

COVID-19

A Test of Resiliency and Flexibility



By Stephen Marmaduke, Esq.

CCOVID-19 has dramatically impacted most businesses. Although veterinary practices have demonstrated great resilience in surviving the pandemic, the impacts are considerable. Processes have changed from before the patient enters the clinic until the patient is returned to its owner. The physical, mental, and logistical impacts of the virus itself are considerable. Given these far-reaching general impacts of COVID on veterinary practice, it is a challenge to focus on and address the range of COVID-related legal issues. Moreover, legal issues and guidance around COVID are changing as rapidly as the challenges the pandemic presents.

The Families First Coronavirus Relief Act ("FFCRA") came into effect on April 1, 2020. Businesses scrambled to adopt the FFCRA without receiving clear guidance. Then, once we developed an understanding on how to approach FFCRA leaves, the FFCRA was replaced in December 2020 by hastily-enacted legislation. The new federal administration is contemplating additional changes that may be put into effect before any guidance is offered on the December 2020 legislation, and before this article is published. State laws will undoubtedly follow, and individual counties have not been bashful in issuing their own guidance or orders. In short, things are changing quickly. So where do we start?

The best approach for the veterinary profession is to (1) be nimble, (2) rely on available resources, and (3) take defensible positions.

Be Nimble in Identifying and Responding to COVID Impacts

The veterinary industry has adapted to COVID better than most. This is not happenstance. Credit must be given to vet-

erinary practices for identifying the aspects of the practice impacted by COVID and initiating changes to address them. The simple change to curbside pick-ups afforded protection to owners and staff. Unfortunately, mandates for social distancing and employee absences due to necessary quarantine or actual illness have been problematic and in some instances have forced clinics to close. As the challenges posed by the pandemic continue to evolve and knowledge regarding COVID grows, the approach to responding to COVID-related impacts must also evolve. Veterinarians, as individuals and as a profession, must continue to identify changes and take action. It is the failure to adapt that can create legal issues and jeopardize safety.

COVID has turned many aspects of business management—particularly employment practices—upside down. The numerosity and ever-changing nature of issues resembles "whac-a-mole" while the guidelines for addressing these issues are insufficient. The rights and obligations of employers and employees are unclear in these uncharted waters. Adding to the uncertainty are real health fears, political overlays, and religious beliefs.

Whether you are an employer or an employee, you must be nimble. Anticipate that there will be changes and be flexible to adopt changes. The saying "we are all in this together" applies to the workplace.

Rely on Available Resources

Multiple governmental agencies have responded to the pandemic by enacting regulations and guidance that in some instances not only overlap, but may be inconsistent. Both the federal and California governments have enacted statutes

focused on COVID-related issues generally and workplace-related issues specifically, such as the FFCRA. These statutes are products of expedited legislative processes and were intended to address immediate issues, which, as we have learned, may quickly change. To implement these statutes, federal and state administrative agencies—notably the U.S. Department of Labor and Cal/OSHA—issued emergency regulations that were not fully vetted through the normal administrative process. Generally, regulations are to be afforded the power of law, but are subject to challenge if they are inconsistent with the statutes already in place.

Additionally, some governmental bodies have issued guidance, such as the Center for Disease Control and Prevention's guidance regarding the response to COVID exposure and illness in the workplace. There have also been a number of executive orders issued by the California governor. In some cases, however, it is unclear whether these orders are enforceable directives or mere guidance. Confused? There's more! California counties have also been active in enacting their own ordinances, which may be enforced by those counties as well as orders and guidance, the enforceability of which are unclear.

When confronted with a COVID-related issue, such as employees testing positive or being forced to quarantine, where do we turn for help? There is no clear path; and there may be no clear answer. There are some resources, however, to consider including:

- **CVMA's Website (cvma.net)** – The CVMA has been proactive in posting and updating COVID-related information for members on its website. As information specific to the veterinary industry, it is a good “first stop.”
- **CDC Website (cdc.gov)** – The CDC's website contains information and “guidance” regarding the handling of COVID in the workplace. This “guidance” is not legally enforceable, but establishes standards and, arguably, “best practices.”
- **U.S. Department of Labor Website (dol.gov)** – The U.S. Department of Labor issued emergency regulations regarding the FFCRA expanded sick leave and family leave. Although the initial FFCRA leaves expired on December 31, 2020, an optional sick leave program continues through March 31, 2021. By the time this article

is published, there may be new programs administered by the Department of Labor.

- **California Department of Public Health (CDPH) (cdph.ca.gov)**
The “COVID-19 Employer Playbook” was published on September 25, 2020 by the CDPH, and is designed for businesses reopening after a shutdown.
- **Department of Industrial Regulations – Cal/OSHA Emergency Regulations (dir.ca.gov)** – Cal/OSHA has issued a series of mandatory, workplace-focused “standards” addressing social distancing and other COVID-related safety protocols, COVID reporting, workplace responses to exposures, and closures.
- **California Coronavirus Website (covid19.ca.gov)**
An ever-changing montage of information for employers and employees.
- **County Health Departments** – Most counties have websites containing local ordinances and guidance ranging from rent protections to information regarding sick leave. Many county health departments also provide telephonic guidance, particularly concerning COVID-related health issues.

Maintain a Defensible Position

Because of the dynamic nature of the pandemic, even the best resources can sometimes be of little assistance. In scenarios that are novel or where guidance is contradictory, the best approach is take a defensible, “safety-first” position. A defensible position is one that is based upon—even if it does not exactly follow—generally accepted authorities, including laws, regulations, ordinances, orders, and guidance. Depending on the situation a practice may be facing, there may be different options presented. At that point, reasonable judgment emphasizing safety should be used. In the end, the rationale for actions should be documented along with references to the resources supporting the decision.

Conclusion

The challenges of this pandemic are unprecedented. Avoiding legal issues will require both employers and employees to respond nimbly to those challenges, consider the resources available, and—if a path is not clear—be flexible in taking a defensible, safety-centric position based upon relevant laws, regulations and guidance. ■



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Mr. Marmaduke is part of the CVMA's Legal Services Program, a program designed to assist CVMA member veterinarians with workplace safety, legal issues, and laws and regulations that affect the veterinary profession.