

# **Key to success: Cross-Departmental Collaboration for COVID-19 Initiatives**

August 12, 2021

[www.hannabrophy.com](http://www.hannabrophy.com)

<http://kmtg.com>



**“Coming together is a beginning. Keeping together is progress. Working together is success.”**

**– Henry Ford, Industrialist**



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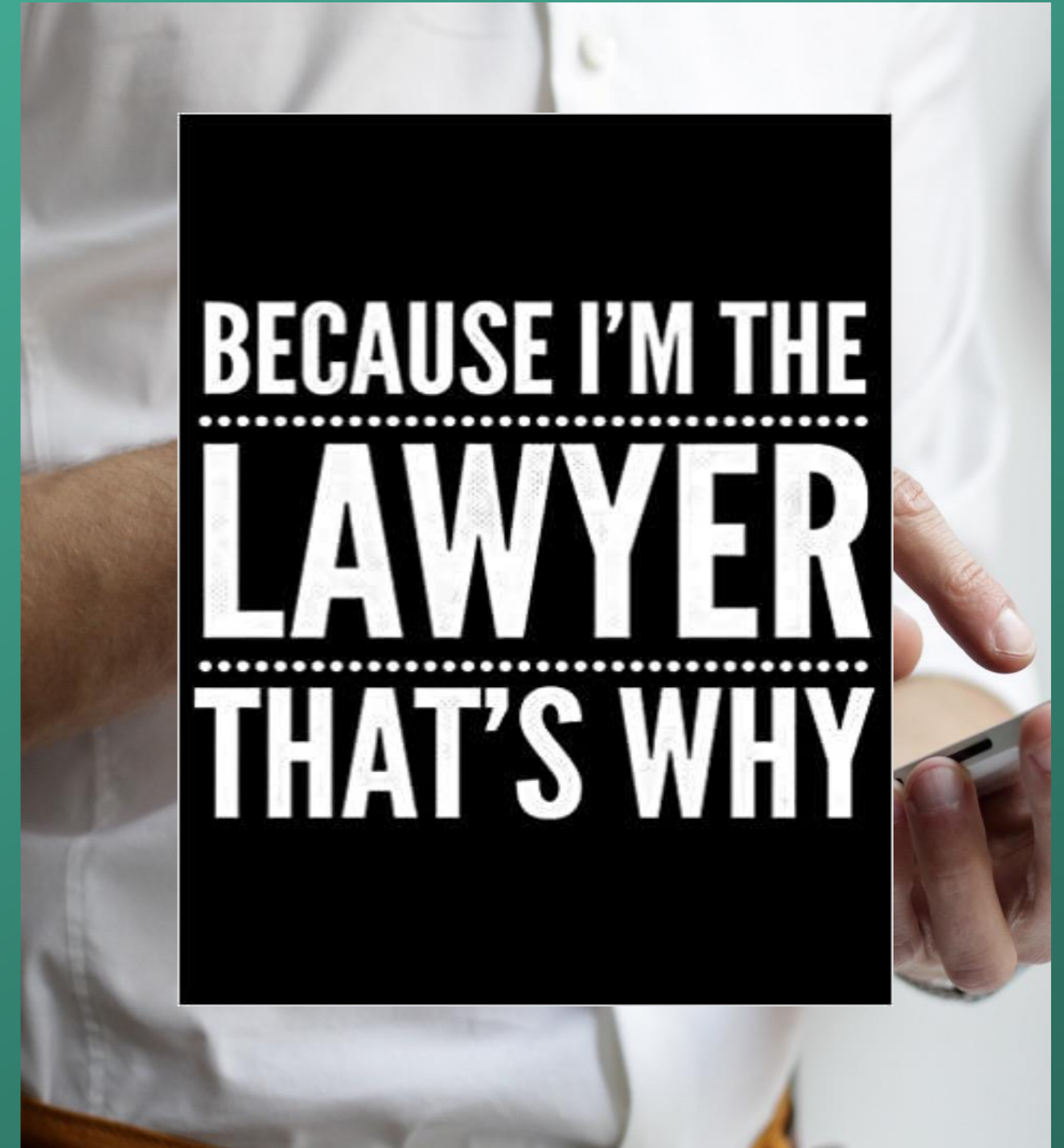
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**Facts and law change frequently.  
Please consult your attorney for  
the most recent laws affecting  
your decisions and claims  
handling strategies**



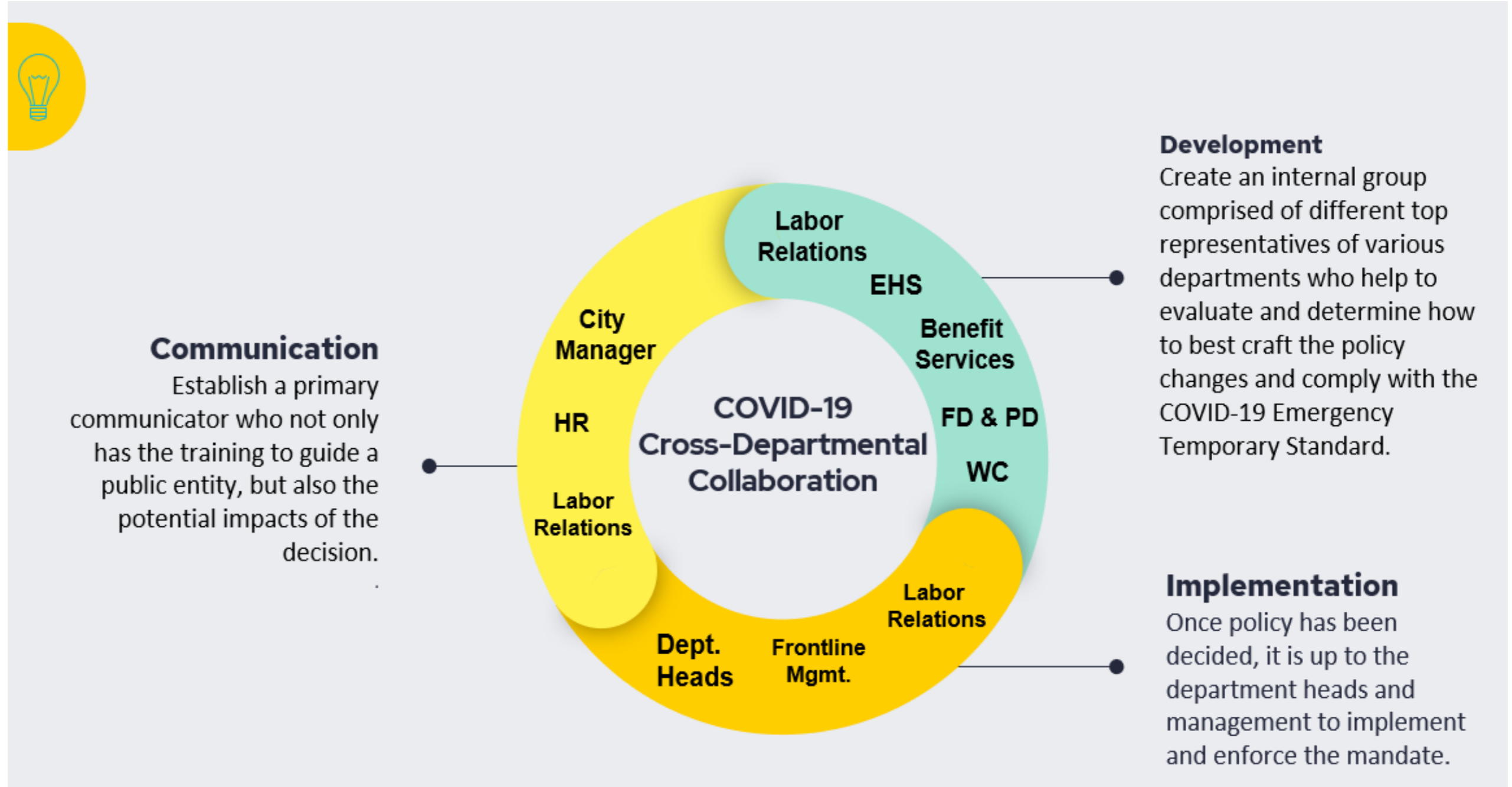
# Discussion roadmap

- General Public Entity Organizational Structure
- COVID-19 in California: Statistics and “Rules”
- Inter-Departmental Communication and Reporting
- COVID-19-related Pay
- Vaccination Considerations
- COVID-19 Cal/OSHA Citations
- COVID-19 Serious and Willful Considerations
- ETS Highlights: Things to Know

**“Crises like the Covid-19 pandemic highlight the importance of effective collaboration...Particularly in a crisis, organizations need to pull together experts with unique, cross-functional perspectives to solve rapidly changing, complex problems that have long-term implications.”**

– Harvard Business Review

# ORGANIZATIONAL STRUCTURE: EXAMPLE





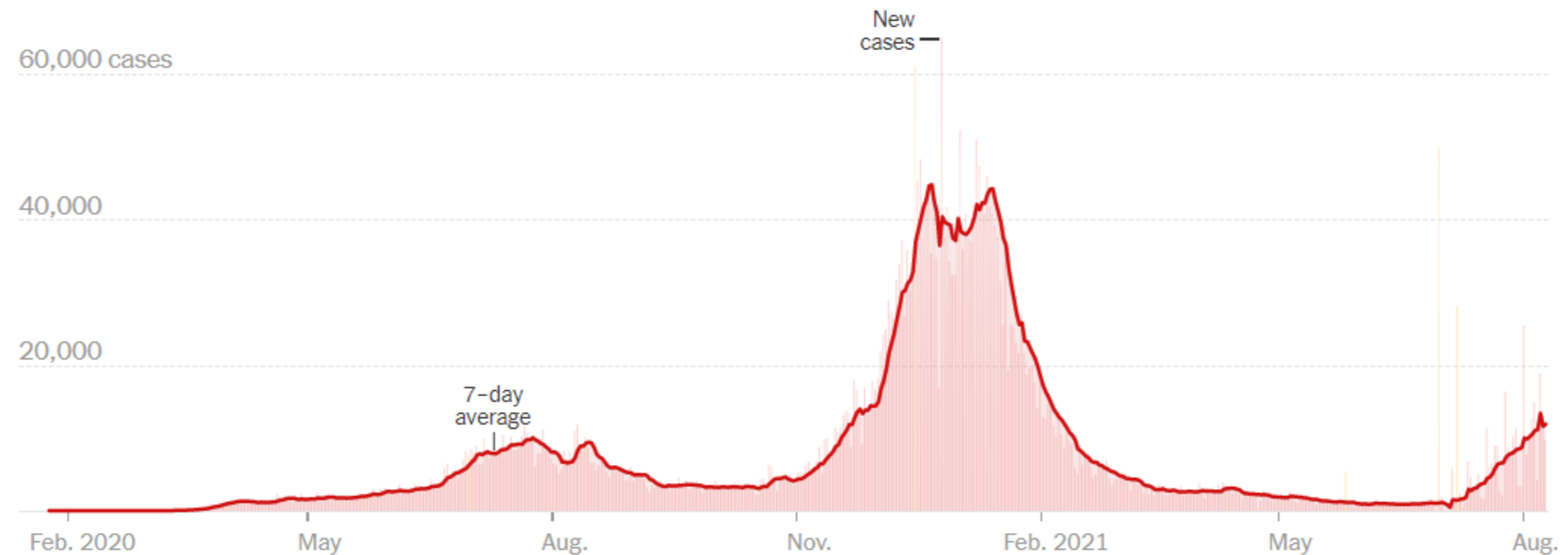
# COVID-19 IN CALIFORNIA: STATISTIC & “RULES”



# COVID-19 STATISTICS IN CALIFORNIA

Updated Aug. 11, 2021

## New reported cases



<https://www.nytimes.com/interactive/2021/us/california-covid-cases.html>

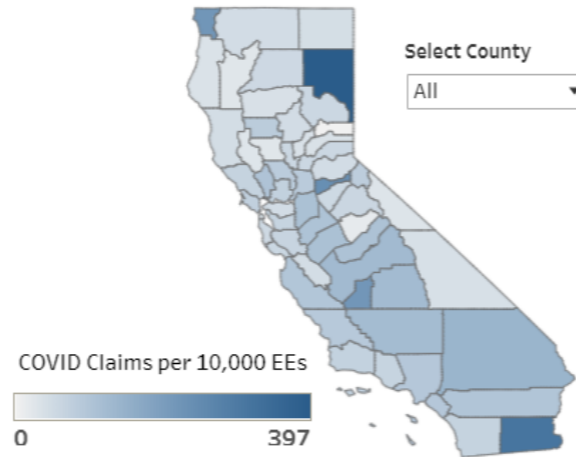
## Statewide Summary

Claims with injuries through July 2021 **151,068**

Claims reported through 8/09/21: **151,148**

Deaths reported through 8/09/21: **1,046**

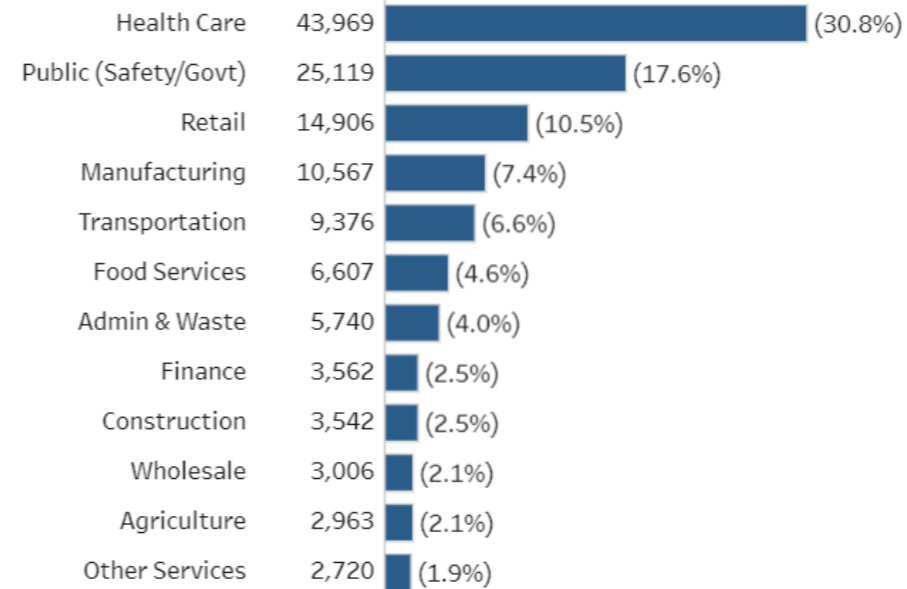
**COVID Claims Per 10K Employees**  
Insured and Self-Insured  
*Select County on map or drop-down menu to filter exhibits*



Note: The Insured/Self-Insured Filter does not apply to this map.

**COVID Claims by Industry**

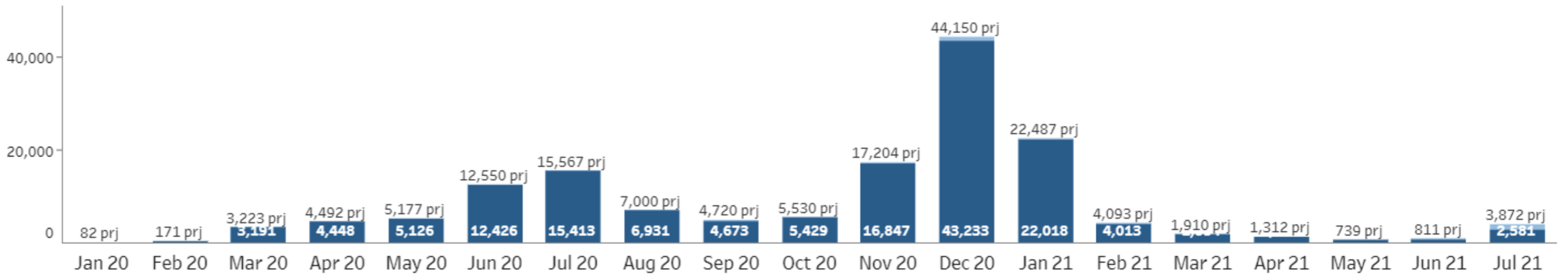
Counts & Proportions Exclude Unknown Values



## COVID Claims by Month of Injury

Reported Jan 2020 - July 2021 claims: **151,068**

Projected Ultimate Jan 2020 - July 2021 claims: **155,090**



# CAL/OSHA'S REVISED ETS & OTHER "RULES": WHERE WE STAND SUMMER 2021

- June 17, 2021 Cal/OSHA adopts revised ETS
  - ETS does not limit more stringent state or local health depart. mandates or guidance
- Current Local Health Department orders MANDATING indoor masks regardless of vaccination status - Yolo, Sacramento, Los Angeles, Alameda, Contra Costa, Marin, San Francisco, San Mateo, Santa Clara
- July 26, 2021 CDPH mandating all state employees and health care workers show proof of vaccination by September 30, 2021
  - Exempted employees test once weekly and wear respirators
- July 27, 2021 CDC recommends fully vaccinated people wear a mask in public indoor settings if they are in an area of substantial or high transmission.
- July 28, 2021 CDPH recommends universal masking indoors
- August 11, 2021 CDPH issued public health order mandating all K-12 school staff to show proof of vaccination by October 15, 2021
- ETS mandates employers continue to monitor public health, City Counsel, state and federal legislation and orders



# INTER-DEPARTMENTAL COMMUNICATION

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## Reporting Structure

Internal group from various departments  
Comprised of leaders from departments that are heavily impacted by the COVID-19 Emergency Temporary Standard

Establish a Reporting Structure

Why it is important?

This chain of command is important for consistency and helps the organization to function more efficiently.

# INTER-DEPARTMENTAL COMMUNICATION

## Potential barriers and pitfalls to Inter-Departmental Communication

### Separation

Physical separation can lead to a collapse in communication.

How to overcome: Through various methods of communication, such as email, video calls, chats and shared spaces can replace in-person communication.

### Silos

In a time of crisis people tend to be more risk-adverse, isolate themselves and fall back on solutions that have worked in the past.

# INTER-DEPARTMENTAL COMMUNICATION

## Potential barriers and pitfalls to Inter-Departmental Communication

How to overcome: Dedicated individuals to reach out to each department to reach out for various COVID-related tasks such as; conducting COVID investigations, contact tracing, guidance on quarantine or isolation times, coordinate COVID testing, disciplinary actions for non-compliant employees, etc.

### Criticism

COVID-19 governmental policies have become hyper-polarized and political.

Expressing your personal opinions in a negative manner can lead to confusion, distrust, and a breakdown in implementation with your workforce.

How to overcome: It is important to remain neutral, focus on the health and safety of your employees and follow the established procedures.



# COVID-19-RELATED PAY



# REVISED ETS – CCR § 3205(C) EXCLUSION PAY

Excluded Employees earnings, rights, benefits maintained.

Employers may use employer-provided employee sick leave for this purpose to the extent permitted by law.

Wages due must be paid at employees regular pay rate, must be no later than regular pay day.

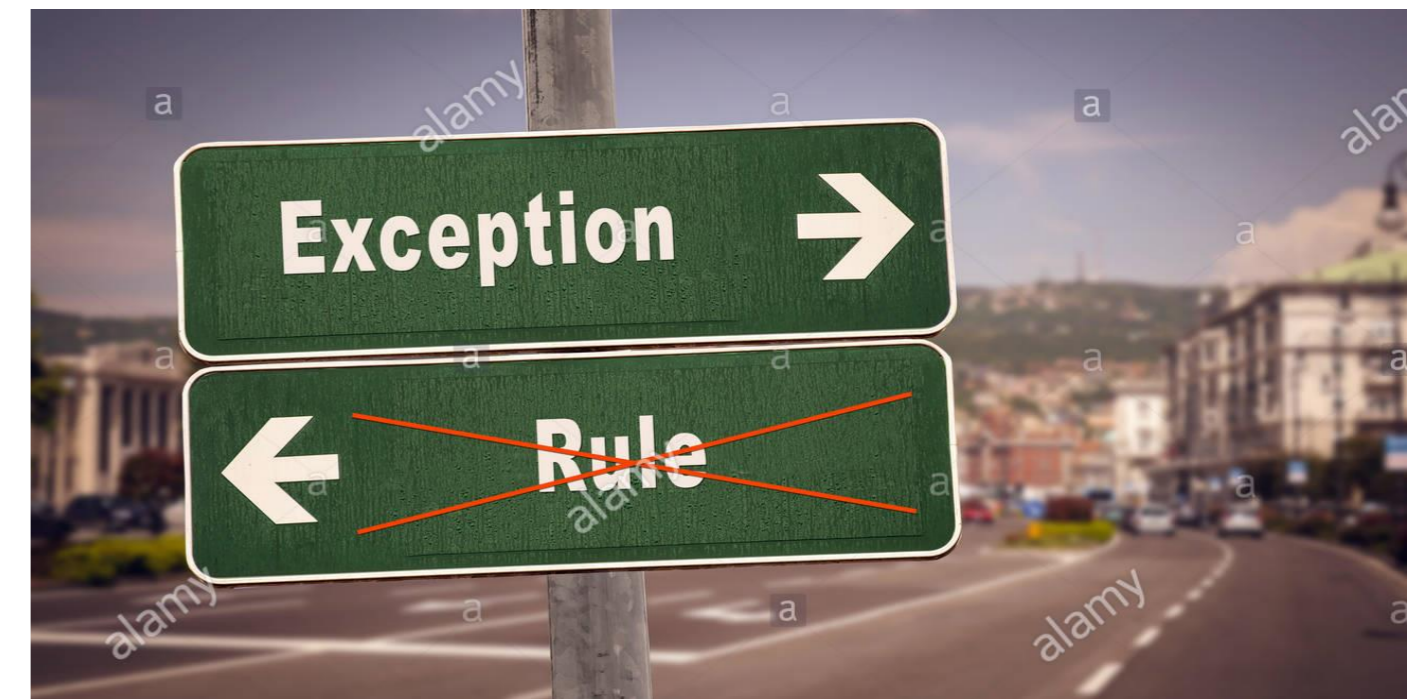
Unpaid wages owed are subject to enforcement through procedures available in existing law.



# REVISED ETS – CCR § 3205(C) EXCLUSION PAY EXCEPTIONS

**If an exception applies, the employer shall inform the employee of the applicable exception.**

- Exception 1 – Employee received workers' compensation temporary disability payments.
- Exception 2 – Close Contact is not work related



# COVID-19-RELATED PAY

## WHERE DOES THE MONEY COME FROM?

### **COVID-19 Supplemental Paid Sick Leave (CA) (Mandatory)**

### **Families First Coronavirus Response Act ) (FFRCA) (Federal – tax credit) (Voluntary)**

- Emergency Paid Sick Leave (EPSL)
- Emergency Family and Medical Leave Expansion Act (EFMLA)

### **Paid Time Off (PTO) (i.e., sick, vacation days)**

### **WC – EDD/TD/4850**

- Corona v. Cal. Walls Inc. (2020) Cal. Wrk. Comp. P.D. LEXIS 256

### **MOU/collective bargaining agreements**



# CA SUPPLEMENTAL PAID SICK LEAVE

**Effective – 3/29/2021, retroactively begins 1/01/2021; Expires – 9/30/2021**

**Mandatory – Public and private sectors with more than 25 employees; 10 days/80 hours**

- Employee request can be oral or in writing
- Vaccine-related eligibility reasons:
  - The covered employee is **attending a vaccine appointment** or cannot work or telework due to **vaccine-related symptoms**.
- Cap on Benefits Full-time covered employees: Not to exceed \$511 per day, up to \$5,110
- Other Eligibility:
  - Caring for themselves or a family member who has COVID-19
  - Subject to an Order to quarantine or isolation
  - School or childcare is closed due to COVID-19  
(similar to the FFCRA)



# FFRCA: EMERGENCY PAID SICK LEAVE

**Emergency Paid Sick Leave – 10 day/80 hours (OPTIONAL)**

**Expires – 9/30/2021; Part of Federal 2021 American Rescue Plan Act**

## **Eligibility:**

- Obtaining a COVID-19 vaccine.
- Recovering from any illness/injury after receiving COVID-19 vaccine.
- Pending COVID-19 test/medical diagnosis results
- Order to Isolate or Quarantine by Federal, State, or local authority.
- Advised to Isolate or Quarantine by health care provider.
- Experiencing COVID-19 symptoms and seeking a medical diagnosis.
- Caring for individual subject to quarantine order.
- Caring for a child if school/place of care is closed, or child care provider unavailable.
- Any other substantially similar condition specified by Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

# FFRCA: EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

## Emergency Family and Medical Leave Expansion Act (EFLMA); 12 weeks PAID

### OPTIONAL; Expires – 9/30/2021; Part of Federal 2021 American Rescue Plan Act

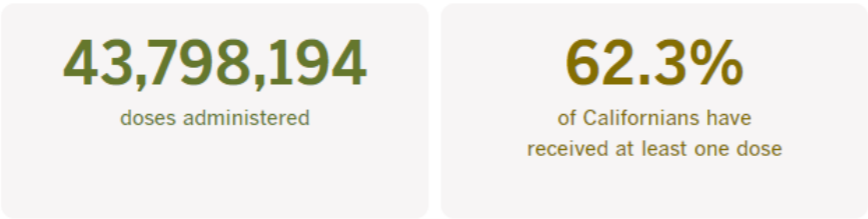
- Eligibility - Any of the qualifying reasons listed under the Emergency Paid Sick Leave.
- Allows for employees to potentially take 14 weeks of paid leave under the Paid Sick Leave (2 weeks) and EFMLA (12 weeks) in response to one of the qualifying reasons of being unable to work due to the COVID-19 pandemic.
- Employers entitled to tax credit at 2/3 of the employee's regular rate of pay, up to the daily and aggregate limits (\$200 per day or \$10,000 in total)
- Employer cannot discriminate with respect to leave on this basis
- An employer *may not* require an employee to use provided or accrued paid vacation, personal, medical, or sick leave *before* the Emergency Paid Sick Leave.
- Employers *may* require employees to use other leave to supplement pay under Emergency Family and Medical Leave.



# VACCINATION ISSUES

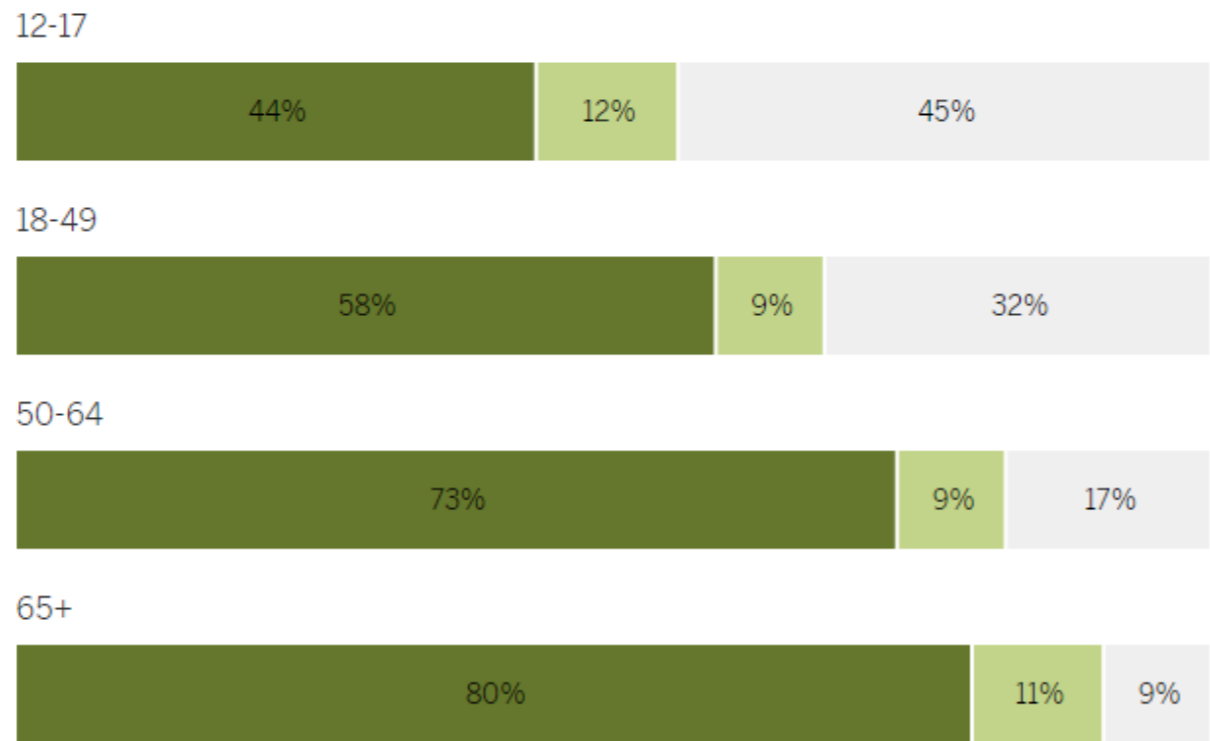
# Tracking coronavirus vaccinations in California

By Los Angeles Times Staff  
Updated Aug. 9 5:59 p.m. Pacific



## Vaccinations by age group

■ Fully vaccinated ■ Partially vaccinated ■ Not vaccinated



California Department of Public Health

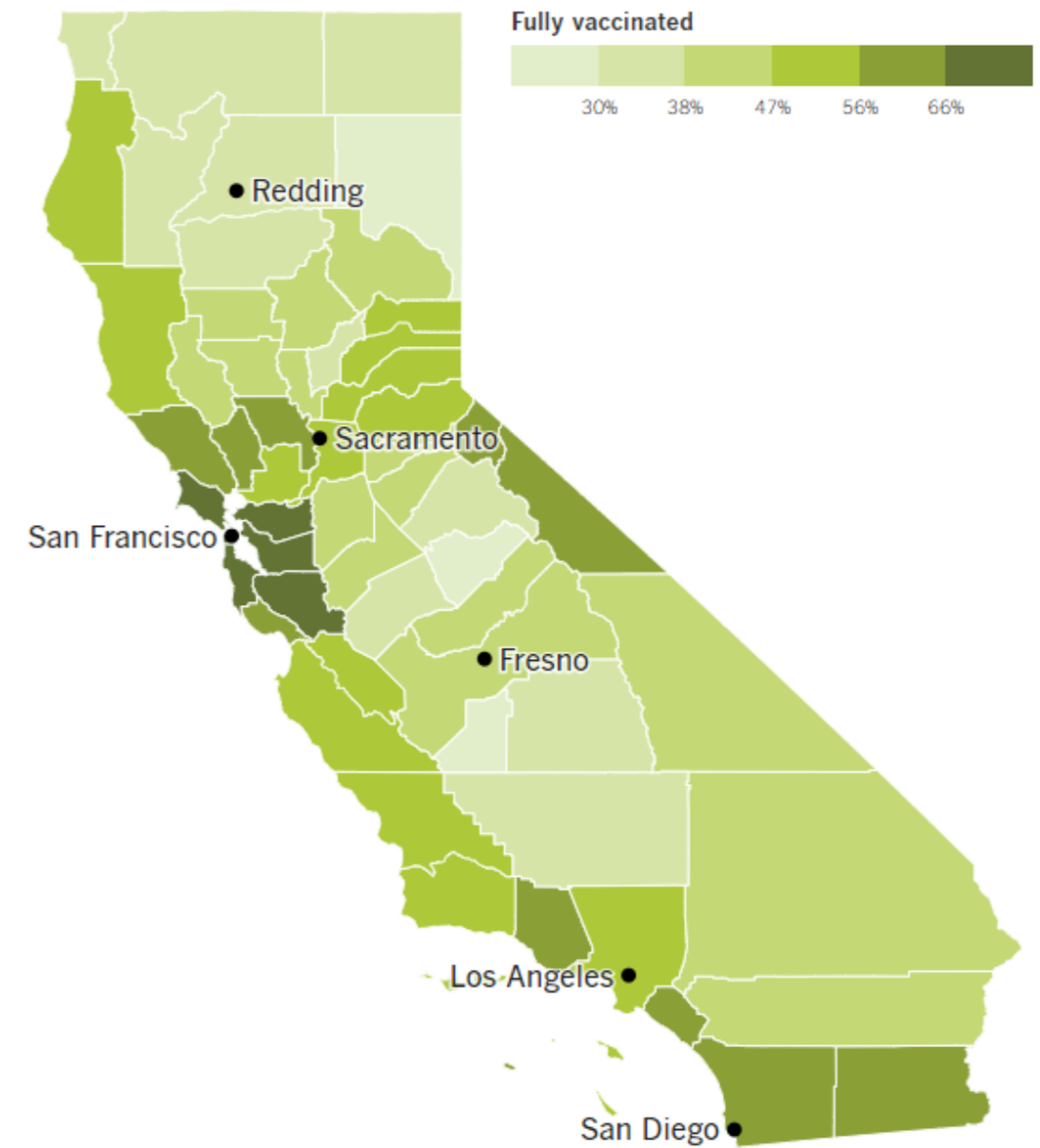
<https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak/covid-19-vaccines-distribution/#county-comparison>

## Vaccinations by county

The state health department publishes a breakdown of the number of residents fully and partially vaccinated in all 58 counties.

Progress

Fully vaccinated At least one dose





# WORKERS' COMPENSATION: AOE\COE FOR VACCINE ADVERSE REACTIONS

Is an adverse reaction to one of the COVID-19 vaccines an injury AOE/COE under California Workers' Compensation?

- LC §3202 and liberal construction
- LC 3208.05 and health care workers
- More likely to find workers' compensation liability for an adverse reaction if found that taking the vaccine was related to employment.
- Provide a claim form if the employee suffers an adverse reaction causing medical treatment beyond first aid.

# WORKERS' COMPENSATION: WHEN TO MANAGE TREATMENT

- This section is only applicable when the claim is accepted.
- While the claim is denied, the Injured Worker may seek treatment from whomever he or she pleases, without regard for Utilization Review or Independent Medical Review.
- If the claim is denied and later accepted, the claims administrator may and should impose the restrictions outlined herein. However, be aware that medical treatment liens will likely surface from the facilities that treated the Injured Worker during the denial period. The Injured Worker may also request reimbursement for self-procured treatment. These issues are negotiable, but nevertheless must be addressed.

# PROOF OF COVID-19 VACCINATION

## **Can an employer require an employee or applicant to submit "proof" of vaccination?**

- Yes. Simply asking whether or not an employee has been vaccinated or requiring proof of vaccination does not a disability-related inquiry, religious creed inquiry, or medical examination.
- However, employers should not ask information beyond whether or not an employee has been vaccinated (e.g., why haven't you been vaccinated?)
- If employees decline to disclose whether or not they have been vaccinated, they should be treated as if they are unvaccinated.
- Consider mandating COVID-19 testing for those employees who have valid disability or religious exemptions, or those who decline to state, in conjunction with the provision of respirators and other infection control measures.

# MANDATING VACCINES FOR EMPLOYEES: FEHA AND EEOC SAY YES

## May an employer require its employees to be vaccinated against COVID-19?

- Yes. Under the Fair Employment and Housing Act ("FEHA"), an employer may require employees to receive an FDA-approved vaccination against COVID-19 infection so long as the employer does not discriminate against or harass employees or job applicants on the basis of a protected characteristic, provides reasonable accommodations related to disability or sincerely-held religious beliefs or practices, and does not retaliate against anyone for engaging in protected activity (such as requesting a reasonable accommodation).



# REASONABLE ACCOMMODATIONS: DISABILITY

## **What if an employee claims a disability prevents him or her from getting vaccinated?**

- The FEHA requires employers to reasonably accommodate employees with known disabilities.
- Engage in the interactive process with the employee
- Obtain healthcare certification documentation from healthcare provider
- Consider possible reasonable accommodations (remote work, respirator use, partitions or secluding employee away from others)

## **An accommodation is not reasonable if:**

- It imposes an undue hardship on the employer
- The employee is unable to perform the employee's essential duties even with a reasonable accommodation
- The employee cannot perform those duties in a manner that would not endanger the employee's health or the health or safety of others even with reasonable accommodations

# REASONABLE ACCOMMODATIONS: SINCERELY HELD RELIGIOUS BELIEF

## What if an employee claims a sincerely held religious belief prevents him or her from getting vaccinated?

- The FEHA requires employers to reasonably accommodate employees known sincerely-held religious beliefs and practices (also known as religious creed).
- Engage in interactive process with the employee
- A reasonable accommodation is one that eliminates the conflict between the religious belief or practice and the vaccination requirement
- Tread carefully when asking about employee's religious beliefs, if there is truly a doubt about the sincerity of the belief—employer can obtain documentation from relevant sources
- Accommodations similar to those with a disabled employee would apply here



# COVID-19 CAL/OSHA CITATION

# CAL/OSHA: GENERAL PROCEDURAL TIMELINE – COVID-19

## **Basis for Inspections**

- Complaint, fatality-initiated, accident-initiated
- Referral, unprogrammed-related

## **After an Inspection**

- Order Prohibiting Use
- No 1BY Notice (Notice of Intent to Classify Violation as Serious) per AB 685
- Issuance of Citations
- Notification of Penalty, Abatement



# CAL/OSHA: GENERAL PROCEDURAL TIMELINE – COVID-19

## OSH Appeals Board – Safety Violation

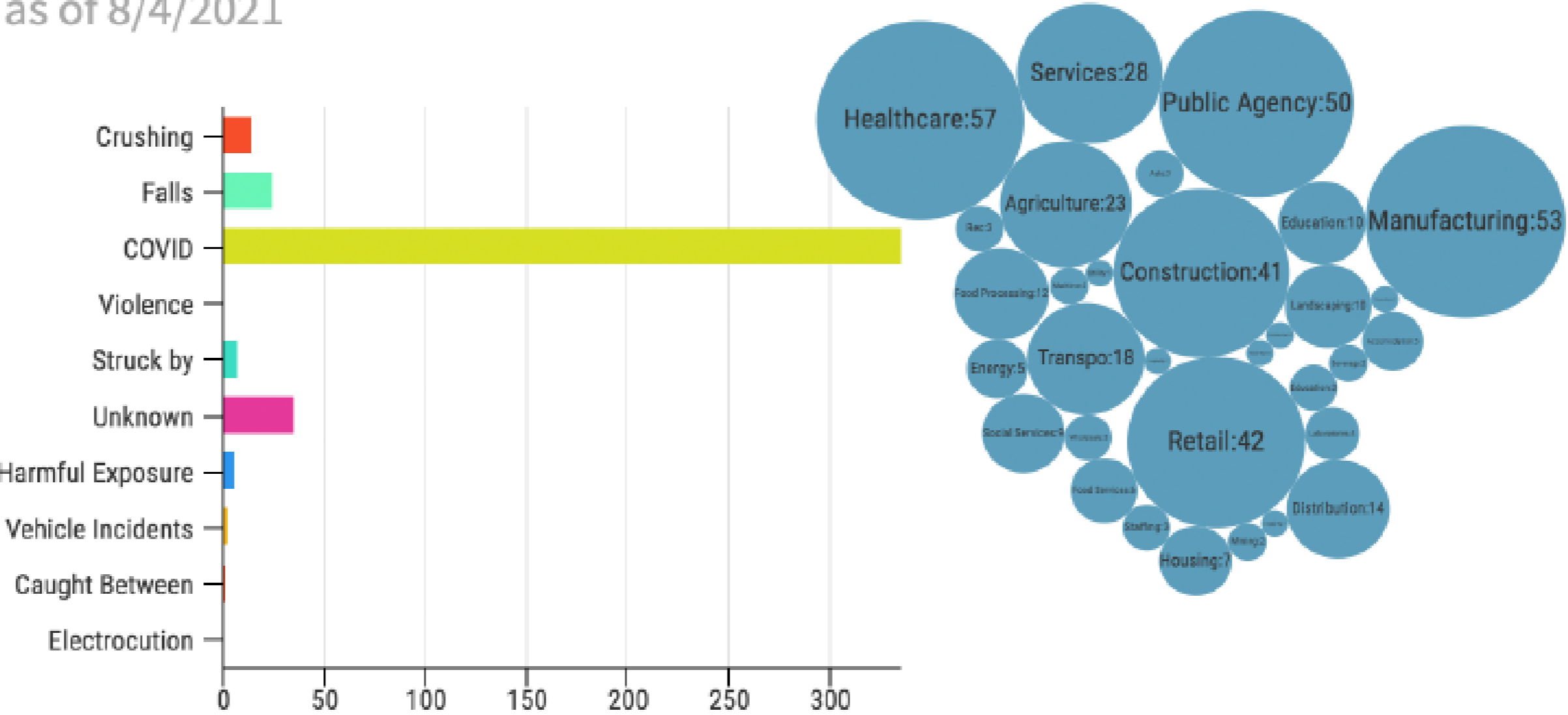
- File Appeal
- Hearings
- Stipulation & Agreement, Trial

## WCAB Simultaneous Proceeding

- Serious & Willful Misconduct Claim (generally must be filed within one year of DOI)
- Amended S&W Complaint to add 4553.1?
- Division findings/stipulation generally admissible in WCAB proceedings. (Labor Code § 6304.5)
- WCJ likely influenced by Cal/OSHA findings/Stipulation.

# 2021 Cal/OSHA Fatality Investigations

as of 8/4/2021



# CAL/OSHA: COMMON COVID-19 CITATIONS:

## Title 8, CCR § 3203, 3205, 5199. IIPP/CPP/ATD

- Failure to establish, update or implement workplace safety plans/IIPP
- Failure to identify and evaluate workplace hazards
- Failure to follow requirements for providing necessary PPE
- Failure to install Plexiglas barriers
- Failure to ensure physical distancing
- Failure to implement procedures to screen employees for COVID-19 symptoms
- Failure to provide adequate health and safety training
- Failure to documentation safety and health training
- Failure to effectively investigation COVID illnesses
- Failure to determine employee's eligibility to use a respirator before each employee is fit tested
- Failure to ensure employees wear face coverings

Title 8, CCR § 342 – Failure to immediately report serious COVID illnesses

Title 8, CCR § 3402 – Failure to ensure prompt access of records to DOSH reps

Title 8, CCR § 14300.5 – Failure to make work-relatedness determination

Title 8, CCR § 14300.29 – Failure to make record on Log 300

**Prior Cal/OSHA Guidance: Before 2/01/2021, Cal/OSHA will cite, but not assess a monetary penalty for ETS violations if it would not have been a violation under the IIPP.**



# COVID-19 SERIOUS AND WILLFUL CONSIDERATIONS

# COVID-19 & SB 1159 & THE EO QUALIFIED FIRST RESPONDER UNDER 3212.87? OUTBREAK INFORMATION

**Is the injured worker a qualified first responder so no outbreak required?**

- What if they were moonlighting?

**What if there is an outbreak?**

- Need for Departments to have standard reporting practices &
- communicate if the employee traveled to multiple locations



# SERIOUS & WILLFUL MISCONDUCT CLAIMS

## LABOR CODE 4553 & 4553.1

### **(4553) Employee's Burden to Show the Employer:**

- a) Knew, or should have known, of a dangerous condition;
- b) Knew the probable consequence of its continuance would involve serious injury to the employer; and
- c) Deliberately failed to take corrective action

*(Johns-Manville Sales Corp. v. WCAB (1979) 96 App. 3d 923,931)*

### **(4553.1) The Appeals Board must specifically find:**

- a) Specific manner order was violated
- b) Safety order violation was proximately cause of injury or death
- c) Safety order, and the conditions making the safety order applicable, were *known to, and violated by, a particular named person, either the employer or a representative*, or that the condition making the safety order applicable was obvious and created a probability of serious injury, and that the failure of the employer or a representative to correct the condition constituted a reckless disregard for the probably consequences.

# COVID-19 & SERIOUS & WILLFUL CLAIMS LABOR CODE 4553/4553.1 – HOW COULD THIS APPLY TO COVID-19 CLAIMS?

## Other employees have COVID-19

- “The employer made my client work in a hotbed of infection”



**The argument:** The employer knew that there were other employees COVID-19 in the office and still required employees to show and be exposed to it.

“The employer knew of a dangerous condition (the rampant COVID-19 in the workplace) and disregarded the probable consequences of infecting the Applicant”.

# SERIOUS & WILLFUL MISCONDUCT CLAIMS LABOR CODE 4553.1 – HOW COULD THIS APPLY TO COVID-19 CLAIMS?

**“The employer failed to exclude employees from the worksite who were exposed to COVID-19.”**

**The Requirement:** The employer must exclude all COVID-19 cases and Close Contacts from the worksite.

“The employer knew of a dangerous condition (Close Contact) and disregarded the probable consequences of infecting the Applicant by failing to timely exclude the Close Contacts from the work site.

**\*What if an employer failed to exclude a COVID-19 case? Would an employees argument be circumstantially supported if there was an outbreak? If there was a major outbreak?**



# SERIOUS & WILLFUL MISCONDUCT CLAIMS LABOR CODE 4553.1 – HOW COULD THIS APPLY TO COVID-19 CLAIMS?

## Defenses – Excluding Employees

**Knowledge** – The employer did not know of the ETS requirement to exclude people from the worksite who were within 6 feet for a cumulative of 15 minutes within a 24 hour period of a COVID-19 case. The employer took reasonable steps to exclude certain people.

**Proximate Cause** – Even though the employer failed to exclude the requisite employees, was this failure to exclude the proximate cause of Applicant's COVID-19 illness?

- Contact Tracing – Where did this employee contract COVID-19 from?
- Presumptive Injury – Was this employee's claim accepted based on a SB 1159 presumption? Was this Applicant "patient zero" and brought COVID-19 to the workplace? Did Applicant have another COVID-19 exposure?

**Qualified Executive** – Who made the decision to exclude certain employees? Did the qualified executive, managing officer or general superintendent provide instructions to exclude employees who were within 6 feet for a cumulative of 15 minutes with a 24 hour period? Was the implementation of the this policy defective?



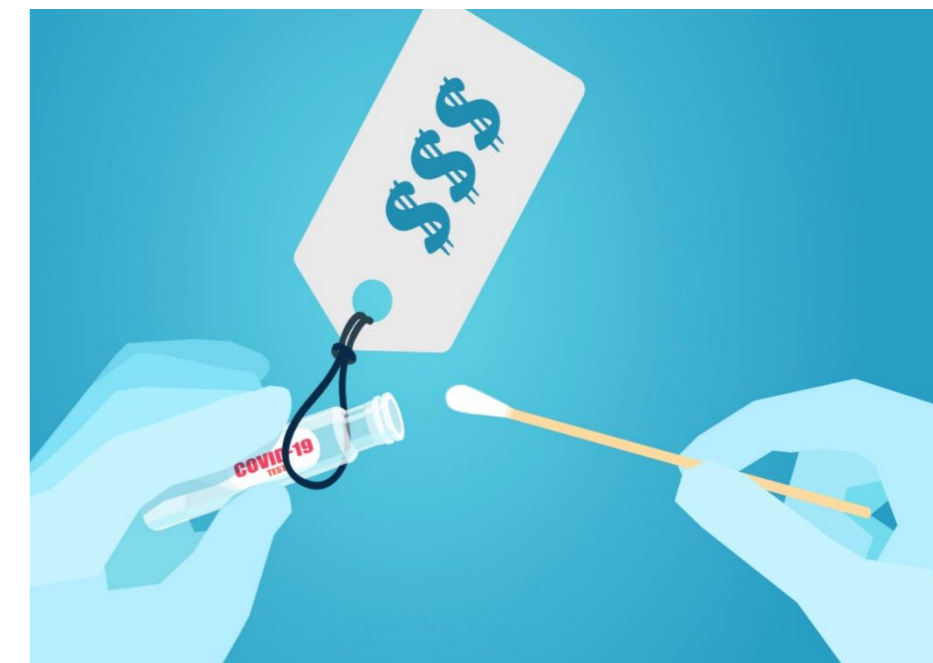
# ETS HIGHLIGHTS: THINGS TO KNOW

# REVISED ETS – CCR § 3205(C) TESTING OF SYMPTOMATIC EMPLOYEES

## New Requirement Alert!

### Test Symptomatic Non-fully vaccinated Employees

- Employers shall make COVID-19 testing available at no cost to employees with COVID-19 symptoms who are not fully vaccinated, during employees' paid time
- This is regardless of whether there is a known exposure



# REVISED ETS – CCR § 3205(C) PERSONAL PROTECTIVE EQUIPMENT

## Employers to Evaluate Need for PPE

### Upon Request, Employers Must Provide Respirators (N95) to Not Fully Vaccinated Individuals

- Respirators will be for voluntary use in compliance with CCR 5144(c)(2) to not fully vaccinated individuals and who are working indoors or in a vehicle with one or more persons.
- When respirators provided for voluntary use, the employer must encourage its use and ensure correct size respirator is worn.



# REVISED ETS: CCR § 3205(C) EMPLOYER COVID-19 PREVENTION PLAN: TIPS

- Maintain daily cleaning and disinfecting plan
- Obtain self-attestation of employee vaccination status (vaccination cards)
- Maintain/modify employee COVID-19 symptom screening process
- Maintain distinct work groups, if applicable
- Formulate face covering policy
- Document visitors on worksite
- Maintain face coverings and respirators (N95) at worksite for employee use
- Ensure maximum indoor ventilation
- Ensure compliance with Cal/OSHA industry-specific guidance
- Develop revised CPP
- Provide CPP training to Employees



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# THANK YOU