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COVID-19 AND HOTEL OPERATIONS

California Webinar March 24, 2020

I. ABOUT DARSHAN PATEL

Darshan Patel is a member of the AAHOA. He operates several independent and franchised properties throughout California. He is the principal of The Law Offices of Darshan Patel, APC, which has an experienced team of California attorneys that have expertise in defending and advising hotels and other businesses concerning contracts, employment issues, and general business litigation.

II. WHAT THIS WEBINAR COVERS

- A. Common legal questions arising out of the Covid-19 epidemic;
- B. Concerning issues particular to the hospitality industry.
- C. Using California and Federal laws in effect as of March 24, 2020¹;

III. WHAT THIS WEBINAR DOES NOT COVER

¹ Webinar viewers should note that the situation is fluid and governmental authorities are enacting new laws daily. We encourage businesses to keep up-to-date on developments in order to ensure compliance with the latest regulations.

- A. Medical or technical aspects of combatting Covid-19; or
- B. Legal advice about your particular situation;
- C. The facts and the law vary from case-to-case and this presentation only provides general knowledge.
- D. Contact the firm of Darshan Patel if you want more particular advice or legal analysis concerning a scenario you are facing.

IV. OVERVIEW

The questions that this presentation tackles are divided into three categories:

- A. Guest Issues
- B. Business Issues
- C. Employment Issues

V. GUEST ISSUES

- A. Am I allowed to continue operations in California?

Yes, but you must reduce to minimum basic operations unless otherwise ordered by the government. You should follow government orders, which are changing daily. The Governor most recently issued Executive Order N-33-20 which orders Californians to shelter-in-place. This order provides that only essential businesses are allowed to have their employees report to work, and even then, they are only allowed to have enough staff to maintain “minimum basic operations.” Essential business are businesses that operate in “16 critical infrastructure sectors” as defined by the Department of Homeland Security. One sector is “Commercial Facilities” which includes lodging. Therefore, you are permitted to continue operations, but only at minimal level.

- B. Can I refuse to accommodate to a guest who has Covid-19?

Yes. A hotel who refuses accommodations without just cause can be civilly or criminally liable in California. (Cal. Penal Code § 365.) However, hotel is presumed

to have acted with just cause in refusing to provide an accommodation. (*Id.*) California courts have cited the inability to pay or having an infectious disease as examples of just causes to refuse accommodation. (*Cf. Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 160-61 (disapproved of on other grounds *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, fn. 10).)

C. What should I do if one of my guests is checking in and exhibiting symptoms of Covid-19 (cough/shortness of breath)?

Hotels are required to do a delicate balancing act when it comes to this situation. The guest exhibiting symptoms has a right of privacy and potentially a protected disability under the Americans with Disabilities Act and the California Fair Employment and Housing Act. If a hotel asks a guest to discuss their health prior to checking in, the hotel can be opening itself up to liability. On the other hand, the hotel has a duty to take reasonable precautions to ensure the safety of the other guests and staff. We suggest the following procedure:

1. Ask casual questions designed to assess your risks and elicit a voluntary disclosure. For example:
 - a. Ask if they would like a glass of water. In doing so, you are acknowledging their symptoms. Many guests may volunteer facts concerning their medical condition when prompted.
 - b. Ask where they are travelling from. Guests traveling from areas with large Covid-19 populations are more likely to have been exposed (i.e., Washington, Italy, etc.)
2. If you reasonably believe that the guest poses a safety risk to the other guests and your staff, you may refuse to accommodate the guest. When you do, the following are some best practices:
 - a. Make sure that the decision is made by management by instructing staff to escalate if they have guests with symptoms checking in.
 - b. Tell the guest that you would like to accommodate them, but you have concerns about the health and safety of your other guests and staff. Direct them to the nearest medical facility.

- c. Have a second staff member present as a witness when the manager explains to the guest they will not be checking in.
- d. Refund the guest, if the reservation was pre-paid.
- e. The manager and the staff witness should prepare written statements after-the-fact explaining what happened and why they believed the guest posed a health risk.
- f. Disinfect the surfaces where the guest might have touched after they leave.

D. What should I do if one of my guests tests positive for Covid-19 after they are already staying at my hotel?

Hotels have a duty to take reasonable steps to assist sick guests. That is usually satisfied by contacting appropriate medical personnel. Once you have a guest that have been diagnosed with Covid-19, you should prepare to have your operations disrupted. People who came in contact with the guest must self-quarantine and surfaces the guest might have touched need to be disinfected. You should comply with all governmental orders and CDC recommendations.

It is possible that the guest will need to extend their stay until they are either hospitalized or they are no longer contagious. The CDC indicates that those with Covid-19 or those who came in contact with a Covid-19 patient can discontinue self-isolation the later of 14 days after the contact/diagnosis or after they have taken two Covid-19 tests a day apart that came back negative. The guest is liable for the cost of their extended stay unless the government agrees to assume liability or legislates otherwise. There is no legal justification for having the hotel bear the financial burden of a quarantine.

VI. BUSINESS ISSUES

A. I have no revenue because I have no guests, can I temporarily close?

The entire hospitality industry is being affected by this pandemic in an unprecedented way. Many hotels may have no guests, and no revenue. This forces

us to make tough decisions. Temporarily ceasing operations may be the best financial option for many of us. I am sure many of you have already temporarily closed.

If you have a franchise agreement, it may place restrictions on how you can temporarily cease operations. We recommend reviewing your agreement prior to making the decision to see if ceasing operations breaches your franchise agreement. Even if it does, many hotel chains recognize the hardship that the Covid-19 pandemic has created and may be willing to waive a technical breach in these extraordinary circumstances.

B. Can the Government Commandeer My Hotel?

Governor Newsom has issued Executive Order N-25-20 allowing California to commandeer hotels and other temporary residences to combat the Covid-19 pandemic. That has already occurred across the state. And, it can happen to you.

At a time when there are no travelers, having the government commandeer your hotel can be an economic life raft. The government is Constitutionally required to pay you “just compensation” for using your hotel during the duration they are commandeering it. (U.S. Const. Fifth Amend.; Cal. Const. Art I, § 19.)

If the government commandeers your hotel, you will be required to follow their orders and may have limited control over how your property is run. Your staff is likely to be replaced by trained government personnel. The circumstances differ greatly depending on the location and the governmental authority.

C. Does insurance cover my losses?

It depends on the type of claim you are making and what your insurance policy says. Many policies have a pathogenic or virus exclusion that prevents coverage for Covid-19 losses. Policies that provide for business interruption or business income loss coverage without a pathogenic/virus exclusion are the most likely to provide for insured losses. It is worth looking at your policy to determine whether there is the potential for coverage.

D. If I cease operations, what happens to my employees?

If you cease operations, you have two options with respect to your employees: (1) layoff your employees or (2) furlough your employees.

1. Laying Off Employees

If you layoff your employees, they are essentially being terminated with the potential to later be reinstated. That means when the crisis subsides, you can reinstate them, but in the interim you have no obligations to them. However, prior to laying them off, you do need to pay your employees for all hours worked and accrued vacation/paid-time off. Failure to pay employees everything they are owed when laying them off may result in you being assessed Labor Code penalties.

If you employ over 100 full-time employees and you layoff 50 or more employees during at a time, you may be required to provide 60 calendar days' notice of a mass layoff under the Worker Adjustment and Retraining Notification Act ("WARN"). It is likely that the natural disaster exception to WARN's notice requirements will apply to allow mass layoffs during this crisis, but it has not been litigated, so there are no guarantees. Even so, the penalty for a WARN violation is only \$500 a day, which is far less daily payroll for most hotels.

2. Furloughing Employees

The second option is furloughing. A furlough is an involuntary leave of absence for employees. This means that during a furlough, your workers are still your employees, they are just not scheduled to work. If furloughed employees have benefits like health insurance or paid time off, those benefits continue. Workers can elect to use accrued paid time off while furloughed. Furloughed employees cannot utilize sick leave because they are not scheduled to work any shifts. Furloughed employees also likely qualify for unemployment.

We recommend having all employees update their contact information prior to putting a furlough into effect. Because once people start traveling again, you will need to be able to alert the employees when operations resume. Any employees who do not return to work within a reasonable timeframe after being notified to return to work may be separated as having abandoned their positions.

3. The Advantage of Furloughing Rather Than Laying Off

Furloughing employees may be more advantageous to employers who do not have large banks of paid time off. First, furloughing employees give you the ability to recall employees gradually without going through the process of reinstating. Second, many furloughed employees will resign during the furlough or find employment elsewhere, which may reduce your workforce's unemployment utilization, which saves money in the long-run.

E. What if I cannot meet my outstanding obligations?

If you have outstanding loans or other debts that come due and you are unable to meet the obligation because of the pandemic, we recommend first contacting the creditor before the payment comes due. Many banks, lenders and even the IRS are extending relief to businesses that are suffering.

If you need operating capital, you may qualify for a Small Business Administration Disaster Loan or other emergency bridge loans. Moreover, our industry is lobbying Washington for a relief package that will help us weather the storm.

Other agreements like vendor contracts, collective bargaining agreements, leases, or purchase and sale agreements may provide *force majeure* clauses that relieve a party from performing when certain circumstances beyond their control arise. Some *force majeure* clauses may be invoked due to this pandemic. However, the terms of the agreement govern.

VII. EMPLOYEE ISSUES

The laws concerning Covid-19 work protections are changing rapidly as legislators scramble to pass relief bills.

A. Can I ask an employee to stay home or leave work if they exhibit Covid-19 symptoms?

Yes. If an employee is has flu-like symptoms you should ask the employee to seek medical attention and/or get tested for Covid-19 and remain at home until cleared or recovered. OSHA advises employers to immediately isolate workers who have signs or symptoms of Covid-19. (OSHA Guidelines, p. 10.)

Some employers may be interested in requiring employees to take their temperature at work, which would ordinarily be a prohibited employer-mandated medical

examination. However, federal agencies have acknowledged that this is permitted to prevent spread of Covid-19. Please note that while fever and dry cough are the two most common symptoms, an employee carrying Covid-19 may not have an elevated temperature, so these temperature checks may not be worthwhile.

The EEOC has indicated that if an employer advises an employee having symptoms to go home there is no issue of disability/medical condition discrimination. Until that person tests negative for Covid-19, the safest course is to take precautions to protect your guests and staff by acting as though the symptomatic person were diagnosed. Note that you should avoid identifying any infected or exposed worker or guest by name to other employees/guests to ensure compliance with confidentiality laws.

There is no duty to report a suspected or confirmed case of Covid-19 to the CDC. That responsibility falls to healthcare workers interacting with the infected employee.

B. What should I do if an employee refuses to leave the workplace or stay home?

First, you should make sure that the employee understands the order and the reasons behind it. If they still will not leave, you should warn the employee that they are trespassing on private property or that they will be terminated for insubordination. You resort to calling the police or terminating the employee if necessary.

C. What precautions must I undertake to keep my workplace safe?

OSHA has issued guidelines on how to prepare workplaces for Covid-19 outbreaks. Most employers can protect workers by emphasizing basic infection prevention measures: handwashing, encouraging sick/exposed workers to stay home, encouraging mouth covering when coughing or sneezing, providing tissues and trash receptacles, and maintaining regular disinfecting and cleaning practices of all surfaces and equipment. (OSHA Guidelines, p. 8-9.) Workers who show signs of infection should be isolated or required to stay home. (*Id.*, p. 10.) Workers who can work from home should. All workers should keep a six-foot distance from other employees.

You are not required to provide safety masks or respirators to employees unless they are working directly with Covid-19 patients or those exposed to Covid-19. But, you

may want to consider allowing employees to wear their own protective equipment to make them feel safer.

- D. Can an essential employee refuse to come to work because they feel unsafe because of the pandemic?

Probably not. OSHA allows employees to refuse to work in a workplace where there is imminent danger of death or serious physical harm or where there is a “reasonable expectation that health hazards are present and exposure will shorten life or cause substantial reduction in physical or mental efficiency.” A hotel would probably only rise to this standard if it was commandeered by the government, filled by Covid-19 patients, and the employees were required to work without protective equipment like a face mask or gloves.

- E. When do I have to continue paying my hourly employees who are not working?

You must pay all hourly employees for hours worked. If they are not working, they are not earning wages. However, if an employee is scheduled to work, but cannot because they or a family member are sick or quarantined, you must allow the employee to use any paid sick leave that is on the books. An employee who has no sick leave left may use paid time off if permitted by your company’s policies. An employee does not need to be paid for any leave in excess of their accrued paid-time-off or sick leave, however an employee who qualifies for Family Medical Leave Act leave may retain their job and use up to 12 weeks of unpaid leave.

Please note that in California, employers must provide a minimum of three days or 24 hours of sick leave to employees to use after the 90th day of their employment.

On April 2, 2020, the newly passed Federal Families First Coronavirus Response Act (“CRA”) goes into effect. It requires employers with fewer than 500 employees to provide: (a) paid sick leave of 80 hours for full time employees and (b) for part time employees, the number of hours of sick leave that the employee works on average every two weeks. However, the Department of Labor is permitted to exempt employers with 50 or less employees if it would jeopardize the viability of the business. There will be tax credits available to businesses subject to the CRA, but it is unclear what is required to access them.

F. When do I have to continue paying my salaried employees who are not working?

If a salaried, Fair Labor Standards Act exempt employee is performing at least some work during the seven-day workweek, they are required to be paid the entire salary for that workweek.

G. Is an employee who claims to have contracted Covid-19 on the job eligible for worker's compensation?

Maybe. If the employee contracted Covid-19 during some activity benefiting their employer, the illness might “arise out of and in the course of employment.” However, it will be difficult for employees to prove where they contracted the virus. This will be determined on a claim-by-claim basis. You should provide any employee who wants to make a worker's compensation claim the forms to do so.

H. What if my workforce is unionized?

If your workforce is unionized, your collective bargaining agreement governs most situations unless it is silent or less protective than labor laws that cannot be waived by a collective bargaining agreement. We recommend having an attorney look at your collective bargaining agreement and provide specific advice. But, in general, you should make sure that your union is notified prior to any changes in the terms and conditions of employment related to Covid-19.