely,

Shawn M. Joost, Of Counsel
Murphy Austin Labor and Employment Law Team

COVID-19 – NEW LAWS AND GUIDANCE

COVID-19 Regulations – What just happened?

By Shawn M. Joost, Of Counsel

No, employers may not go back “to normal” in the workplace yet. But the June [Cal/OSHA Revised Emergency Temporary Standards](#) include several changes that allow for relaxation of prior requirements. The new regulation also includes some new employer responsibilities.

Note that different regulations may apply to certain employers, such as those subject to the Aerosol Transmissible Diseases Standards or in certain health care situations.



Some highlights of the revised standard:

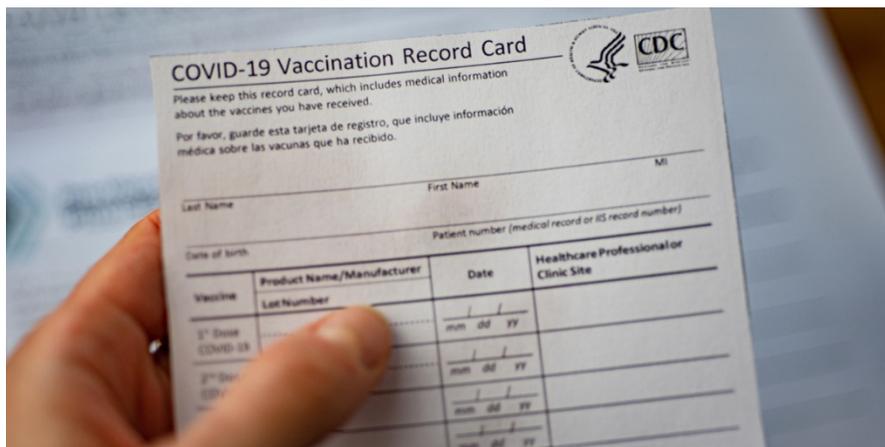
Masks

- Fully-vaccinated employees need not wear masks, indoors or outdoors, except during an outbreak or other narrowly defined circumstances. BUT – before fully-vaccinated employees shed their masks, employers must document that they are fully vaccinated (meaning two weeks have passed since they completed their shots).
- Employees who are not fully vaccinated must wear masks indoors, with limited exceptions such as being in a room alone or eating/drinking. In addition, employers must provide respirator masks for unvaccinated employees if they request them. Employees who are not fully vaccinated do not need to wear masks outdoors, except during an outbreak or other narrowly defined circumstances.
- Employers may not prevent employees from wearing a mask voluntarily and may not retaliate against employees who choose to do so.

Vaccine Status Documentation

Employers will need to document the status of employees if they want to take advantage of allowing fully-vaccinated employees to forgo masks or to avoid workplace exclusions after exposures. You can do this in several ways.

- Keeping copies of employees' vaccine cards (in a separate confidential health record file)
- Asking to see employees' vaccine cards and keeping a list of names without keeping copies of the cards
- Asking the employees to “self-attest” as to their status, and documenting those self-attestations



An employee who refuses to provide documentation should be treated as unvaccinated.

Workplace Exclusion and Testing

- Fully-vaccinated employees *without symptoms* need not be tested or excluded from the workplace after “close contact” with a COVID-19 case.
- Testing is required during working time and at no cost to:
 - Unvaccinated employees
 - after an exposure to a COVID-19 case
 - in an outbreak
 - when the employee has symptoms
 - Vaccinated employees who develop symptoms after an exposure to a COVID-19 case

Physical Distancing

Physical distancing is no longer required except during an outbreak (as defined) or an employer is required to assess the workplace for hazards. You can still require physical distancing if you wish.

Training

Your training requirements are expanded to include training your employees:

- On the fact that the COVID-19 vaccines are effective at preventing COVID-19 and protecting against transmission;
- On the fact that respirator masks protect the wearer while regular masks primarily protect people around the wearer;
- The conditions under which face masks must be worn at work; and
- The availability of respirator masks.

Prevention Program

Also, **you must update your written COVID-19 Prevention Program** to reflect the new rules. Cal/OSHA provided an [updated COVID-19 Model Prevention Program](#) to assist employers.

Outbreaks

In the event of an outbreak (3 or more COVID-19 cases) or a major outbreak (20 or more) at a worksite, stricter masking and social distancing rules, as well as other requirements, go into effect.

For more detail, visit [Cal/OSHA's FAQ](#) on the revisions.

Finally and Importantly: The Cal/OSHA regulation has changed. But other laws relating to COVID-19 remain in effect. So, you still must comply with paid sick leave for COVID-19-related issues; and notice requirements to employees, your workers' compensation carrier, and public health authorities in the event of a COVID-19 case at a worksite. To fulfill these obligations, you must continue to track which employees are where on a given workday and maintain those records.

FREQUENTLY MISUNDERSTOOD ISSUES IN EMPLOYMENT LAW

When do I have to pay my employees overtime?

By Shawn M. Joost, Of Counsel

California overtime laws contain several traps for the unwary, and we've seen some recent claims because of employers' misconceptions. In this article, we review some important points about calculating overtime, and what can happen if you make a mistake.



In general, California employees are entitled to one and one-half times (1.5) their regular rate of pay for:

- Hours more than 40 hours in a workweek;
- Hours more than 8 hours and not more than 12 hours in a workday (even if the employee works less than 40 hours in the workweek); and
- The first 8 hours on the seventh consecutive day of work in one workweek.

And, California employees are entitled to two times their regular rate of pay for:

- Hours more than 12 hours in a workday; and
- Hours more than 8 hours on the seventh consecutive workday in a workweek.

Agricultural employers are still in the process of “phasing in” to the above rules. For example, agricultural employers with 25 or more employees do not pay overtime until after 8.5 hours of work in a workday or 45 hours in a workweek. For detail on overtime for agricultural employees, you should review Industrial Welfare Commission Wage Order 14.

Other exceptions to the general rules include certain truck drivers, employers who have properly adopted an alternative workweek schedule, and employers with collective bargaining agreements that meet certain requirements.

All hours worked, including travel time hours, are counted in determining when employees have worked enough hours to qualify for overtime.

Unpaid overtime can turn into a big liability, especially if an employee separates from employment and does not receive all wages due in a timely fashion. At that point, the “waiting time penalty” begins to accrue at the rate of a day’s wages per day until the unpaid wages are paid, to a maximum of thirty days.

To take an example from a client’s recent unfortunate incident:

The employer thought that overtime was owed if an employee worked *both* more than eight hours in a day and more than forty hours in the workweek. An employee who worked only four days in total worked one nine-hour day and three eight-hour days and then resigned. The employee was paid straight time for all hours worked, but no overtime for the ninth hour on the nine-hour day because he had not worked 40 hours in the workweek. A few months later, the employer received a demand for the \$15.00 of unpaid overtime, plus the waiting time penalty of \$7,200.00 (\$30/hours x 8 hours/day x 30 days), plus interest and attorneys’ fees.

So, take a few minutes to ensure that your payroll practices comply with overtime laws. It could save you money in the long run.

NEW DEVELOPMENTS IN EMPLOYMENT LAW

Recent Appellate Court Decision Gives Employers Options on Determining the “Regular Rate of Pay.”

By Shawn M. Joost, Of Counsel

Determining an employee’s “regular rate of pay” is critical for paying the proper amount of overtime. For employees who are paid the same hourly rate at all times and nothing else, determining the “regular rate” is easy. But for dual rate employees, it’s a little trickier.



A recent case provides guidance and some options to California employers. In *Levanoff v. Dragas* (2021) 2021 WL 2621360, the court was asked to determine if the “weighted average” method for determining the “regular rate” was required by California law, or if employers could use the “rate in effect” method.

The “weighted average” method pays dual rate employees overtime based on a “regular rate” calculated by adding all hours worked in one pay period and dividing that number into the employee’s total compensation for the pay period. The “rate in effect” method pays dual rate employees overtime at the hourly rate in effect at the time the overtime hours began.

The employees in *Levanoff* received a higher hourly rate during hours they were working in a management trainee program, which was generally at the end of their shifts. Hence, the employees were paid overtime based on the higher hourly rate in effect when the overtime hours began.

Although the Department of Labor Standards Enforcement (DLSE) Manual endorses the “weighted average” method, the DLSE Manual does not have the force of law. The *Levanoff* court found that the employer’s use of the “rate in effect” method of determining the “regular rate” complied with California law because the policy was both neutral on its face and in practice. Importantly, the undisputed evidence demonstrated that the policy was beneficial to the total employee group over time, meaning that the employees – as a whole – were paid more in overtime pay under the “rate in effect” method than they would have been paid under the “weighted average” method, even though some individual employees were paid less.

Employers with dual rate employees now have the option to consider whether the “rate in effect” method, which makes the calculation of overtime much easier, would be beneficial. Individual factors in the creation and implementation of such a policy would need to be assessed to determine if the particular situation would be considered neutral for its employees and compliant with the law.

EQUAL EMPLOYMENT OPPORTUNITY

Sexual Orientation and Gender Identity (SOGI) Discrimination

By Shawn M. Joost, Of Counsel

Last year, the U.S. Supreme Court ruled that discrimination based on sexual orientation or gender identity was a violation of federal law prohibiting discrimination and harassment on the basis of sex. Of course, these were already express protected categories under California's Fair Employment and Housing Act.



The federal Equal Employment Opportunity Commission recently issued [a fact sheet](#) and [FAQs](#) on such sex discrimination, and [a fact sheet on facilities and bathroom access](#) with tools and guidance for employers on these topics. You may find these resources helpful.



Created and curated by Shawn Joost, [Murphy Austin's Employment Law News](#) is a quarterly update focused on the top changes affecting California employers.



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