

June 4, 2020

**Via Email**

Barbie Robinson, MPP, JD, CHC  
Sonoma County Public Health Director

Dr. Sundari R. Mase, MD, MPH  
Sonoma County Public Health Officer

Sonoma County Board of Supervisors  
Susan Gorin  
David Rabbitt  
Shirlee Zane  
James Gore  
Lynda Hopkins

Dear Public Health Director, Dr. Mase and Supervisors Gorin, Rabbit, Zane, Gore and Hopkins:

This letter serves as a composite voice regarding recent proposed and currently pending obligations imposed on employers that are reopening after sheltering in place per Public Health Orders and amendments. We are employment lawyers representing Sonoma County employers from all corners of the County. Most of us have been practicing locally for many years, and our combined experience has led us to this joint letter. The Public Health Department has mandated a requirement, now on hold, that employers collect and report to it daily COVID data from employees. We are of the opinion that this mandate will not meet the goal of the Public Health Department, cannot be implemented as proposed and cannot be enforced uniformly across all sectors of business.

We understand the importance of tracking meaningful data in the effort to manage the COVID crisis, and we respect the work and the results and applaud the accomplishments of all of you and your staff. Most employers have also been diligent and strive to follow all the rules and guidance from the CDC, OSHA, EEOC, DOL, DLSE, the Governor and Sonoma County. Implementing the various rules has not been an easy task for our clients, and all of us have been juggling multiple requirements imposed on business so that they can either remain open or prepare to open. Sonoma County employers are taking extraordinary steps to make sure their employees are safe. That is their number one concern and they (and we) take it seriously.

The current mandatory procedure of collecting and reporting data creates an undue burden on our local employers while not providing any additional protection for employees, whether through the SoCo COVID Check App, by use of the website by the employer entering the data on behalf of the employee or by alternative means. Our rationale follows:

Each one of these collection procedures is dependent on employee cooperation and full participation. Simply put, employers would be hard pressed to take adverse action against employees who decline to participate in full—or in part, which is the more likely scenario. Consequently, the Public Health Department would not be receiving an accurate picture of the status of reopening businesses.

Additionally, it is unclear what the data will provide the County since it does not demonstrate who has a likely infection, or in what business the employee works (except for the website alternative). It is clear that the May 22, 2020 order only places an extra requirement on employers that has real consequences as follows:

#### USE OF THE APP

1. Employers may need to pay for employees' time to use the app before work and while they are waiting in line to be checked, leading to overtime claims that have not been documented because the employee hasn't clocked in yet.
2. Employees do not all have smart phones.
3. For those employees with smartphones, the employer may now need to pay for the use of that phone.
4. Employers will need to train and pay someone to look at the screen of each person reporting to work and will need to figure out a way to do that safely, since the screen cannot be seen from six feet apart.
5. Employees can decline to use the App altogether because it is their personal phone.

#### WEBSITE (Information) Entered by the Employer

1. The use of the website on a daily basis will prevent timely opening and potentially increased costs to employers through payment of overtime.
2. Employees can decline to verbally answer except to a person trained and confidential in handling private information on the basis of invasion of privacy.
3. A private space would be required for verbal responses with financial ramifications to employers.
4. The potential exposure by multiple uses of a private space to the employer representative and the time to disinfectant between employees.

#### ALTERNATE EMPLOYER PROCEDURES

1. The employer must still ensure all of its employees report daily and it presents an undue burden on the employer, particularly those with over 25 employees, to compile the data and report it.
2. There is a great deal of uncertainty about what an acceptable alternative method would be, which puts a further financial and resource burden on employers to figure it out.

#### ENFORCEMENT FOR NON COMPLIANCE

Perhaps the biggest issue for employers is how would they enforce this rule? Does the employer enforce after one occurrence? Several? Does it depend on whether the employee has generally complied? What is the appropriate response for an employee who has clocked in without complying? Would the response depend on the information later provided or the reason behind the lack of compliance?

The self-check procedures are designed so that an employer can check them before an employee starts work. This requirement places supervisors and managers in the position of making difficult decisions about who can report to work and who can't based on a sampling of symptoms that may have nothing to do with COVID-19. If the employer, through its management employees, exercises discretion of

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allowing some employees to come to work with symptoms, complete forms late or not perform the check at all, the employer may create an atmosphere of perceived discrimination and unfairness.

Finally if the employer takes other adverse action (such as a demotion, suspension, written warning or even termination) based on the employee's non-compliance, we believe that the employer's ability to operate is compromised by the lack of adequate staffing, poor morale among the remaining employees and, of course, lawsuits.

#### CONCLUSION

Most employers already have steps in place to ask employees to self-report on their wellness before coming to work and also have the required signage telling employees and visitors they must be symptom-free to enter the workplace. We do not believe the smart phone App adds anything, while creating significant upset and risk of legal exposure (for the time and use of cell phone). We believe making this App a voluntary tool that employers can use if desired would be the best practice.

Alternatively, we suggest employers provide to Sonoma County Public Health Department the following on a one-time basis:

- a. All employees have acknowledged that they are required to stay home if they have symptoms related to COVID-19 and to contact a designated representative;
- b. That the employer conducts a daily check (and explains the process); and
- c. That the employer will report any employee known to have contracted COVID-19 and follow the CDC protocols for essential businesses who have had employee exposure to COVID-19.

We welcome a dialogue with you about this issue. We would be pleased to Zoom meet with Sonoma County Public Health/Employment Development Department's designated representative, or send a representative to the next Board of Supervisors' regular meeting. Please contact Valorie Bader at [707-757-8353](tel:707-757-8353)/[valorie@weltyweaver.com](mailto:valorie@weltyweaver.com). We all have the same goal, which is to contain and ultimately eliminate COVID-19. Please help us guide our local employers so that they can remain in business and keep their employees safe.

Sincerely,

Jennifer Douglas, Managing Partner, DP&F  
Valorie Bader, Of Counsel , Welty Weaver & Currie PC  
Dawn Ross, Managing Partner, Carle, Mackie, Power & Ross  
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cc: Sonoma County Employment Development Department  
Santa Rosa Metro Chamber of Commerce  
North Bay Builder's Exchange