

New Requirements – COVID in the Workplace

SAN MATEO COUNTY

SILICON VALLEY
CONVENTION AND VISITORS BUREAU

TODAY'S SPEAKERS



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Workplace Strategies Cal/OSHA Implications of COVID-19

November 17, 2020

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- Defends employers in litigation in federal and state court
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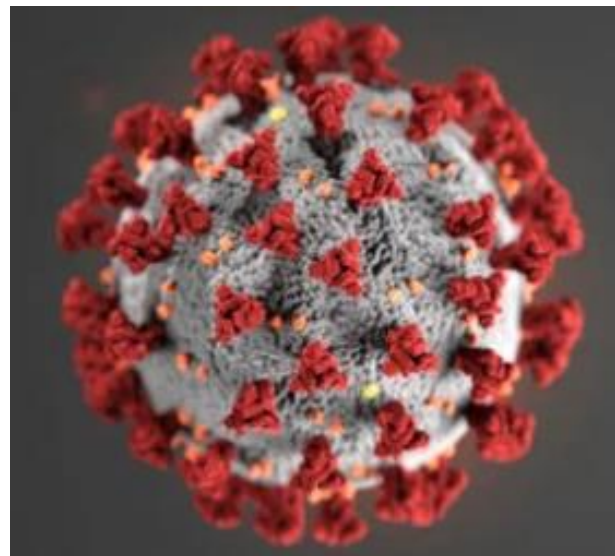
MEGAN STEVENS SHAKED is an Associate in the Workplace Safety and Employment Practices at **Conn Maciel Carey's** San Francisco office, where she focuses her practice on a wide-range of employment litigation and counsel for clients on myriad legal issues employers face in the workplace, including all aspects of the employment relationship:

- Defends employers in litigation in federal and state court
- Counsels employers on compliance with employment laws
- Represents employers in inspections, investigations and enforcement actions involving Cal/OSHA

AGENDA

✓ Cal/OSHA Implications of COVID-19 in the Workplace

- Interim Guidelines on Protecting Workers from COVID-19
- Temperature/Symptom Screening
- Requiring Face Coverings
- COVID-19 Illness Recording and Reporting Guidance
- New CA Legislation - AB 685 and SB 1159
- Cal/OSHA's Proposed Emergency COVID-19 Rule





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Recent California COVID-19 Legislation

Assembly Bill 685 (Effect. 1/1/21)

- AB 685 creates uniformity in reporting of workplace **“COVID-19 outbreaks”** to Department of Public Health (DPH)
 - “COVID-19 outbreak” means 3+ more lab-confirmed cases within a two-week period among employees living in different households
 - Any “COVID-19 outbreak” must be ***reported to the local public health agency*** where the worksite is located ***w/n 48 hours***
- State DPH is required to make this info available on its website allowing general public to ***“track the number and frequency of COVID-19 outbreaks and the number of COVID-19 cases and outbreaks by industry”***

Assembly Bill 685

- For any workplace exposure to COVID-19, employer must provide ***notice to all employees and the employers for subcontracted employees*** at the same worksite within the infectious period that “***may have been exposed to COVID-19***”
 - Written notice must be given within ***1 business day***
- If workforce is unionized, must be provided notice to union
- ***Specific content required*** for the written notice

Senate Bill 1159 (Effect. Imm.)

- Creates a “*disputable presumption*” that a COVID-related illness is compensable for WC purposes generally where:
 - employee has tested positive for **COVID-19 during an “outbreak”** at employee’s place of employment and within 14 days after a day that employee was in the workplace; AND

the employee’s last day in the workplace was on or after July 6, 2020.
- An “*outbreak*” exists if within 14 calendar days any of the following has occurred:
 - For employer with 100 or fewer employees at a specific workplace, 4 employees test positive for COVID-19
 - for employer with more than 100 employees at a specific workplace, 4 percent of the employees test positive for COVID-19
 - the workplace is ordered closed by the health department or Cal/OSHA due to a risk of COVID-19 infection

Senate Bill 1159

- SB 1159 requires that available paid sick leave benefits be used and exhausted before any temporary disability benefits are paid
- COVID-19 related illness is presumed compensable where it is not rejected within 45 days after the date the claim form is filed
- For any employee who has tested positive during an outbreak, the employer must make a report to its WC claims administrator (used to determine if an outbreak has occurred in administering claims)
- An employer that fails to provide this report may be cited by the Labor Commissioner and subject to penalties.

Senate Bill 1159

- Employer must **report** to its claims administrator, by email or facsimile, ***all of the following information*** within 3 business days when the employer “knows or reasonably should have known” that an employee has tested positive for COVID-19 during an outbreak:
 - Employee has testified positive.
(Do not disclose personal ident. Info unless the employee asserts infection is work related/filed WC claim)
 - Date when employee tests positive
 - Specific address of employee’s specific place of employment during the 14-day period preceding employee’s positive test
 - Highest number of employees who reported to work at the employee’s specific place of employment in the 45-day period preceding last day the employee worked there



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Proposed Emergency COVID-19 Rule

Proposed COVID-19 Prevention Standard

- Applies to “***all employees and places of employment,***”
except for:
 - Places of employment with one employee who does not have contact with other persons
 - Employees working from home
 - Employees when covered by Aerosol Transmissible Diseases Std. [healthcare specific]
- Not intended to limit more protective or stringent state or local health department mandates or guidance

Written COVID-19 Prevention Program

- Employers must **“establish, implement and maintain”** an effective, written COVID-19 Prevent Program
- Written program must include the following elements:
 - System for communicating to employees
 - Identification and evaluation of COVID-19 hazards
 - Investigation and responding to COVID-19 cases in the workplace
 - Correction of COVID-19 hazards
 - Training and instruction
 - Physical distancing and face coverings
 - Other engineering/admin controls and PPE
 - Reporting, recordkeeping and access
 - Exclusion of COVID-19 cases from the workplace
 - Return to work criteria



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CAL/OSHA Implications of COVID-19

Relevant Cal/OSHA Standards

**Aerosol
Transmissible
Diseases**

5199

**Injury & Illness
Prevention
Program**

3203

**Personal
Protective
Equipment**

3380

**Control of Harmful
Exposures**

5141

**Reporting &
Recording**

342 and 14300

CAL/OSHA Guidance on COVID-19



State of California

Department of Industrial Relations

Cal/OSHA Interim General Guidelines on Protecting Workers from COVID-19

May 14, 2020

Background

Cal/OSHA's regulations require protection for workers exposed to airborne infectious diseases such as the 2019 novel coronavirus disease (COVID-19). This interim guidance does not impose new legal obligations. It provides employers and workers with information for preventing exposure to the coronavirus (SARS-CoV-2), the virus that causes COVID-19. Employers and employees should review their own health and safety procedures as well as the recommendations and standards detailed below to ensure workers are protected.

Employers Covered by the ATD Standard

Cal/OSHA requires employers covered by the Aerosol Transmissible Diseases (ATD) Standard (title 8, [section 5199](#)) to protect employees from airborne infectious diseases such as COVID-19 aerosols. The ATD Standard applies to:

1. Hospitals, skilled nursing facilities, clinics, medical offices, outpatient medical facilities, health care facilities, hospices, medical outreach services, medical transport and other health care facilities.
2. Certain laboratories, public health services and police services that are reasonably expected to handle aerosol transmissible diseases.
3. Correctional facilities, homeless shelters, and drug treatment programs.
4. Coroner's offices, mortuaries, funeral homes, and other facilities that perform autopsies and handle cadavers.
5. Any other locations when Cal/OSHA informs employers in writing that they must implement the ATD Standard.

When covered employers effectively implement the ATD Standard, they also reduce exposure to COVID-19 in the workplace who may not have patient contact, and the community as a whole. Review section 5199 and any current interim compliance guidance on the Cal/OSHA website for further information.

Additional Cal/OSHA Regulations for Employers Not Covered by the ATD Standard

Although the scope of the ATD Standard is limited to certain employers, there are other Cal/OSHA regulations that apply to all employers. COVID-19 precautions that may be required by these standards are applicable to most workplaces in California, particularly those with significant public interaction such as retail establishments and service industries since COVID-19 is widespread in the community.

Injury and Illness Prevention Program (IIPP)

California employers are required to establish and implement an IIPP (title 8 [section 3203](#)) to protect employees from workplace hazards, including infectious diseases. Employers are required to determine if COVID-19 infection is a hazard in their workplace. If it is a workplace hazard, then employers must implement infection control measures, including applicable and relevant recommendations from the Centers for Disease Control and Prevention (CDC), [Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 \(COVID-19\)](#), and [Coronavirus Disease 2019 \(COVID-19\): How to Protect Yourself & Others](#). For most California workplaces, adopting changes to their IIPP is mandatory since COVID-19 is widespread in the community.

Worksite-Specific COVID 19 Prevention Plan

- Establish a written, worksite-specific COVID-19 prevention plan at every facility, perform a comprehensive risk assessment of all work areas, and designate a person at each facility to implement the plan
- Identify contact information for the local health department for communicating info about COVID-19 outbreaks among employees
- Train and communicate w/ employees/employee reps on the plan
- Regularly evaluate the workplace for compliance with the plan and document and correct deficiencies identified
- Investigate any COVID-19 illness and determine if any work-related factors could have contributed to risk of infection.
- Identify close contacts (w/in 6' for 15 min. +) of an infected employee and isolate COVID-19 positive employee(s) and close contacts

Protective Measures to Consider

- Implement COVID-19 Exposure/Infection Control Plan
- Engineering controls (e.g., high-efficiency air filters, increase ventilation rates, install physical barriers, etc.)
- Admin. controls (e.g., require sick workers to stay home, virtual meetings, implement telework if feasible, job rotations/staggered shifts, requiring face coverings, etc.)
- Safe work practices (procedures to reduce duration, frequency, or intensity of exposures; e.g., requiring regular hand washing)
- PPE (conduct temporary PPE Hazard Assessment (e.g., face shields, respiratory protection, gloves, gowns, etc.)



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Procedures Impacting Employers

Health Screening Procedures

- If employers are planning to do any diagnostic testing on workers, they must follow CDC guidance and regulatory requirements including:
 - Testing must be job related and consistent w/ business necessity
 - Employer must ensure tests are accurate and reliable
 - Employers should still require that employees observe infection control practices
 - Employers who are testing and recording must keep the records for one year, maintain confidentiality and comply w/ Calif. Consumer Privacy Act (possibly required to be kept for 30+ years pursuant to Cal/OSHA's Employee Medical Record rule)



Health Screening Procedures

- Employers can require employees to participate in testing even if they do not exhibit symptoms
 - Note: This is permissible under the “Direct Threat Exemption” of the ADA
- A negative test does not mean an employee will not be infected later, so employers should keep following the guidance of medical and public health authorities
- Consider having employees self-monitor and/or fill out questionnaires



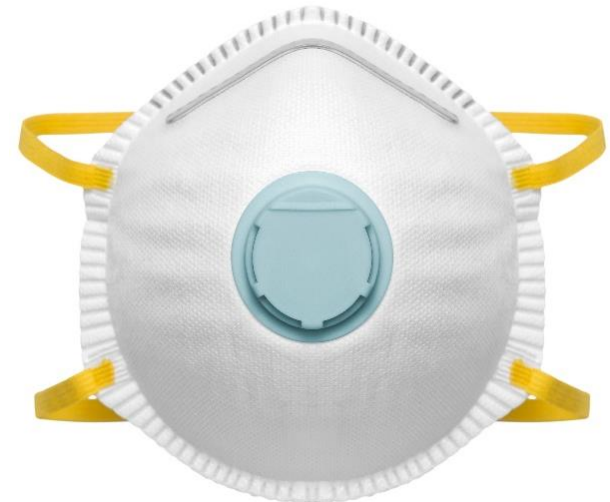
Health Screening Procedures

- Employers must:
 - Conduct testing in a non-discriminatory manner
 - Maintain the confidentiality of test results
 - Determine whether time related to testing is compensable under federal and state wage and hour laws
 - Have protocols in place for employees who refuse testing
 - Have consent / acknowledgement forms
 - Establish protocols for notifying employees of results
 - Determine when and under what conditions employees who test positive can return to work



Requiring Employees to Wear Masks

- Employers may require use of face coverings in the workplace:
 - A face covering is a cloth, bandana, or other type of materials that covers an employee's mouth and nose.
 - The CDC lists five criteria for “cloth face coverings:”
 1. Fit snugly but comfortably against the side of the face
 2. Be secured with ties or ear loops
 3. Include multiple layers of fabric
 4. Allow for breathing w/out restriction
 5. Be able to be laundered and machine dried without damage or change to shape



Requiring Employees to Wear Masks

- **What if an employer has distributed face coverings, but an employee fails to bring their face covering to work?**
 - Because face coverings are considered protective equipment, the employee should not be permitted to work on-site until s/he is able to obtain a face covering
- **What if employees want to use their own face coverings?**
 - Must make sure the coverings meet the CDC's requirements and that they clean them correctly
 - Employers should provide employees a reimbursement or subsidy for material and cleaning costs
 - Must be work appropriate and cannot feature offensive images or content

Requiring Employees to Wear Masks

- Employers should provide training to employees at the time that face coverings are distributed or implemented
- If an employee declines to wear a face covering for medical reasons, employers should engage in the interactive process with such employees as required by the ADA
- An employee who cannot breathe through a face covering should not be required to wear one, but may need to be temporarily removed from customer-facing responsibilities, provided with leave, or accommodated in some other fashion





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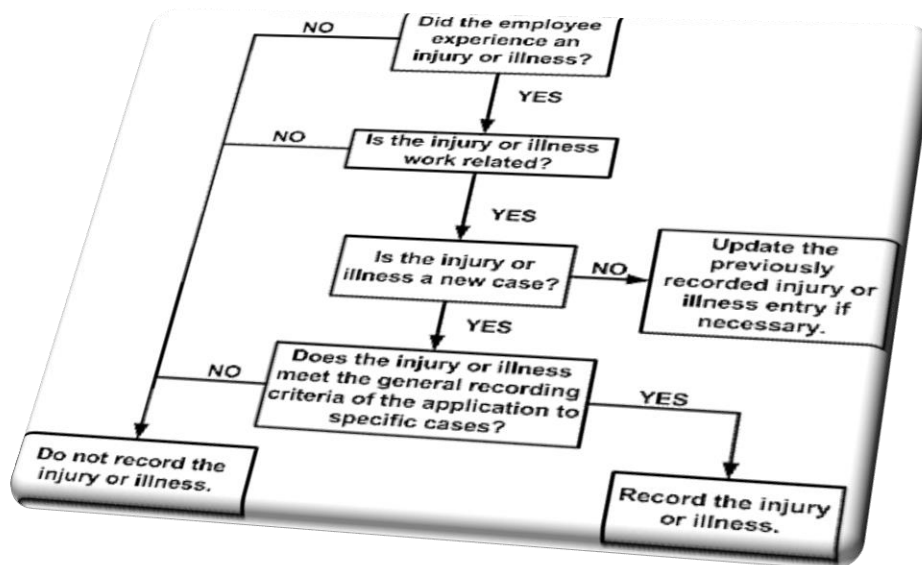
Cal/OSHA COVID-19 Recordkeeping and Reporting

Cal/OSHA Recordkeeping Requirement

W/in 7 calendar days, covered employers must record every injury, illness or fatality that are:

- 1) work-related;
- 2) a new case; AND
- 3) meet 1+ of the general recording criteria – i.e., it results in any of:

- Death
- Days away from work
- Restricted work or transfer to another job
- Medical treatment beyond 1st aid
- Loss of consciousness




Cal/OSHA Recordkeeping FAQs COVID-19

- Does a COVID-19 case have to be **confirmed** to be recordable?
 - No. Unlike Fed OSHA's guidance, Cal/OSHA's FAQs now make clear that Cal/OSHA does NOT require a positive test for COVID-19 to trigger recording requirements
- Is time employee spends in **quarantine** considered *days away from work*?
 - Unless employee has a work-related illness that would otherwise require days away from work, time spent in quarantine is NOT *days away from work* for recording
 - This likely means quarantine days do not count, if it was precautionary only (i.e., quarantine b/c of a close contact, but it is later confirmed the employee did not contract the illness)

Cal/OSHA Form 300 (Rev. 7/2007) Appendix A
Log of Work-Related Injuries and Illnesses

Attention: This form contains information relating to employee health and must be used in a manner that protects the confidentiality of employees to the extent possible while the information is being used for occupational safety and health purposes.
 See CCR Title 8, 14300.29(b)(6)-(10).

Year 20 
 Department of Industrial Relations
 Division of Occupational Safety and Health

You must record information about every work-related death and about every work-related injury or illness that involves loss of consciousness, restricted work activity or job transfer, days away from work, or medical treatment beyond first aid. You must also record significant work-related injuries and illnesses that are diagnosed by a physician or licensed health care professional. You must also record work-related injuries and illnesses that meet any of the specific recording criteria listed in CCR Title 8, Section 14300.8 through 14300.12. Feel free to use two lines for a single case if you need to. You must complete an Injury and Illness Incident Report (Cal/OSHA Form 301) or equivalent form for each injury or illness recorded on this form. If you're not sure whether a case is recordable, call your local Cal/OSHA office for help.

Identify the person		Describe the case			Classify the case							
(A) Case no.	(B) Employee's name	(C) Job title (e.g., Welder)	(D) Date of injury or onset of illness	(E) Where the event occurred (e.g., Loading dock north end)	(F) Describe injury or illness, parts of body affected, and object/substance that directly injured or made person ill (e.g., Several degree burns on right forearm from acetylene leak)	(G) Days away from work	(H) Job transfer or restriction	(I) Restricted work activity cases	(J) Days away from work	(K) On job transfer or restriction	(L) Days away from work	(M) Check the "Injury" column or choose one type of illness:
		Inventory										(1) Injury
		Inventory										(2) Skin disorder
		Inventory										(3) Respiratory condition
												(4) Poisoning
												(5) Hearing loss
												(6) All other illnesses

Cal/OSHA's Guidance on COVID-19 Work-Relatedness

- Contrary to Fed OSHA's "more likely than not" standard and carve-out for identifiable alternative (non-work) explanations, Cal/OSHA has established a (possibly rebuttable?) **presumption** of work-relatedness if there is any identifiable workplace exposure that can be shown
- The following factors reflect a work-related exposure:
 - Interactions w/ people known to be infected with the virus
 - Working in the same area where people known to have been infected had been
 - Sharing tools, materials or vehicles w/ persons known to have been infected
- Unclear how Cal/OSHA expects employers to evaluate circumstances w/ an identifiable workplace exposure AND also an identifiable non-work exposure that is much more likely to have caused the illness

Cal/OSHA on Work-Relatedness

- Even w/ NO identifiable workplace exposure to trigger the presumption, employers must still evaluate the employee's **work duties** and **environment** to determine whether the illness is work-related (perhaps under a more-likely-than-not standard?)
- Cal/OSHA IDs the following factors as relevant for that analysis:
 - The type, extent, and duration of contact the employee had in the work environment w/ other people, particularly the general public
 - Social distancing and other controls that impact the likelihood of exposure
 - Whether the employee had work-related contact w/ anyone who exhibited signs and symptoms of COVID-19
- Any doubts about whether an injury/illness or fatality is related to a workplace must be resolved in favor of a report to the Division

Cal/OSHA COVID-19 Reporting

- “Every employer shall report immediately...to the nearest Dist. Office [] any serious injury or illness, or death, of an employee **occurring in a place of employment or in connection with any employment.**”
- “In connection with any employment”
 - Contracted in connection w/ work, regardless where symptoms onset
- “Occurring in a place of employment”
 - Serious illness or fatality that occurs at work are reportable, ***even if it is not work related***
 - Cal/OSHA FAQs make clear a non-work related COVID-19 illness occurs “in a place of employment” if the employee “became sick at work”



Conn Maciel Carey COVID-19 Task Force Resources

COVID-19 TASK FORCE

As employers around the country grapple with the employment law and workplace safety implications of the 2019 Novel Coronavirus, "COVID-19," Conn Maciel Carey has formed a multi-disciplinary legal and regulatory task force comprised of our dedicated Workplace Safety, Labor and Employment Law, and Litigation attorneys to help our clients across all industries manage the multitude of pandemic-related issues employers are facing and prepare for potential litigation that is around the corner. We have produced a comprehensive database of resources to guide employers through this uncharted territory and the unique workplace challenges presented by the presence of a new health hazard in our nation's workplaces.

Members of CMC's COVID-19 Task Force

Eric J. Conn OSHA Chair	Kara M. Maciel Labor and Employment Chair	Bryan A. Carey Partner	Nicholas W. Scala MSHA Chair
Kate M. McMahon OSHA Partner	Jordan B. Schwartz Labor and Employment Partner	Andrew J. Sommer Cal/OSHA and Employment Partner	Aaron R. Gelb OSHA and Employment Partner
Amanda Strainis-Walker OSHA Partner	Mark M. Trapp Labor and Employment Partner	Lindsay A. DiSalvo Associate	Megan S. Shaked Associate

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COVID-19 FAQs for Employers

As the COVID-19 Pandemic continues to evolve, we have created an extensive index of frequently asked questions about HR, employment, and MSHA/OSHA related regulatory developments and guidance from federal agencies and the CDC. Conn Maciel Carey's COVID-19 Task Force will be updating our list of FAQs frequently, but please reach out to us for the most up to date information.

- Employee Layoffs & Reduced Working Schedules
- Vacation, Paid Time Off & Sick Leave
- Temperature Checks for Employees
- Preventing Exposure in the Workplace
- Space Restrictions in Retail
- Employer-Employee Confidentiality
- Offer Letters & Flexible Start Dates
- The CARES Act
- OSHA Recordkeeping and Reporting of COVID-19 Cases
- Personal Protective Equipment
- Annual Physical Requirements
- On-Site Inspection Activities
- Emergency Infectious Disease Rule / NEP
- Employer Liability

COVID-19 OSHA Recordkeeping and Reporting Resource Guide

CMC's COVID-19 Task Force has prepared a series of resources to assist employers in assessing whether a COVID-19 diagnosis for one of its employees is reportable to OSHA and/or recordable on the company's OSHA 300 Log, and if so, "how to" record it on the log. The toolkit includes a COVID-19 OSHA Reporting Flow Chart, a COVID-19 OSHA Recording Flow Chart, a one-pager on "How to record" COVID-19 cases on the log, and a detailed "Work-Relatedness Questionnaire." For more information about the OSHA reporting and reporting implications of COVID-19, [read this detailed article](#).

COVID-19 FAQs for Employers

Check out our blogs:

the **OSHA DEFENSE** report



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the **EMPLOYER DEFENSE** Report



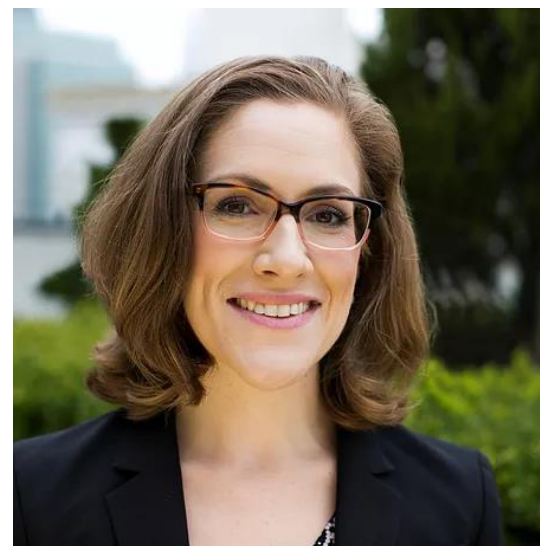
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A blurred background image of a laptop on a wooden desk. To the left of the laptop is a glass of water. To the right is a smartphone. The text 'Q&A' is overlaid in the center.

Q&A

UPCOMING VIRTUAL EVENTS

“As Fresh as it Gets” 2020 Virtual Awards Ceremony

2020 has been a challenging year to say the least, but many of our local restaurants have been more dedicated than ever to purchase San Mateo County-grown produce and products. Join us virtually on Wednesday, November 18 at 2:00 PM as we honor the chefs and restaurants who are committed to supporting local agriculture with an As Fresh as it Gets award.

Wednesday, November 18th | 2:00 PM

SPECIAL REQUEST

San Mateo County Historical Association *COVID-19 Stories*

The San Mateo County Historical Association is collecting stories that chronicle changes to people's daily lives in the wake of COVID-19. Journal entries from the past provide a glimpse into what daily life was like during a specific time period.

They also provide insight by showing individual reactions to significant historical events. All ages and backgrounds are encouraged to participate.

[More Information >>](#)



Thank you for Joining Us!

ADDITIONAL QUESTIONS?

Please contact Nova Maldonado at Nova@visitsmcsv.com.

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