

DFEH Employment Information on COVID-19



FAQ

A pandemic of respiratory illness caused by a new coronavirus (COVID-19) currently exists in California and beyond. Governor Newsom declared a state of emergency in California on March 4, 2020.

Workers and employers should adhere to the latest government guidance on how to reduce transmission of COVID-19 in the workplace, including guidance from the [Centers for Disease Control and Prevention](#) (CDC), the [California Department of Public Health](#), and the [California Division of Occupational Safety and Health](#) (Cal/OSHA).

At the same time, employers must adhere to state and federal civil rights laws, including the Fair Employment and Housing Act (FEHA). For employers with 5 or more employees, the FEHA prohibits [employment discrimination and harassment](#) on the basis of race, national origin, disability, age (over 40), and other characteristics. The FEHA also requires employers to reasonably accommodate employees with a disability, unless an employer shows undue hardship after engaging in the interactive process.

DFEH is providing this guidance to assist employers and employees with frequently asked questions about how to keep workplaces safe during the COVID-19 pandemic while also upholding civil rights. This guidance is based on current public health information and may be updated from time to time, and replaces previous guidance issued on March 20, 2020. This guidance is for informational purposes only and does not create any rights or obligations separate from those imposed by the FEHA and other laws.

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GENERAL INFORMATION

■ Are civil rights laws in effect during a pandemic?

Yes. The FEHA prohibits employers from discriminating against or harassing employees because of race, color, ancestry, national origin, religion, age (over 40), disability (mental and physical), sex, gender (including pregnancy), sexual orientation, gender identity, gender expression, genetic information, marital status, military or veteran status, and other characteristics. National origin includes geographic places of origin, ethnic groups, and tribal affiliations.

For example, it is unlawful for an employer to refuse to hire, segregate, or send employees home because of their actual or perceived race or national origin, or because of their association (including marriage or co-habitation) with someone based on race or national origin. Employers must take reasonable steps to prevent and promptly correct discriminatory and harassing conduct in the workplace.

■ Does the FEHA prohibit employment discrimination and harassment because of someone's "medical condition"?

Yes, but the FEHA defines "medical condition" to mean "any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer" or "genetic characteristics." "Genetic characteristics" is [further defined](#) by FEHA.

COVID-19 INQUIRIES AND PROTECTIVE EQUIPMENT

■ May an employer ask all employees entering the workplace if they have COVID-19 symptoms?

Yes. Employers may ask employees if they are experiencing COVID-19 symptoms, such as fever, chills, coughing, or a sore throat. Employers must keep confidential any employee health information obtained, including keeping employee medical files separate from the employee's personnel file. See FAQ below for further information about what an employer may disclose if an employee tests positive for COVID-19 or is quarantining because of possible infection.

■ May an employer take all employees' temperatures before allowing them to enter the workplace?

Yes. Generally, measuring an employee's body temperature is a medical examination that may only be performed under limited circumstances. Based on public health guidance, employers may measure employees' body temperature for the limited purpose of evaluating the risk that employee's presence poses to others in the workplace as a result of the COVID-19 pandemic.

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■ **May an employer require employees to submit to a medical test to detect the presence of the COVID-19 virus or antibodies to the virus before permitting employees to enter the workplace?**

Under the FEHA, an employer may mandate a medical examination when it is “job-related and consistent with business necessity.” Applying this standard in light of present guidance from the CDC, and consistent with [guidance](#) from the Equal Employment Opportunity Commission, employers may require employees to submit to [viral testing](#) but not [antibody testing](#) before permitting employees to enter the workplace, as explained below.

Viral Testing. Employers may require that employees submit to viral testing in order to determine whether an employee has COVID-19 infection, before allowing an employee to enter the workplace. That is because an employee with COVID-19 is unable to perform the employee’s essential duties in a manner that would not endanger the health or safety of others in the workplace even with reasonable accommodation there. Employers should ensure that the testing used is accurate and reliable, and that any viral testing is part of a [comprehensive plan](#) for reducing transmission of COVID-19 in the workplace. Employers should be aware that viral tests can have false-negative results and that a negative viral test does not mean that an employee will not acquire COVID-19 in the future.

Antibody Testing. The CDC’s current [guidance](#) states that “[antibody] test results should not be used to make decisions about returning persons to the workplace.” Whereas viral testing directly tests for the presence of COVID-19, antibody testing indirectly detects past or waning COVID-19 infection by testing for immune response. Antibody testing is less accurate and reliable than viral testing for detecting COVID-19 infection. In light of the CDC’s current guidance, antibody testing does not currently meet the FEHA’s requirement that a medical examination be “job-related and consistent with business necessity.”

■ **May an employer ask employees why they have been absent from work if the employer suspects it is for a medical reason?**

Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is entitled to ask why an employee has not reported for work. If an employee discloses an illness or medically-related reason for absence, employers must maintain that information as a confidential medical record.

■ **May an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of COVID-19?**

Yes. An employer may require employees to wear personal protective equipment during the COVID-19 pandemic. However, where an employee with a disability needs a related reasonable accommodation (e.g., non-latex gloves or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

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EMPLOYEES WITH COVID-19 SYMPTOMS OR INFECTION

■ **How much information may an employer request from employees who report feeling ill at work?**

Employers may ask employees if they are experiencing COVID-19 symptoms, such as fever, chills, coughing, or a sore throat. That is because, consistent with guidance from the EEOC, an employee with COVID-19 is unable to perform the employee's essential duties in a manner that would not endanger the health or safety of others in the workplace even with reasonable accommodation there. Employers must keep confidential any employee health information obtained, including keeping employee medical files separate from the employee's personnel file. See FAQ below for further information about what an employer may disclose if an employee tests positive for COVID-19 or is quarantining because of possible infection.

■ **May an employer send employees home if they display COVID-19 symptoms?**

Yes. The CDC states that employees who become ill with symptoms of COVID-19 at work should leave the workplace. Employers may send employees who exhibit COVID-19 symptoms home for the reasons stated in the previous FAQ. Employers must provide paid sick leave and compensate the employee under paid sick leave laws. If sick leave is exhausted, employees may be entitled to other paid leave (including vacation or paid time off), or job-protected unpaid leave.

■ **May an employer send employees home if they test positive for COVID-19?**

Yes. According to the CDC, "[p]ositive test results using a viral test indicate that the employee has COVID-19 and should not come to work and should isolate at home. Decisions to discontinue home isolation for workers with COVID-19 and allow them to return to work may follow either a symptom-based, time based, or a test-based strategy." Employers must maintain all test results as a confidential medical record.

■ **What information may an employer reveal if an employee is quarantined, tests positive for COVID-19, or has come in contact with someone who has the virus?**

Employers should not identify any such employees by name in the workplace to ensure compliance with privacy laws. If an employee tests positive for or is suspected to have COVID-19, the employer will need to follow the most current local, state, or federal public health recommendations. Employers should take further steps at the direction of public health authorities that may include closing the worksite, deep cleaning, and permitting or requiring telework.

Employers may notify affected employees in a way that does not reveal the personal health-related information of an employee. For example, the employer could speak with employees or send an email or other written communication stating : "[Employer] has learned that an employee at [office location] tested positive for the COVID-19 virus. The employee received positive results of this test on [date]. This email is to notify you that you have potentially been exposed to COVID-19 and you should contact your local public health department for guidance and any possible actions to take based on individual circumstances."

Employers may not confirm the health status of employees or communicate about employees' health.

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JOB-PROTECTED LEAVE

- **Are employees entitled to job-protected unpaid leave under the California Family Rights Act (CFRA) if they cannot work because they are ill because of COVID-19 or must care for a family member who is ill?**

Employees may be entitled to up to 12 weeks of job-protected leave under the California Family Rights Act for their own serious health condition, or to care for a spouse, parent, or dependent child with a serious health condition.

COVID-19 will qualify as a serious health condition if it results in inpatient care or continuing treatment or supervision by a health care provider. It may also qualify as a serious health condition if it leads to conditions such as pneumonia.

Employees are eligible for this form of job-protected CFRA leave if they work for an employer with at least 50 employees within 75 miles of their worksite; have worked there for at least a year; and have worked at least 1250 hours in the year before they need time off.

- **If an employee requests leave under the California Family Rights Act because of COVID-19, what kind of certification from a health care professional is appropriate in a pandemic?**

Generally, employees are expected to give employers notice as soon as practicable when they request CFRA leave because of their or a family members' serious health condition. Employers may require a medical certification of the serious health condition from a health care provider within 15 days of the employee's request, unless it is not practicable for the employee to do so.

In the context of a pandemic, it is not typically practicable for employees to provide advance notice of the need for leave (when that need is related to the pandemic), or for employees to obtain certifications when health care providers are working to address urgent patient needs. In a pandemic, employers must use their judgment and recommendations from public health officials to waive certification requirements when considering and granting leave requests.

REASONABLE ACCOMMODATIONS FOR EMPLOYEES WITH A DISABILITY / VULNERABLE POPULATIONS

- **If an employee cannot come to work because of illness related to COVID-19, are they entitled to a reasonable accommodation for a disability?**

Maybe. All employers of five or more employees have an affirmative duty to make [reasonable accommodation](#) for the disability of an employee if the employer knows of the disability, unless the employer can demonstrate, after engaging in the interactive process, that the accommodation would impose an undue hardship. When needed to identify or implement an effective, reasonable accommodation for an employee with a disability, the FEHA requires a timely, good faith, interactive process between the employer and employee.

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Telework is a familiar form of accommodation. Unpaid leave can also be a form of reasonable accommodation, even when employees are not entitled to CFRA leave. Whether illness related to COVID-19 rises to the level of a disability (as opposed to a typical seasonal illness such as the flu) is a fact-based determination. Employers should consider telework and leave as reasonable accommodations for employees with illness related to COVID-19 unless doing so imposes an undue hardship. Factors considered when deciding whether providing leave is an undue hardship include: the number of employees, the size of the employer's budget, and the nature of the business or operation.

■ **If an employee has a medical condition that increases their risk for severe illness from COVID-19, is the employee entitled to a reasonable accommodation?**

According to the [CDC](#), people of any age with the following underlying medical conditions **are at** increased risk for severe illness from COVID-19: cancer; chronic kidney disease; COPD; immunosuppressed state from solid organ transplant; obesity; serious heart conditions; sickle cell disease; and Type-2 diabetes. Individuals with the following conditions **may be** at increased risk for severe illness from COVID-19: moderate to severe asthma; cerebrovascular disease; cystic fibrosis; hypertension or high blood pressure; immunocompromised state from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines; neurologic conditions such as dementia; liver disease; pregnancy; pulmonary fibrosis (having damaged or scarred lung tissues); smoking; thalassemia (a type of blood disorder); and Type-1 diabetes.

If the underlying medical condition qualifies as a [disability](#), then the employer must reasonably accommodate the employee, absent undue hardship to the employer. See previous FAQ for more information. If the underlying medical condition does not rise to the level of a disability, employers are not required to reasonably accommodate the employee, though DFEH suggests that employers endeavor to accommodate workers who are or may be at increased risk of severe illness from COVID-19 as a general strategy to keep their workers safe and healthy.

■ **If an employee is vulnerable to severe illness from COVID-19 due to their age, is the employee entitled to a reasonable accommodation?**

According to the CDC, "among adults, the risk for severe illness from COVID-19 increases with age, with older adults at highest risk." However, because age is not a disability, employers are not required to reasonably accommodate employees based on their age alone. Nor may employers discriminate against older employees. For example, an employer may not return only employees under age 65, even if the employer is doing so to protect its older employees from COVID-19 risks.

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■ **What medical documentation should employees provide to support a request for reasonable accommodation to work remotely or take leave because they are disabled by COVID-19?**

Generally, when an employee requests a reasonable accommodation in the form of a change in schedule, telework, or leave, employers may request reasonable medical documentation confirming the existence of the disability and the need for reasonable accommodation.

During the current pandemic, it may be impracticable for employees to obtain medical documentation of a COVID-19-related disability from their medical provider. To the extent employers require medical documentation in order to grant reasonable accommodations, DFEH recommends waiving such requirements until such time as the employee can reasonably obtain documentation.

■ **During a pandemic, must an employer continue to provide reasonable accommodations for employees with disabilities that are unrelated to the pandemic, barring undue hardship?**

Yes. An employer's responsibilities to individuals with disabilities continue during a pandemic. If the employee, because of a physical or mental disability, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodation, an employer can lawfully exclude the employee from employment or employment-related activities.

If an employee with a disability needs the same reasonable accommodation at a telework site as at the workplace, the employer should provide that accommodation, absent undue hardship. In the event of undue hardship, the employer and employee should work together to identify an alternative reasonable accommodation.

If you think you have been a victim of employment discrimination, please contact DFEH.

TO FILE A COMPLAINT

Department of Fair Employment and Housing

dfeh.ca.gov

Toll Free: 800.884.1684

TTY: 800.700.2320

If you have a disability that requires a reasonable accommodation, the DFEH can assist you by scribing your intake by phone or, for individuals who are deaf or hard of hearing or have speech disabilities, through the California Relay Service (711), or you can contact us above.