

# Coronavirus Laws and Your Dealership: Part VIII

June 14, 2021

Brian Maas, CNCDA President

Anthony Bento, CNCDA Director of Legal and Regulatory Affairs

John P. Boggs, Fine, Boggs & Perkins LLP

David J. Reese, Fine, Boggs & Perkins LLP





**THANK YOU  
FOR YOUR  
2021  
SPONSORSHIP**

**DIAMOND**



**PLATINUM**

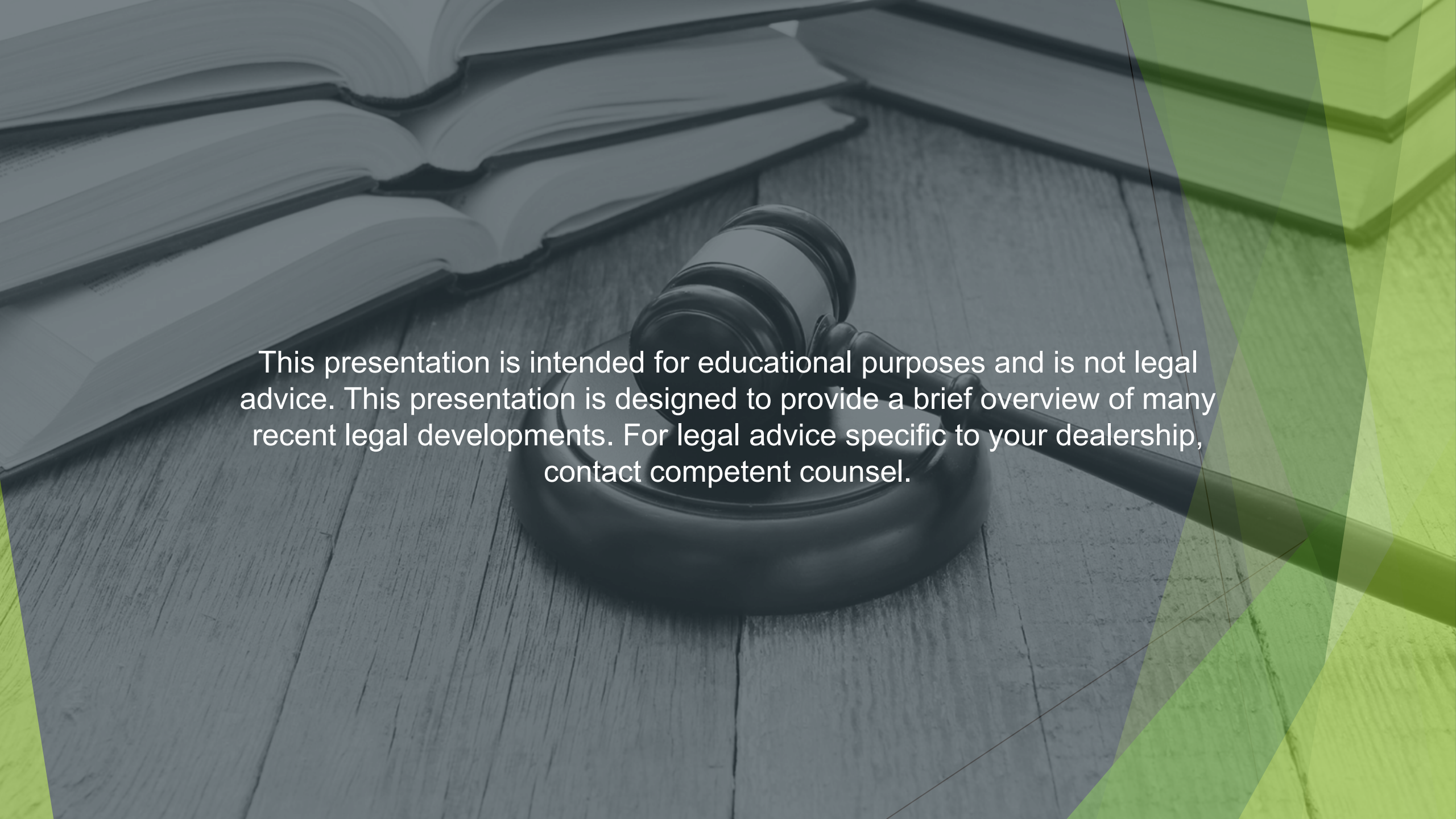




## What are we covering today?

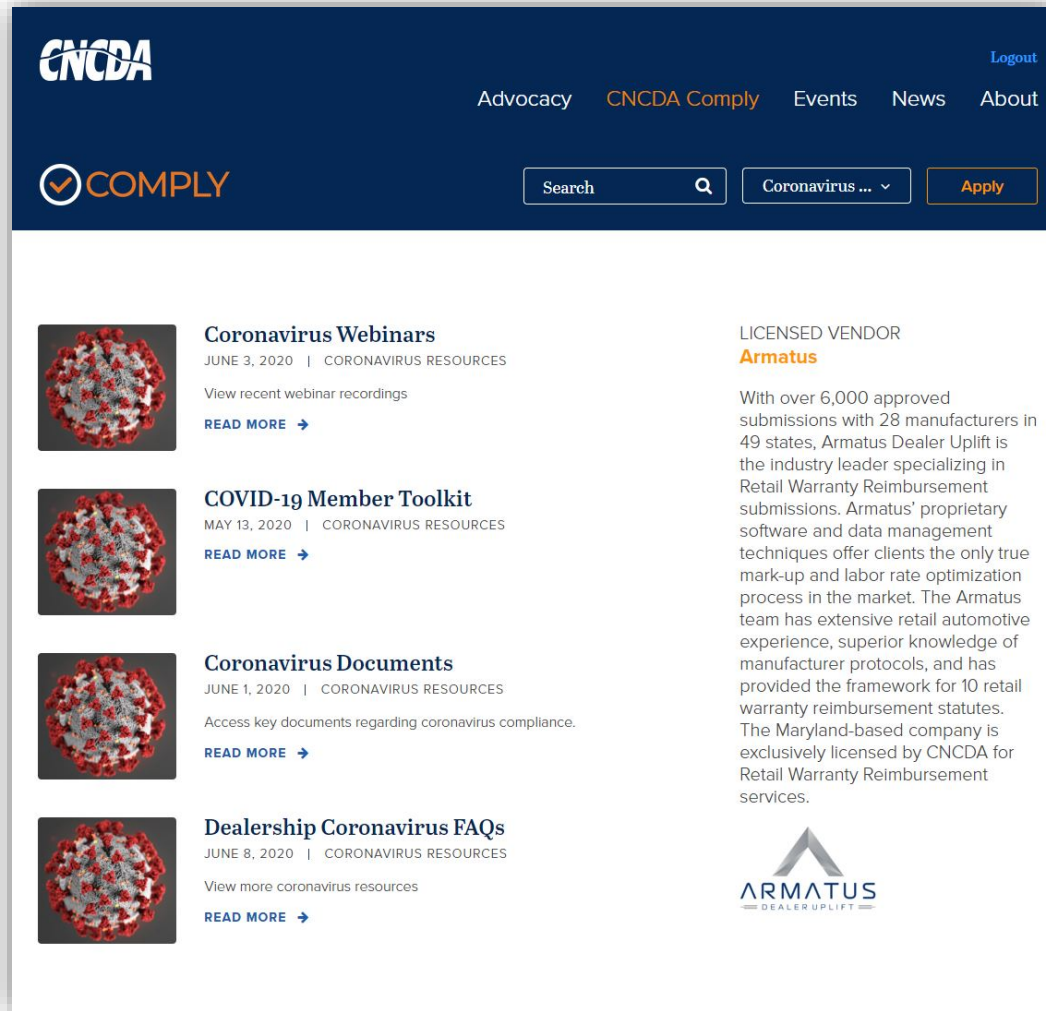
1. California's "Reopening"
2. Cal/OSHA Requirements
3. Employee Vaccination Issues
4. Continuing Compliance Issues
5. Q&A





This presentation is intended for educational purposes and is not legal advice. This presentation is designed to provide a brief overview of many recent legal developments. For legal advice specific to your dealership, contact competent counsel.

# Free Online Resources for CNCDA Members



The screenshot shows the CNCDA website's 'COMPLY' section. The header includes the CNCDA logo, a 'Logout' link, and navigation links for 'Advocacy', 'CNCDA Comply', 'Events', 'News', and 'About'. Below the header is a search bar with the text 'Coronavirus ...' and an 'Apply' button. The main content area features four resource cards, each with a coronavirus icon, a title, a date, and a 'READ MORE' link. The resources are: 'Coronavirus Webinars' (June 3, 2020), 'COVID-19 Member Toolkit' (May 13, 2020), 'Coronavirus Documents' (June 1, 2020), and 'Dealership Coronavirus FAQs' (June 8, 2020). To the right of these cards is a section for a 'LICENSED VENDOR' named 'Armatus', which describes their software and services for retail warranty reimbursement. The Armatus logo is at the bottom of this section.

**CNCDA** Logout

Advocacy **CNCDA Comply** Events News About

COMPLY Search Coronavirus ... Apply

**Coronavirus Webinars**  
JUNE 3, 2020 | CORONAVIRUS RESOURCES  
View recent webinar recordings  
[READ MORE →](#)

**COVID-19 Member Toolkit**  
MAY 13, 2020 | CORONAVIRUS RESOURCES  
[READ MORE →](#)

**Coronavirus Documents**  
JUNE 1, 2020 | CORONAVIRUS RESOURCES  
Access key documents regarding coronavirus compliance.  
[READ MORE →](#)

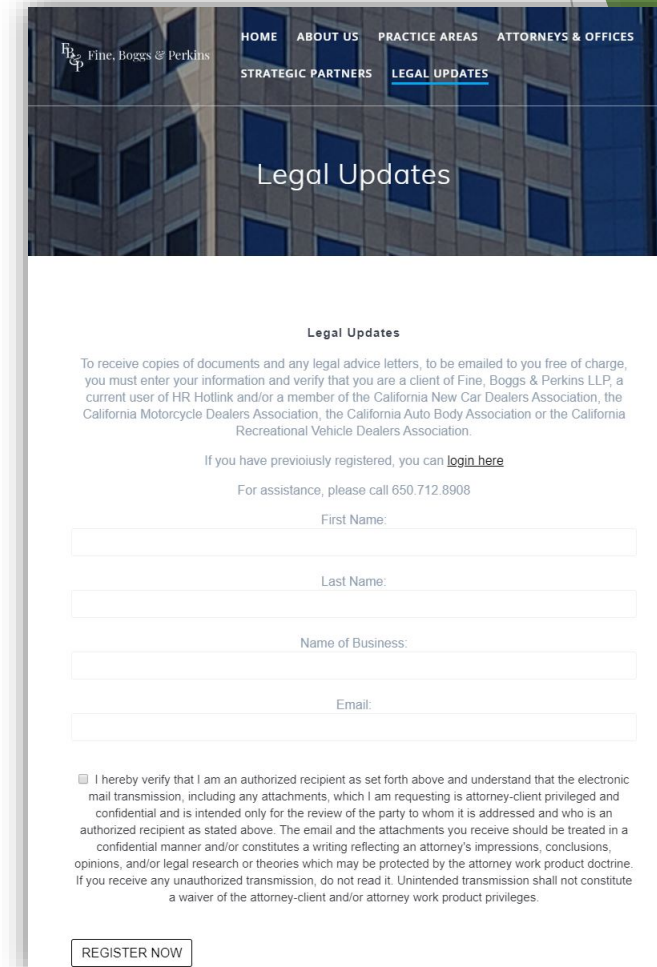
**Dealership Coronavirus FAQs**  
JUNE 8, 2020 | CORONAVIRUS RESOURCES  
View more coronavirus resources  
[READ MORE →](#)

LICENSED VENDOR  
**Armatus**

With over 6,000 approved submissions with 28 manufacturers in 49 states, Armatus Dealer Uplift is the industry leader specializing in Retail Warranty Reimbursement submissions. Armatus' proprietary software and data management techniques offer clients the only true mark-up and labor rate optimization process in the market. The Armatus team has extensive retail automotive experience, superior knowledge of manufacturer protocols, and has provided the framework for 10 retail warranty reimbursement statutes. The Maryland-based company is exclusively licensed by CNCDA for Retail Warranty Reimbursement services.

**ARMATUS**  
DEALER UPLIFT

<https://www.cncda.org/dealer-coronavirus-resources/>



The screenshot shows the 'Legal Updates' registration form on the website of Fine, Boggs & Perkins LLP. The header includes the firm's name and navigation links for 'HOME', 'ABOUT US', 'PRACTICE AREAS', 'ATTORNEYS & OFFICES', 'STRATEGIC PARTNERS', and 'LEGAL UPDATES'. The main heading is 'Legal Updates'. The form text explains that users must enter their information to receive legal documents and advice letters. It provides a 'login here' link for previously registered users and a phone number for assistance. The form includes input fields for 'First Name', 'Last Name', 'Name of Business', and 'Email'. A checkbox section contains a legal disclaimer about the electronic transmission of documents. A 'REGISTER NOW' button is at the bottom.

Fine, Boggs & Perkins LLP

HOME ABOUT US PRACTICE AREAS ATTORNEYS & OFFICES  
STRATEGIC PARTNERS **LEGAL UPDATES**

## Legal Updates

**Legal Updates**

To receive copies of documents and any legal advice letters, to be emailed to you free of charge, you must enter your information and verify that you are a client of Fine, Boggs & Perkins LLP, a current user of HR Hotlink and/or a member of the California New Car Dealers Association, the California Motorcycle Dealers Association, the California Auto Body Association or the California Recreational Vehicle Dealers Association.

If you have previously registered, you can [login here](#)

For assistance, please call 650.712.8908

First Name:

Last Name:

Name of Business:

Email:

☐ I hereby verify that I am an authorized recipient as set forth above and understand that the electronic mail transmission, including any attachments, which I am requesting is attorney-client privileged and confidential and is intended only for the review of the party to whom it is addressed and who is an authorized recipient as stated above. The email and the attachments you receive should be treated in a confidential manner and/or constitutes a writing reflecting an attorney's impressions, conclusions, opinions, and/or legal research or theories which may be protected by the attorney work product doctrine. If you receive any unauthorized transmission, do not read it. Unintended transmission shall not constitute a waiver of the attorney-client and/or attorney work product privileges.

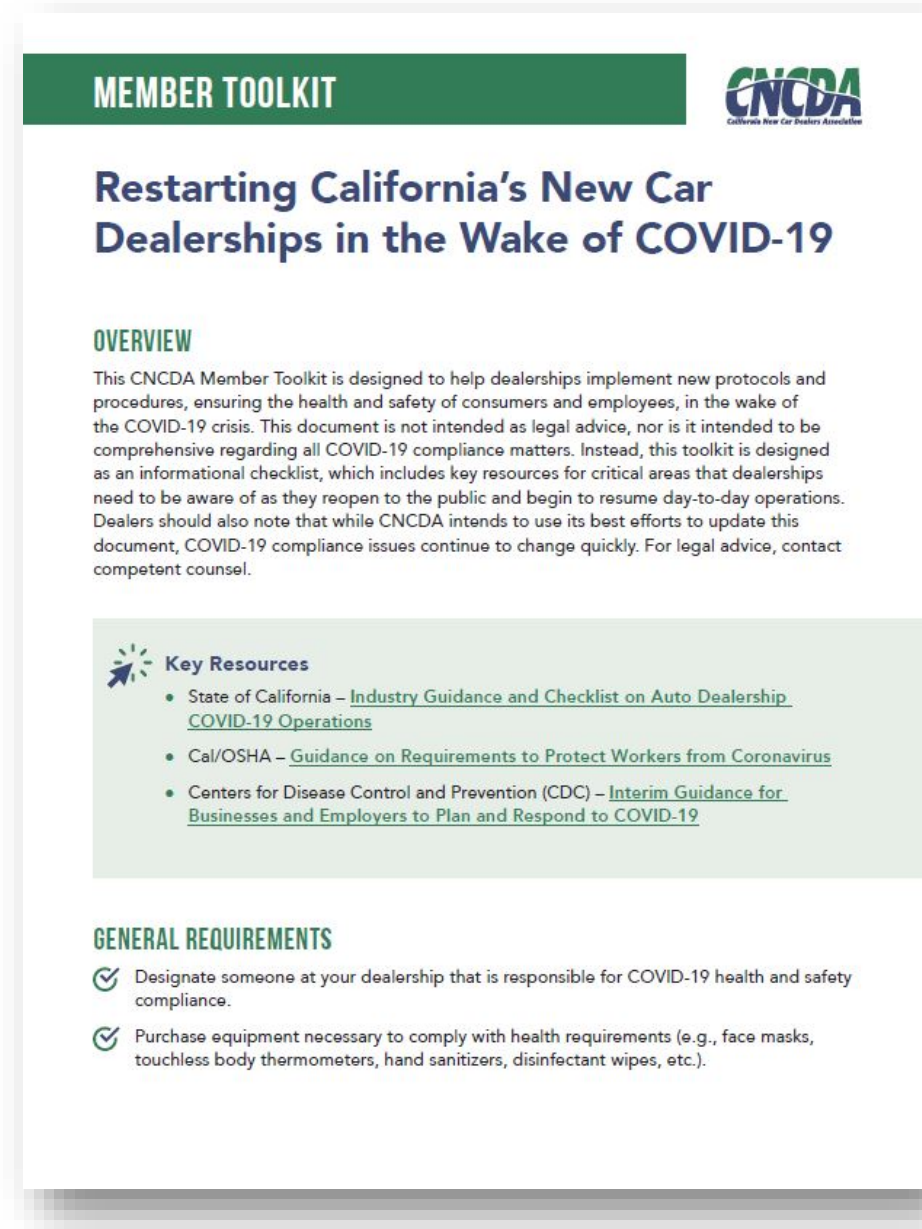
[REGISTER NOW](#)

<https://www.employerlawyers.com/legal-updates/>



# CNCDA COVID-19 Member Toolkit

- ▶ Contains many helpful resources on issues discussed in this webinar
  - ▶ Links to CNCDA resources (e.g., return to work protocol)
  - ▶ Links to important state, federal, and local resources.
- ▶ Available on CNCDA Comply
  - ▶ <https://www.cncda.org/publications/covid-19-toolkit/>



## COVID-19 General Checklist for Automobile Dealerships and Rental Employers

July 2, 2020

This checklist is intended to help automobile dealerships and rental employers implement their plan to prevent the spread of COVID-19 in the workplace and is supplemental to the [Guidance for Automobile Dealers and Rental Employers](#). This checklist is a summary and contains shorthand for some parts of the guidance; familiarize yourself with the guidance before using this checklist.



### Contents of Written Workplace Specific Plan

- ☐ The person(s) responsible for implementing the plan.
- ☐ A risk assessment and the measures that will be taken to prevent spread of the virus.
- ☐ Use of face coverings, in accordance with [CDC guidance](#).
- ☐ Training and communication with workers and worker representatives on the plan.
- ☐ A process to check for compliance and document corrective actions.
- ☐ A process to investigate COVID-cases, alert the local health department, and identify and isolate close workplace contacts of infected workers.
- ☐ Protocols for when the workplace has an outbreak, in accordance with [CDC guidance](#).
- ☐ Update the plan as necessary to prevent further cases.



### Register for Workplace Training

# Part 1 CALIFORNIA'S "REOPENING"

# California's "Reopening"

- ▶ California officials have made statements about the "full reopening" of the state on June 15.
- ▶ Some restrictions will continue (as discussed later), but the following restrictions should end:
  - ▶ Customers that are fully vaccinated do not need to wear face masks (except in limited circumstances).
  - ▶ No occupancy restrictions (no more color-coded county tier system).
    - ▶ Potential exception: LA County protocol may continue to limit indoor occupancy to 75%
- ▶ **BUT EMPLOYEES ARE UNDER DIFFERENT RULES!**



# California's "Reopening"

- ▶ Guidance for the Use of Face Coverings (Effective June 15)
  - ▶ Fully vaccinated customers
    - ▶ Masks generally not required indoors or outdoors.
    - ▶ Exceptions: shuttle service, test drives (more than one person in the car)
  - ▶ Not fully vaccinated customers
    - ▶ Masks still required indoors.
    - ▶ Masks required outdoors when distancing not possible.

# California's "Reopening"

- ▶ Guidance for the Use of Face Coverings
  - ▶ How can businesses distinguish between vaccinated and unvaccinated individuals?
    - ▶ Notify customers of vaccination requirement and allow vaccinated individuals to self-attest that they comply prior to entry.
    - ▶ Implement vaccine verification (not recommend at dealerships)
    - ▶ Require all customers to continue to wear masks
  - ▶ Don't prevent any customer from wearing a mask, if they choose to do so

# Local Orders

- ▶ Most local health orders have been rescinded, but some still exist.
  - ▶ LA County still has dealership-specific protocol, but LA has announced intent to amend protocol to align with state/CDC guidance on masks on June 15.
- ▶ When a local order and a state order conflict, follow the most restrictive order.
- ▶ Double-check your county health agency website, if in doubt.



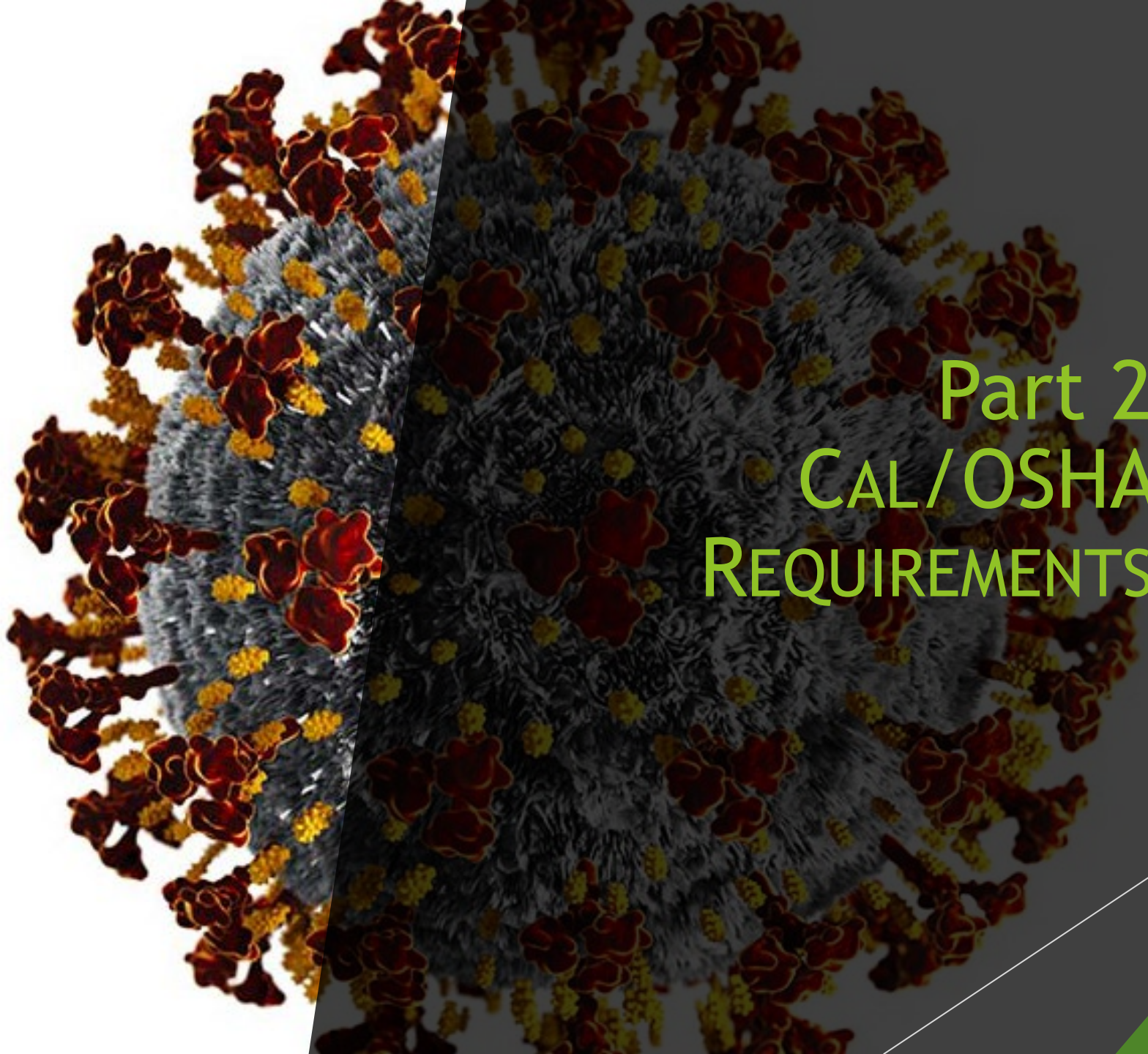
# Travel Advisories

## ▶ State travel advisory

- ▶ Advises Californians to avoid interstate travel unless “essential” (business travel is essential)
  - ▶ Doesn’t apply to work-related travel.
  - ▶ Doesn’t apply to fully vaccinated people.
- ▶ Non-essential travelers should get tested 3-5 days upon arrival into California and stay home for a full 7 days after travel, even if test negative.
- ▶ Non-essential travelers that don’t get tested should stay home and self-quarantine for 10 days after travel.
- ▶ <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Travel-Advisory.aspx>

## ▶ Local Advisories

- ▶ LA County
  - ▶ Updated to largely conform to state advisory.
  - ▶ <http://www.publichealth.lacounty.gov/media/Coronavirus/traveladvisory.htm>
- ▶ Check your county website.



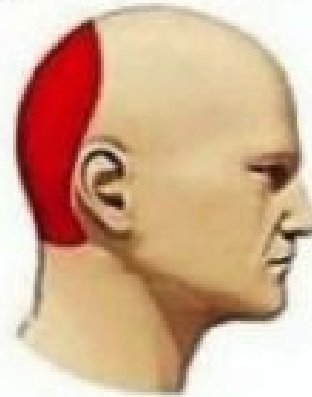
# Part 2 CAL/OSHA REQUIREMENTS

# Types of Headaches

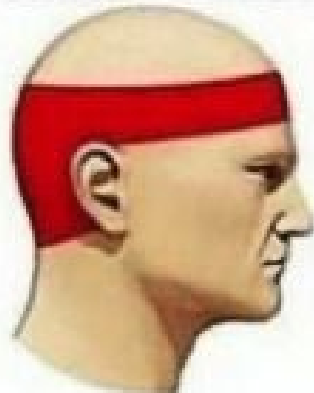
**Migraine**



**Hypertension**



**Stress**



Trying to Keep Up With Cal/OSHA





# Cal/OSHA Requirements

- ▶ For nearly a year, we were told that vaccine availability would allow business and social activity to resume at something like pre-pandemic levels
  - ▶ As vaccines began receiving Emergency Use Authorizations and growing distribution, discussions about when the restrictions would be relaxed became America's favorite parlor game
  - ▶ In early April 2021, Governor Newsom stoked the fires by teasing a "fully open" economy by mid-June
  - ▶ On May 13, the CDC issued updated guidance suggesting that the fully vaccinated could discontinue certain social distancing, face covering requirements, and quarantine restrictions

# Cal/OSHA Requirements

- ▶ So why are we still talking about employee mask requirements in the future tense?
  - ▶ The CDC guidelines are just that: guidelines
    - ▶ Not legally binding
  - ▶ The state's public health guidance effective (discussed earlier) June 15 doesn't apply to employees/workers
  - ▶ For employers, the key rule that needs to be changed are the November 2020 Cal/OSHA COVID-19 Emergency Temporary Standards
  - ▶ Cal/OSHA botched its initial rollout of updated rules, which were intended to be effective June 15.

# Cal/OSHA Requirements

- ▶ On June 3, 2021, the Cal/OSHA Board readopted revised COVID-19 prevention Emergency Temporary Standards (ETS) that have been in place since November 30
- ▶ This was the outcome from a marathon meeting and public comment section that initially saw Board members reject changes in anticipation of further guidance from the California Department of Public Health (CDPH)
- ▶ These provisions were adopted by Cal/OSHA Board on June 3, slated for approval by the Office of Administrative Law in time to take effect on June 15 with the Governor's state-wide reopening



- ▶ Notable modifications (adopted at June 3 meeting)
  - ▶ Fully vaccinated employees without COVID-19 symptoms could only discontinue using masks inside when everyone else in the room (not just employees!) is fully vaccinated and not showing symptoms
    - ▶ Effectively continued to require masks for all employees in indoor retail settings (impossible to document customer status)
  - ▶ Outdoors, fully vaccinated employees could go without face coverings, but others must mask up when less than six feet away from another person

## Cal/OSHA Requirements (Adopted at June 3 Meeting)

# Cal/OSHA Requirements

- ▶ But the June 3 Standards didn't last a week
  - ▶ Massive public opposition
- ▶ On June 9, the Cal/OSHA Board voted to withdraw the proposed revisions to the ETS rules even before they could be approved as regulations by the Office of Administrative Law
- ▶ The rejected revisions were pulled after another extensive public comment session, not because there was no appetite for relaxing the rules . . . but because of the broad consensus that further relaxing would be required
- ▶ And Cal/OSHA itself suggested that further action might be expected at the upcoming June 17 meeting

# Cal/OSHA Requirements - New Proposed Rules

- ▶ Late Friday, June 11, Cal/OSHA staff released a new set of revisions to the ETS requirements from November 30, 2020
- ▶ Like the efforts from May and earlier this month, these new proposed changes are not legal requirements — yet!
  - ▶ They will need Cal/OSHA Board approval, most likely on June 17
  - ▶ They will need approval from the Office of Administrative Law, most likely by the end of June
- ▶ Only then will the November 30 ETS rules be modified to recognize the impact of the vaccine distribution efforts and overall reduction on COVID-19 cases



# Cal/OSHA Requirements Proposed (not yet effective)

## ► Face Covering Changes

- In most cases, vaccinated workers will no longer be required to use face coverings
  - Face Covering regulations were modified to apply only to “all Employees who are not fully vaccinated”
    - However, workers should still wear face coverings when on test drives or operating shuttle, when other persons present (same as customers).
  - Employers are obligated to provide Face Coverings to Employees upon Request, including N95 Respirators
- Unvaccinated individuals will be required to wear Face Coverings unless existing exceptions apply

- ▶ Employee exclusion (i.e., self-isolation) requirements
  - ▶ General rule: employees that come in close contact with infected individual during infectious period should be excluded from workplace
  - ▶ Exceptions:
    - ▶ Asymptomatic fully vaccinated employees
    - ▶ Employees that are exposed but have recovered from COVID-19 within the last 90 days
    - ▶ Employees that were exposed but were properly wearing N95-style respirators (not regular face masks)
- ▶ Physical distancing and sanitation rules also relaxed

Cal/OSHA  
Requirements  
Proposed (not  
yet effective)

## ► New Training Requirements

- Employers are required to provide training on the availability and use of N95 Respirators, which are also available upon request
- COVID-19 Training requirements now also include training on “the fact that vaccination is effective at preventing COVID-19, protecting against both transmission and serious illness or death.”
- Training on new ventilation, filtration, and air quality for indoor environments is required under the new proposed rules

Cal/OSHA  
Requirements  
Proposed (not  
yet effective)

- ▶ What are some provisions that did not change substantially?
  - ▶ The revised ETS **does not change** the requirement to implement a screening process for identifying and responding to employees with symptoms
    - ▶ Symptom Checkers must continue
  - ▶ The revised ETS still requires the employer to make testing available (on company time and company dime) to employees who have had a “close contact” exposure in the workplace
  - ▶ Wage Continuation Requirements
    - ▶ Same rules apply
    - ▶ Interaction with SB 95 paid leave / Federal tax credit (discussed later)
      - ▶ Revised leave request form available on CNCDA Comply

Cal/OSHA  
Requirements  
Proposed (not  
yet effective)



# Cal/OSHA Requirements

- ▶ Key takeaways:
  - ▶ As discussed in the prior section, fully vaccinated customers do not need to wear masks (except in limited circumstances) beginning June 15.
  - ▶ Fully vaccinated employees will likely need to wear masks until the end of the month.
    - ▶ Cal/OSHA should make a decision on this at its June 17 meeting; rules would be effective roughly 10 days later.
    - ▶ Stay tuned!
  - ▶ Updates to your COVID-19 Prevention Program will most likely be required later this month



# Part 3 EMPLOYEE VACCINATION ISSUES

# Vaccine Policies at Your Dealership

- ▶ Our Current Advice: Don't require your employees to get the vaccine
  - ▶ There is a lot of disagreement in the legal community about this because the vaccines are not currently "FDA-approved," they are only *authorized* for emergency use.
  - ▶ After the vaccines are FDA-approved, mandatory vaccinations (with exceptions with persons with disabilities and sincerely held religious beliefs) will be possible. Talk to counsel before doing this.
- ▶ You must provide paid leave to employees getting the vaccine or suffering vaccine side effects (discussed later)

# Vaccine Policies

- ▶ Can I require proof of vaccination of employees?
  - ▶ This question implicates multiple legal issues—confidential medical information, invasion of privacy, discrimination, etc.
- ▶ Can I condition the benefits of vaccination upon the employee providing proof of vaccination?
  - ▶ Yes. If the employee wants to take advantage of special status of vaccinated persons (e.g., not wearing a mask) or not being subject to quarantine when the person has had close contact exposure, then the employer can require proof.



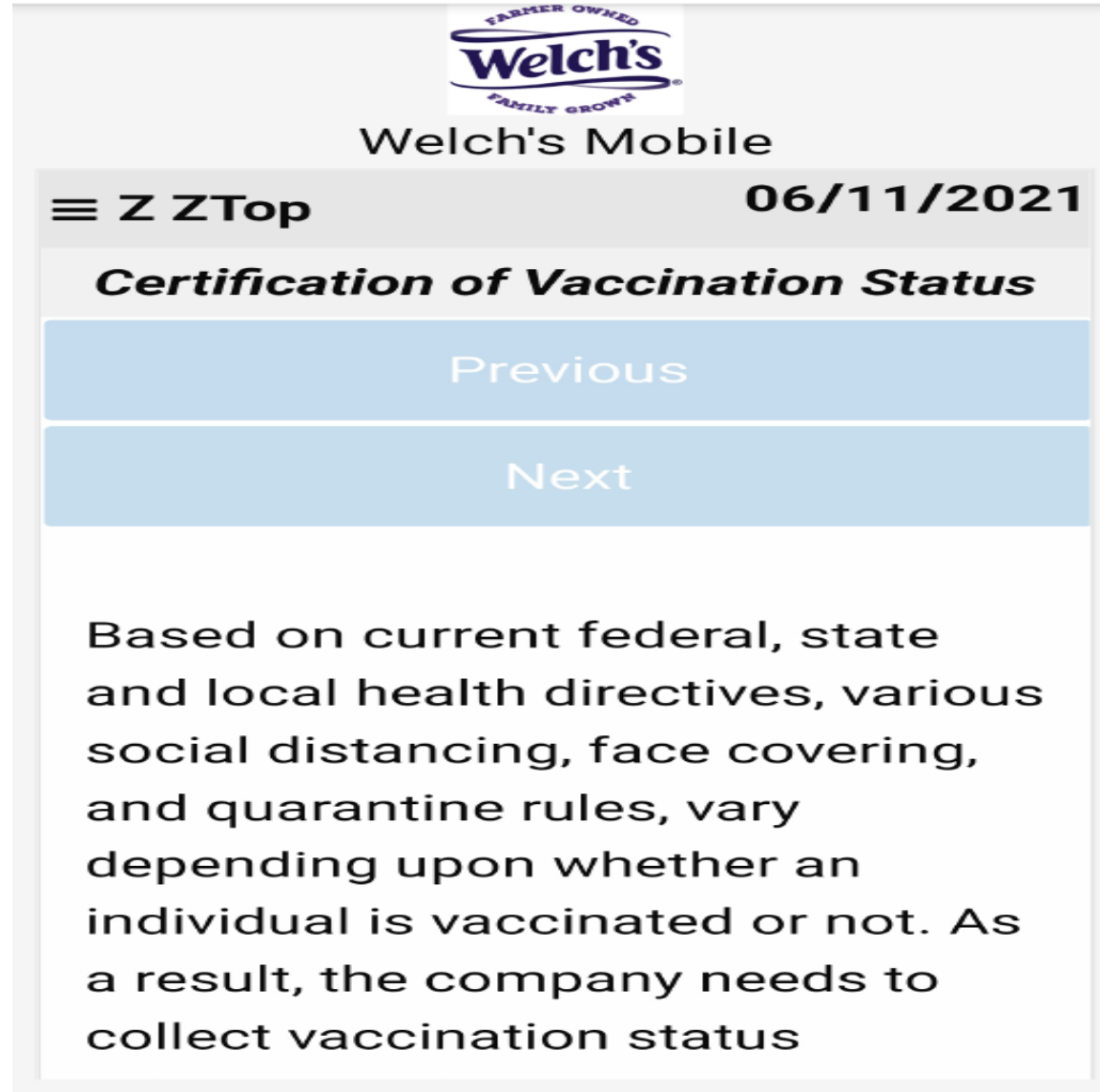
# Vaccine Status Collection

- ▶ How should I go about requiring proof?
  - ▶ Current Advice – Employees
    - ▶ Use the honor system until further legal guidance is available.
    - ▶ Instead of asking to see the actual vaccination record, use a written survey to find out status without requiring the actual vaccination record.
    - ▶ County of Santa Clara has gone with this approach and is requiring that all employers get the answers to a survey from employees to determine their status. We expect other jurisdictions will follow this example.
    - ▶ Key to Questionnaire: Make the questionnaire mandatory, but give the option to employee to decline to answer the question.
    - ▶ Of course, if the employee declines to answer, they would not be eligible for vaccination perks.

# Vaccine Status Collection

- ▶ We can already hear the pushback. Another questionnaire? Another process? More documents to store?
- ▶ HR Hotlink to the rescue
  - ▶ Whether you use the full HR Hotlink suite or just the symptom checker, HR Hotlink fixed the problem.
  - ▶ Here is how it works

# HOW IT WORKS



The image shows a mobile application interface for Welch's. At the top is the Welch's logo with the text "FARMER OWNED" above it and "FAMILY GROWN" below it. Below the logo is the text "Welch's Mobile". Underneath is a navigation bar with a hamburger menu icon, the text "Z ZTop", and the date "06/11/2021". The main content area is titled "Certification of Vaccination Status". Below this title are two blue buttons: "Previous" and "Next". At the bottom of the screen is a paragraph of text explaining the purpose of the app.

**Welch's**  
FARMER OWNED  
FAMILY GROWN

Welch's Mobile

≡ Z ZTop 06/11/2021

***Certification of Vaccination Status***

Previous

Next

Based on current federal, state and local health directives, various social distancing, face covering, and quarantine rules, vary depending upon whether an individual is vaccinated or not. As a result, the company needs to collect vaccination status

# HOW IT WORKS



## Welch's Mobile

- ☐ I am fully vaccinated.  
I received my second dose of the Pfizer or Moderna vaccine or my single dose of a Johnson & Johnson vaccine less than two weeks ago.
- ☐ I received my first dose of Moderna or Pfizer, and my second appointment is scheduled.  
I have not yet been vaccinated, but I have already scheduled an appointment to receive my first dose of vaccine.
- ☐ I have not been vaccinated.
- ☐ I decline to answer whether I have been vaccinated.

I understand that I am required to provide accurate information in response to the question above. I hereby affirm that I have accurately and truthfully answered

# HOW IT WORKS

≡ Z ZTop

06/11/2021

Vaccination Declaration Report

« ↺ 🖨

Company

Welch's Mobile

Workgroup

All

All

A			
B	⬆	⬆	⬆
C			
D	Z ZTop	06/11	Single/Both less than 2 weeks
E	Lorelei Adamson	06/11	Fully Vaccinated
F			
G	Somerset Willison	06/10	Second Scheduled
H			
I	Sybilla Ven Niekerk	06/10	Fully Vaccinated
J			
K	Ky Phipard-Shears	06/10	Decline Answer
L			
M	Henrie Knibbs	06/10	Single/Both less than 2 weeks
N			
O	Shina Hilliam	06/10	Not Vaccinated
P			
Q	Shirlee Haacker	06/10	Fully Vaccinated
R			
	Otto Goodliff	06/10	Decline Answer
	Boniface Elkin	06/10	First Scheduled





# Part 4 CONTINUING COMPLIANCE ISSUES

# COVID-19 Paid Sick Leave Requirements

- ▶ FFCRA (Families First Coronavirus Response Act)
  - ▶ Passed by Congress in March 2020.
  - ▶ Paid leave mandate applied to employers with fewer than 500 employees.
  - ▶ Included tax credits to offset business cost of providing leave.
  - ▶ Paid leave mandate expired on December 31, 2020.
  - ▶ December COVID-19 stimulus package modified and extended the tax credits.
    - ▶ Extended tax credits on existing allotments through March 31, 2021

# COVID-19 Paid Sick Leave Requirements

- ▶ ARPA (American Rescue Plan Act)
  - ▶ Passed by Congress this Spring.
  - ▶ Continued tax credits to offset business cost of providing leave for those who choose to offer paid leave.
    - ▶ Tax Credits available through September 30, 2021.
    - ▶ New balance of up to 80 hours, starting April 1, 2021.
    - ▶ Not 80 **additional** hours; 80 **new** hours, since the old unused hours are no longer available
  - ▶ Scope expanded to include vaccine-related circumstances (discussed later)

# California Paid Sick Leave (SB 95)

- ▶ Effective March 29, 2021, employers that employ more than 25 employees nationally are required to provide California employees with up to 80 hours of COVID-19 related paid leave.
- ▶ SB 95 also allows employees that took unpaid COVID-19 leave starting January 1, 2021 to request reimbursement.
  - ▶ Request may be oral or in writing
  - ▶ For example, if employee used 80 hours in February 2021 and employer used accrued sick leave pay (not EPSL under the FFCRA) to pay employee, employer may have to reinstate sick leave balance used and/or pay the difference.

# California Paid Sick Leave (SB 95)

- ▶ How much time?
  - ▶ 80 hours (full time)
  - ▶ Equivalent amount for part time employees
    - ▶ 14 times the average daily earnings over the previous six months
- ▶ Employers may not require employees to use other leave first.
  - ▶ But other leave may be used if \$511/day cap is reached
- ▶ Must be listed on wage statements as a distinct item.
  - ▶ Separate line item on paystub when used
  - ▶ Paystub must list remaining SB 95 leave available
  - ▶ Possible Huge Problem For Payroll Reporting



# California Paid Sick Leave (SB 95)

## EMPLOYEE NOTICE REQUIREMENT

- ▶ Poster: 2021 COVID-19 Supplemental Paid Sick Leave
  - ▶ Post in normal places where notice are posted
  - ▶ <https://www.dir.ca.gov/dlse/2021-COVID-19-Supplemental-Paid-Sick-Leave.pdf>
- ▶ Email to employees if no practical place to post

### **2021 COVID-19 Supplemental Paid Sick Leave**

Effective March 29, 2021

Covered Employees in the public or private sectors who work for employers with more than 25 employees are entitled to up to 80 hours of COVID-19 related sick leave from January 1, 2021 through September 30, 2021, immediately upon an oral or written request to their employer. If an employee took leave for the reasons below prior to March 29, 2021, the employee should make an oral or written request to the employer for payment.

**A covered employee may take leave** if the employee is unable to work or telework for any of the following reasons:

- Caring for Yourself: The employee is subject to quarantine or isolation period related to COVID-19 as defined by an order or guidelines of the California Department of Public Health, the federal Centers for Disease Control and Prevention, or a local health officer with jurisdiction over the workplace, has been advised by a healthcare provider to quarantine, or is experiencing COVID-19 symptoms and seeking a medical diagnosis.
- Caring for a Family Member: The covered employee is caring for a family member who is subject to a COVID-19 quarantine or isolation period or has been advised by a healthcare provider to quarantine due to COVID-19, or is caring for a child whose school or place of care is closed or unavailable due to COVID-19 on the premises.
- Vaccine-Related: The covered employee is attending a vaccine appointment or cannot work or telework due to vaccine-related symptoms.

#### **Paid Leave for Covered Employees**

- 80 hours for those considered full-time employees. Full-time firefighters may be entitled to more than 80 hours, caps below apply.
  - For part-time employees with a regular weekly schedule, the number of hours the employee is normally scheduled to work over two weeks.
  - For part-time employees with variable schedules, 14 times the average number of hours worked per day over the past 6 months.
- Rate of Pay for COVID-19 Supplemental Paid Sick Leave: Non-exempt employees must be paid the highest of the following for each hour of leave:
  - Regular rate of pay for the workweek in which leave is taken
  - State minimum wage
  - Local minimum wage
  - Average hourly pay for preceding 90 days (not including overtime pay)
- Exempt employees must be paid the same rate of pay as wages calculated for other paid leave time.

**Not to exceed \$511 per day and \$5,110 in total for 2021 COVID-19 Supplemental Paid Sick leave.**

**Retaliation or discrimination against a covered employee requesting or using COVID-19 supplemental paid sick leave is strictly prohibited.** A covered employee who experiences such retaliation or discrimination can file a claim with the Labor Commissioner's Office. Locate the office by looking at the [list of offices on our website](http://www.dir.ca.gov/dlse/DistrictOffices.htm) (<http://www.dir.ca.gov/dlse/DistrictOffices.htm>) using the alphabetical listing of cities, locations, and communities or by calling 1-833-526-4636.

This poster must be displayed where employees can easily read it. If employees do not frequent a physical workplace, it may be disseminated to employees electronically.



Copyright © 2021 State of California, Department of Industrial Relations. Permission granted to display, perform, reproduce and distribute exclusively for nonprofit and educational purposes, and may not be used for any commercial purpose. All other rights reserved.

# Coordinated Bases for Paid COVID-19 Leave

- ▶ The Original FFCRA bases have been largely retained, albeit with some tweaks
- ▶ Subject to a quarantine or isolation order (state, local, CDC)
- ▶ Advised by a health professional to self-quarantine
- ▶ Experiencing COVID-19 Symptoms and Actively Seeking Diagnosis
  - ▶ ARPA expansion no longer requires symptoms, but covers time seeking diagnosis following exposure to COVID-19 or where the employer requests that the employee obtain a test
  - ▶ SB 95 still refers to symptoms

# Coordinated Bases for Paid COVID-19 Leave

- ▶ Caring for a family member in isolation.
- ▶ Caring for a child whose school/daycare is closed due to COVID-19.
  - ▶ SB 95 qualifies this by requiring not just COVID-related closure of school or care facility, but that the closure is related to COVID-19 on the premises
  - ▶ Note: ARPA would permit leave (intermittent or block time) for school closures (or partial school closures)
- ▶ Attending appointment for COVID-19 vaccine.
- ▶ Experiencing symptoms related to COVID-19 vaccine.

# Additional Paid COVID-19 Leave Considerations

- ▶ ARPA Tax Credit provisions are voluntary, but not intended for cafeteria-style application
  - ▶ Employers cannot pick-and-choose for which bases they will offer paid sick leave; all or nothing is the rule
  - ▶ Employers are not permitted to discriminate between employees to whom the leave will be offered
    - ▶ Highly-compensated employees, full-time employees, or based on length of employment

# Additional Paid COVID-19 Leave Considerations

- ▶ Leave Valuation Considerations
  - ▶ \$511 per day cap (for employee's own conditions) remains in place under ARPA deduction rules, and has been adopted under SB 95 rules
  - ▶ \$200 per day cap and 2/3 of regular pay limitation still applies under ARPA when caring for others (either isolated because of exposure or because of closed school), but California's SB 95 does not provide for the 2/3 or \$200/day limitations
- ▶ ARPA continues FFCRA six-month average for valuing paid leave and available tax credits
- ▶ SB 95 requires the higher of several options:
  - ▶ Regular rate of pay for the workweek in which leave is taken
  - ▶ Average rate of pay over prior 90 days of employment
  - ▶ State or Local Minimum Wage



# Illustrative Examples

- ▶ Example A: Salesperson misses 3 days in April 2020 following adverse post-vaccination symptoms
  - ▶ SB 95 requires paid sick leave based on 90-day average daily rate, unless average rate for current pay period were higher
    - ▶ State or Local MW rates will not generally be higher unless such rates recently increased to a level above the historical average rate
  - ▶ ARPA permits tax credit based on six-month average daily rate
  - ▶ What must the employer pay?
    - ▶ Pay the higher of (a) the 90-day average daily rate (or current pay period rate) and (b) the six-month average daily rate; and
    - ▶ Take the tax credit no higher than the six-month average daily rate

# Illustrative Examples

- ▶ Example B1: Technician used 8 days of FFCRA leave in October 2020 because of exposure quarantine, and then missed 8 additional workdays in February 2021 because of new exposure outside of work; Employer paid 2 additional FFCRA days, then 3 days of California Sick Leave (non-COVID), and then applied 3 days of accrued PTO
  - ▶ SB 95 entitles employee to 8 days of Paid Sick Leave in February
    - ▶ Even though FFCRA leave only had 2 available days left, because State 10-day leave entitlement is independent of federal allotment
    - ▶ Even though SB 95 did not become law until March 2021, because the law was specifically made retroactive to January 1, 2021 — all the employer needs to do is ask for the retroactive paid leave
  - ▶ Employer must credit back the PTO days and non-COVID Paid Sick Days, ensuring that the employee received at least the higher of the current rate of pay or the 90-day average pay for the paid time
  - ▶ Employer may take tax credit in 2021 for the 2 days of available FFCRA, but only up to the six-month average daily wage, even if leave paid at a higher 90-day average wage

# Illustrative Examples

- ▶ Example B2: Same Technician gets vaccine in mid-April and misses 10 days recovering from adverse vaccine reaction
  - ▶ SB 95 entitles employee to Paid Sick Leave for this purpose, but employee has only 2 available days left
  - ▶ But ARPA allows up to 10 days (80 hours) of paid leave from April 1, 2021
  - ▶ Employer must pay 2 days at 90-day average wage (or the six-month average, if higher), with the remaining 8 days paid at the six-month average wage
  - ▶ Tax credit available at the six-month average wage for all ten days

# Employer Leave Obligations

- ▶ Other Notable Leave Requirements
  - ▶ Cal-OSHA ETS requirements may require continued wages and benefits for employees excluded by health department rules or health care provider based on asymptomatic work-related exposure, even if other paid leave entitlements exhausted
  - ▶ California requires 3 days of paid sick leave.
  - ▶ Local ordinances may require additional sick leave.
  - ▶ Employees may also be entitled to unpaid FMLA/CFRA leave.
  - ▶ Recalled employees may be able to continue to collect unemployment benefits if they are concerned about returning to work.

Thank you!

Brian Maas, CNCDA President

[bmaas@cncda.org](mailto:bmaas@cncda.org)

916-441-2599

Anthony Bento, CNCDA Director of Legal and Regulatory Affairs

[abento@cncda.org](mailto:abento@cncda.org)

916-441-2599

John Boggs, Fine, Boggs & Perkins LLP

[jboggs@employerlawyers.com](mailto:jboggs@employerlawyers.com)

650-712-8908

David J. Reese, Fine, Boggs & Perkins LLP

[dreese@employerlawyers.com](mailto:dreese@employerlawyers.com)

562-304-5055

HR Hotlink

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

(415) 760-6849 (information)