# What happens to workers, workers' rights, and their advocates in a pandemic?

## A look at both old and new laws that will help us protect workers' rights in the age of COVID-19

By Bryan Schwartz and Jinny Kim

Maybe we never expected to be helping clients from our living room recliners, between organizing videoconferences for our kindergartners and answering questions on mobile technology and "what's for dinner?" from our middle and high schoolers. But, few of us expected a lot of things that are happening now. Though our work lives have been impacted, many of our clients' lives have been upended far more dramatically. Their challenges keep us fighting, even as new hurdles are placed in our paths.

In this article, we discuss the contours of Pandemic World for plaintiffs' employment lawyers – how our practices have been affected by COVID-19, and then how our clients' rights are developing.

### Practicing in unpracticed ways

In practicing law, the wise know the precedents – knowing what happened years ago helps us decide what to do now, on this case. Yet, suddenly how we practice law is new for many of us. This must have been what the old guard felt like when Westlaw, Lexis, and other types of online legal research became available and bookcases of yellow books with yellowing pages became more ornamental than fundamental to our law practices. We have to look forward, rather than looking back – the remote practice of law might become an additional arrow in our quiver, rather than an inconvenience. Could we hire more lawyers and support staff, with less office space and travel costs in the future? For now, everything is Zoom and Hangouts and GoToMeeting and we feel like we are all getting to know each


others' living rooms and pets and kids and sweatshirt collections.

Beyond the obvious differences – that we are all communicating remotely with our colleagues using a host of new technologies – our law practices have been affected by court closures, stalled discovery, defendants becoming insolvent, changes in how we conduct depositions and mediations, frozen hiring of new lawyers and law clerks, and in myriad other ways. The question is how to keep up the pressure on defendants and their counsel – plaintiffs' attorneys' number one job – when so many of our usual weapons are holstered.

## Keep pressing

Some defendants have had operations overwhelmed by COVID-19 – health care providers, for example – and one can readily sympathize with a need for a time out. Other defendants, however, seem cynically to be commandeering the coronavirus "opportunity" to delay what previously they could not stall. Your blessed motion to compel hearing date would finally be arriving, after 20 meet-and-confers, an informal discovery dispute process, several flimsy supplemental productions by defendant trying to derail your motion, hundreds of pages of briefing and separate statements and attachments and exhibits. And now? Off-calendar, with no court date in sight. Defendant rides hard the newest excuse in the playbook – that the virus is inhibiting its ability to do what it was already avoiding for many months before the virus. What can we do?

Never stop. Call and email every day, cell and office numbers and addresses, maybe twice a day. Keep the guns blazing, secure in the knowledge that all over, plaintiffs' attorneys are hearing the same thing. While being empathetic to legitimate health and safety concerns, we call foul on this like we do with other nefarious employer practices. If the court is accepting filings (even if it is not processing them speedily), then keep filing. Meanwhile, keep taking new cases – as we discuss below, there are as many (or more) violations now than in pre-Pandemic World.

## The good news – cases are settling

Unlike many of our clients whose employers are shuttered and who are laid off indefinitely, we attorneys can do this work remotely with the new technologies. Top mediators are reporting great success rates at Zoom mediations. Said one, "I have settled every one I've done in the past three weeks, many by 3:00 p.m. or 4:00 p.m. Ironically, it seems like people are more invested in getting serious earlier and getting it done as soon as possible; maybe because they have childcare issues at home, smell dinner cooking in the background, want to get to their Covidtini – whatever it is, it seems to be working."

The lesson: keep scheduling mediations, especially with mediators you know and trust. While it may be harder to develop trust relationships with unknown quantities, you can still get cases settled with your go-to mediators.

Court reporting services have pivoted to remote depositions. Keep scheduling them – especially for witnesses who are not the core wrongdoers. There seems to be no downside to defending plaintiffs and our witnesses remotely (apart from the inability to kick your client under the table). Some defendants will not agree to remote depositions – perhaps soon the courts will require parties to comply with remote depositions, like the courts have recently forced employers' hands with electronic service (https://newsroom.courts.ca.gov/news/judicial-council-mandates-electronic-service-of-documents-in-most-civil-cases).

## The bad news – employers in financial trouble

A typical message some plaintiffs' lawyers are receiving is this recent one: "I have not been able to discuss this with my client. Moreover, one key issue is that I am unsure about the continued viability of an offer including reinstatement given the [employer's] developing financial condition. I will follow up as soon as I have some more information." Another defendant said, "who knows where the employer will be in three months with COVID - they could be out of business." While many of us are accustomed to poverty pleas from defendants even in the best of times, now unquestionably these are a common feature of our landscape.

Though many businesses are currently avoiding bankruptcy with the government's massive cash infusion into the economy, soon, we will start to see a wave of failing businesses. Line up your bankruptcy lawyers now because they will be busy later in the year! Many businesses will fail and not have bankruptcy filings, trying to come out on the other side of this pandemic, but many others will try to pull through. Even now, bankruptcy courts are conducting hearings, remotely.

Generally, confusion abounds about which courts are accepting which types of filings, and details on courts' different Pandemic World approaches are beyond the scope of this article. (In any event, such information would be outdated by the time you read this!) Check each court's website for this week's latest updates. Plaintiffs' attorneys should continue to seek tolling agreements, though certainly with courts closed, it is likely that many exhaustion deadlines are continued. The smart play is – as usual – exhaust and file as early as you can, wherever you can, rather than letting the clock run.

We are all being forced to make some hard decisions. With trial dates far in the distance, and many businesses in treacherous financial waters, the smart play in many cases may be to get the sure money for your client today where you can, instead of holding out for the best-day outcome. Many of our clients need the money, now.

The bad news is far worse for our clients who are out of work and whose rights have been violated, than it is for us. Following are some of the protections and claims we are discussing with them every day.


## Sick leave

With the closing of offices, schools and childcare centers around the country, many workers are suddenly juggling work and family obligations – in the home – while focusing on staying healthy and safe. The COVID-19 crisis highlights and supplements the complex and confusing patchwork of programs and laws that protect workers' jobs and income when they cannot work because they are sick, caring for family members who are sick or caring for children whose schools and childcare centers are now closed.

Existing California law can be used by sick workers, workers who need preventative care relating to COVID-19 or are caring for sick family members, including when public authorities recommend quarantine or self-isolation. California law requires that all workers have access to at least three paid sick days each year. Local laws provide more paid sick days including for those workers in Berkeley, Emeryville, Los Angeles, Oakland, San Diego, San Francisco and Santa Monica.

Qualified California workers also have access to an existing State Disability Insurance and Paid Family Leave program that allows workers who are unable to work because of their own disability or because they are caring for a family member who has a serious health condition to receive wage replacement benefits. This program is entirely employee funded and provides wage replacement benefits at 60 or 70 percent of a worker's normal pay.

Many employees can access twelve weeks of job-protected unpaid leave under the Family Medical Leave Act (FMLA)/California Family Rights Act (CFRA) for an employee's serious health condition, such as COVID-19, or to care for a family member with a serious health condition. To qualify for coverage, an employee must work for an employer with at least 50 employees within 75 miles of their worksite; have worked there for at least one year; and have worked for a minimum of 1,250 hours in the year prior to taking time off. Because of these stringent requirements, 40% of workers – primarily low-wage earners – are not covered. For employees who do not meet the requirements of the FMLA/CFRA and have a qualifying disability or medical condition, a leave of absence may be a reasonable accommodation under the Americans with Disabilities Act (ADA) or California's Fair Employment and Housing Act (FEHA).

## Families First Coronavirus Response Act

Through the end of the year, employees who work for employers with fewer than 500 employees, are entitled to two weeks (up to 80 hours) of paid sick days paid directly by their employer but reimbursed by the Federal government through the Families First Coronavirus Response Act (FFCRA). These paid sick days are available to current (not furloughed or laid off) employees who have been told to self-isolate, quarantine, or are seeking medical attention because of COVID-19-related symptoms or to employees who are caring for a family member based on these same reasons. Employees can also use these paid sick days if they cannot work due to caring for a child whose school or place of care has closed down. Employees who use paid sick days to care for themselves will receive full pay of up to $511 per day. Employees who use paid sick days to care for a family member or a child whose school or childcare is unavailable will receive 2/3 of their pay of up to $200 per day.

FFCRA also narrowly expands the FMLA by providing up to an additional 10 weeks of paid leave only for employees who need to take care of children who cannot go to school or daycare. This narrow expansion of the FMLA does not cover employees who actually have COVID-19 or to care for family members who have COVID-19.

## Exemptions from FFCRA

Employers with fewer than 50 employees can seek an exemption from the paid sick days provision of the FFCRA if it "would jeopardize the viability of the business as a going concern." Health care workers (which is very broadly defined) and first responders may also be exempt from both the paid sick days and the expanded FMLA provisions of the FFCRA. The Department of Labor itself estimates that 9 million health care workers, 4.4 million first responders and 96% of firms are exempt from coverage. (https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act#p-187)

Enforcement of the FFCRA will depend on what part of the FFCRA you want to challenge. An employer violating the FFCRA's paid sick leave requirements is considered to have failed to pay the minimum wage under the Fair Labor Standards Act. An employer who violates the FFCRA's expanded FMLA provision can be sued under the FMLA itself for failure to provide leave, failure to reinstate, discrimination, or retaliation. However, employees may have no private right of action for the FFCRA's expanded FMLA provision if the employer was not already subject to the FMLA (e.g., employers with fewer than 50 employees).

While the FFCRA will provide a crucial lifeline for those who qualify, a huge percentage of the workforce will not benefit from the legislation. Therefore, states and municipalities are filling in the gaps. To date, Emeryville, Los Angeles, San Francisco and San Jose have passed their own ordinances to offset the shortcomings of the FFCRA by mandating paid sick time for employees of large corporations (500+ employees). In addition, Governor Newsom recently issued an executive order which provides two weeks of paid time off for isolation, quarantine and other medical directives to California workers in the food industry, including farm and agricultural workers, grocery and fast food workers, and delivery workers.

## Layoffs, furloughs and the WARN Act

Due to the coronavirus pandemic, millions of workers across the country are getting laid off, furloughed, or outright terminated.


While most workers in California are considered at-will, some workers have contracts with their employer which set forth termination procedures requiring notice and severance. Employers who fail to fulfill their contractual obligations could face a breach of contract action which would make them liable for lost wages, future wages, and general or special damages.

Employers must pay terminated employees with their final paycheck, accrued vacation pay and required unemployment and COBRA documentation. The failure to do so can subject an employer to waiting-time penalties (under Labor Code section 203), civil and criminal penalties, and attorneys' fees.

On March 17, 2020, Governor Newsom issued Executive Order N-31-20 which temporarily suspends the 60-day advance notice required under the California Worker Adjustment and Retraining Notification (WARN) Act for a layoff, relocation or termination of 50+ employees, in a 30-day period at a business that employs 75 or more employees. The temporary suspension must be for COVID-19-related "business circumstances that was not reasonably foreseeable at the time that notice would have been required." Notice is still required but only "as much notice as practicable." Employers can owe 60 days of backpay and benefits for the period of violation as well as attorneys' fees for failure to provide adequate notice. Employers are also on the hook to the state for civil penalties in the amount of $500 per day of delay, as well as attorneys' fees.

Certainly, for any mass layoff, plaintiffs' attorneys should determine if disparate impact claims can be brought on behalf of a protected class such as older workers or workers with disabilities.

A furlough is different from a layoff – an employer-initiated unpaid leave of absence. Furloughed employees must be paid for all work performed and should not be working (including checking email or voicemail) during the furlough. According to an opinion letter by the Department of Labor Standards Enforcement (the California agency charged with enforcing wage and hour law), a furlough without a definite return to work date within the shorter of 10 days or the employee's normal pay period may be a termination requiring the payment of final wages. A furlough exceeding a de minimis amount of time could trigger WARN Act obligations. (See *Int'l Brotherhood of Boilermakers, et al. v. NASSCO Holdings, Inc.* (2017) 17 Cal.App.5th 1105.)

## Unemployment insurance – up to $1,050 a week

According to Department of Labor data, nearly 17 million, or one in ten, American workers applied for unemployment insurance between March 15 and April 4. (https://www.dol.gov/ui/data.pdf) This does not include workers affected by the coronavirus pandemic but who may not be eligible for regular unemployment insurance, such as independent contractors and those forced to quit because of lack of childcare.

In California, under the existing unemployment insurance (UI) benefits program, qualified employees can receive between $40 and $450 per week depending on their work history and how much they are able to still earn. To qualify for UI, employees must: be out of work or underemployed through no fault of their own; have enough past wages; and be able, available, and willing to work.

On March 27, Congress passed the $250 billion Coronavirus Aid, Relief and Economic Security (CARES) Act which created three new programs: (1) Pandemic Unemployment Assistance (PUA) which provides up to 39 weeks of emergency unemployment assistance to workers who do not qualify for regular state unemployment insurance – including self-employed workers, independent contractors, and freelancers – or who have exhausted their state UI benefits; (2) Pandemic Unemployment Compensation (PUC) which provides all regular UI and PUA claimants with an additional $600 payment per week through July 2020; and (3) Pandemic Emergency Unemployment Compensation (PEUC) which provides an additional 13 weeks of state UI benefits until December 31, 2020, unless it is otherwise extended.

As expected, California and other states are scrambling to set up the infrastructure to administer the federal program. The Employment Development Department will accept online applications for PUA beginning April 28. (https://edd.ca.gov/about_edd/coronavirus-2019/pandemic-unemployment-assistance.htm).

## Health and safety

As most Americans shelter in place, front-line workers are still providing critical care and support, risking their own health and safety and that of their loved ones. These essential workers include health care employees, grocery and pharmacy employees and employees of shipping companies. Many workers needlessly lost their lives. In order to stop tragedies from endlessly repeating, employers must take appropriate measures to provide employees with safe and healthy work environments.

Thousands of employees have filed workplace safety complaints against their employers related to coronavirus, due to lack of Personal Protective Equipment (PPE) (e.g., gloves, masks and cleaning supplies), failure to follow social distancing requirements, and being forced to work alongside sick co-workers. The CDC's reversal of guidance for essential workers, allowing asymptomatic workers to continue working, will only expose others to coronavirus and escalate safety violations. (https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html)

Workers fear not only contagion, but retaliation for raising their concerns with their employers. Employees are being terminated for raising well-founded


health and safety concerns to their employers. An employee terminated for exercising their OSHA rights has strong claims for wrongful termination in violation of public policy and Labor Code sections 1102.5 and 6310, in addition to the Labor Code Private Attorneys General Act (PAGA).

## COVID-19 and Workers' Comp

When a worker contracts COVID-19 on the job, they may be eligible for workers' compensation benefits, including temporary disability payments and medical treatment. Illness due to the common cold or flu is not considered work related for purposes of workers' compensation benefits, but diseases such as tuberculosis, Hepatitis A, and COVID-19 are considered work related. Employees may bring claims for negligence where a company fails to take reasonable measures to prevent the spread of COVID-19, and possibly a public nuisance claim. In a memo to its members dated April 13, the Chamber of Commerce stated that "exposure liability" is "the largest area of concern for the overall business community." (https://www.uschamber.com/coronavirus/implementing-national-return-to-work-plan#liability) The Chamber argues that lawsuits may send businesses and industries into bankruptcy, lobbying for blanket protections against coronavirus-related claims and procedural reforms. (*Ibid.*)

Instead, we should have legislation providing real protections to critical workers who remain on the job. Until that happens, workers will continue to work without access to PPE, get fired for asserting their rights, and will ultimately put their health, safety, and many lives at risk.

## Disability

Employees who work for employers following the guidelines of the Centers for Disease Control (CDC) and local public health authorities are still entitled to worker protections under the ADA and FEHA, including reasonable accommodations, non-discrimination based on disability, and prohibitions against medical examinations and inquiries.

Both the Equal Employment Opportunity Commission (EEOC) and the Department of Fair Employment and Housing (DFEH) have issued coronavirus guidance: "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" (https://www.eeoc.gov/facts/pandemic_flu.html) and the "DFEH Employment Information on COVID-19." (https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ_ENG.pdf) The EEOC has also published technical assistance questions and answers entitled, "What You Should Know about COVID-19 and the ADA, Rehabilitation Act, and other EEO laws." (https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm) The EEOC and DFEH have not yet found COVID-19 to be a disability requiring reasonable accommodations.

Both the EEOC and DFEH guidance make clear that medical testing such as temperature checks and asking employees directly about symptoms and diagnoses are allowed. Employers may report diagnosed coronavirus cases to public health officials, while ensuring that medical privacy is maintained. While some employers have previously been resistant to granting telework as a reasonable accommodation, asserting that physical presence is an "essential job function," many employers will be hard-pressed in the future to argue that telework as a reasonable accommodation is an "undue burden," since so many of us are now doing it routinely.

## Discrimination claims

The COVID-19 pandemic has reportedly resulted in violent attacks, harassment, and discrimination against Asian-Americans and other people of Asian descent in workplaces across California, and litigation is commencing concerning these actionable claims. An employer cannot exclude certain subsets of workers based upon protected classifications, due to a concern about COVID-19 transmissions. An employer can be liable for any failure to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct. Discrimination based on association (including marriage or co-habitation) with someone based on race or national origin is also unlawful. (See DFEH FAQ at 2.)

Workplace discrimination based on marital status is actionable under the FEHA. As one example, an unmarried worker's request for scheduling accommodations due to childcare was denied while her married counterpart was granted a similar scheduling request.

As plaintiffs' attorneys, we should also prepare for disparate treatment litigation around other protected categories including marital status, pregnancy, and age. The CDC has identified older people and pregnant workers as vulnerable populations more likely to experience severe symptoms, but employers still cannot discriminate (including terminate, furlough or withdraw a job offer) simply because a worker is pregnant or older.

## Conclusion

We are all alternating between anxiety, helplessness, boredom, incredulity, and occasionally, hope. How long will Californians be sheltering in place? Are we flattening the curve of the pandemic? Will our favorite establishments still be around a few months from now? And, perhaps most importantly for our clients – how many of us will be out of work in the coming months? Our job as workers' rights advocates is to keep up to date with rapidly changing government agency guidelines and Judicial Council updates that affect our clients. They are counting on us to jump every new hurdle as we keep prosecuting their claims.



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