New California Laws Create Presumption of Workers' Compensation Coverage for COVID-19 Infections and Impose Additional COVID-19 Exposure Reporting and Notice Requirements on Employers

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California Gov. Gavin Newsom signed Executive Order N-62-20—way back on May 6, 2020—which created a presumption that employees' COVID-19-related illnesses were caused at work and therefore covered by workers' compensation. That order covered COVID-19 infections from March 19, 2020 to July 5, 2020, at which time the order expired. To fill the void, on September 17, 2020, Gov. Newsom signed Senate Bill ("SB") 1159 and Assembly Bill ("AB") 685 into law.

SB 1159 resets the rebuttable presumption establishing workers' compensation benefits for certain employees who contract COVID-19. At the same time, California passed AB 685, which allows the state to more closely track COVID-19 cases in the workplace by requiring employers to timely report COVID-19 related exposure information to the California Division of Occupational Safety and Health ("Cal/OSHA"). AB 685 also requires employers to provide notice to employees of workplace COVID-19 exposures.

I. SB 1159 Reinstitutes the Workers' Compensation Rebuttable/Disputable Presumption, With Some Twists.

Workers' compensation benefits are generally limited to injuries that occur in the course of performance of an employee's job duties. SB 1159 creates a disputable presumption that certain employees who test positive for COVID-19 within 14 days after performing work at the place of employment, contracted COVID-19 at work and therefore are entitled to workers' compensation benefits. SB 1159 adds Sections 77.8, 3212.86, 3212.87, 3212.88 to the California Labor Code.

Compensation benefits that are awarded for injuries under SB 1159 include full hospital, surgical, medical treatment, wage replacement benefits, disability indemnity, and death benefits. The law makes a workers' compensation claim relating to a COVID-19 illness presumptively compensable after only 30 days, rather than the standard 90-day time period for all other types of workers' compensation claims.

The presumption of coverage is, by definition, "disputable" and thus may be controverted by other evidence that demonstrates the employee did not contract COVID-19 in the course of employment. The presumption does not apply to work the employee performs remotely at their own residence.

SB 1159 requires qualifying employees to exhaust any paid sick leave benefits available to them in response to COVID-19 before qualifying for wage replacement benefits through the workers' compensation system. Such benefits would include those available under the FFCRA and through California's paid sick leave law.

A. Which Employees Qualify for the Presumption?

All employees who contracted COVID-19 from March 19, 2020 to July 5, 2020: SB 1159 codifies Executive Order N-62-20, which creates the presumption for all employees working in California—regardless of the employer's size—who tested positive for, or were diagnosed by a qualified physician as having, COVID-19 within 14 days after performing work directed by the employer at the employee's place of employment from March 19, 2020 to July 5, 2020.

Essential Workers: The presumption applies to active firefighters, peace officers, fire and rescue service coordinators, employees who provide direct patient care at a home health agency or at a health facility (including custodial employees who come in contact with COVID-19 patients), registered nurses, emergency medical technicians, and providers of in-home supportive services. The presumption also applies generally to employees of health facilities, unless the employer can establish that the employee did not have contact with a COVID-19 patient within the last 14 days of the employee's diagnosis.

All employees of companies with 5 or more employees during an "outbreak": The presumption also applies to all employees who test positive during an "outbreak" at the employee's specific place of employment, and whose employer has five or more employees. An **outbreak** exists if, within 14 calendar days:

- the employer has 100 employees or fewer at a specific place of employment, and 4 employees test positive for COVID-19; or
- the employer has more than 100 employees at a specific place of employment, and at least 4% of the employees at a specific place of employment test positive for COVID-19; or
- a specific place of employment is ordered to close by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent due to a risk of infection with COVID-19.

"Specific place of employment" means the specific building, store, facility, or agricultural field where the employee performs work. This does not include the employee's home unless the employee provides home health care services to another individual at the employee's home or residence. The law does not define "facility," nor does it address whether the presumption applies to employees who perform work exclusively outside these defined areas.

B. SB 1159's Reporting Requirement

SB 1159 also creates a COVID-19 reporting requirement for employers. Specifically, when the employer "knows or reasonably should know" that an employee has tested positive for COVID-19, the employer must report all the following to their workers' compensation claims administrator in writing via e-mail or facsimile, within three business days:

1. That an employee has tested positive for COVID-19. The employer must not provide any personally identifiable information regarding the

employee who tested positive for COVID-19 unless the employee asserts the infection is work-related or has filed a claim form pursuant to Labor Code section 5401;

2. The date that the employee tested positive, which is the date the specimen was collected for testing;

3. The specific address or addresses of the employee's specific place of employment during the 14-day period preceding the date of the employee's positive test; and

4. The highest number of employees who reported to work at the employee's specific place of employment in the 45-day period preceding the last day the employee worked at each specific place of employment.

C. SB 1159's Effective Dates

SB 1159 is enforceable from July 6, 2020 until January 1, 2023, at which time it will be automatically repealed if not extended by the Legislature.

II. AB 685

A. Employers Are Required to Notify Employees After COVID-19 Infections

If a public or private employer in California receives notice of a potential workplace exposure to COVID-19, AB 685 will require the employer to take all of the following actions ***within one business day*** of notice of the potential exposure:

1. Provide a written notice to all employees, and the employers of subcontracted employees, who were on the premises at a worksite within the infection period who may have been exposed to COVID-19. The notice must be sent in a manner the employer normally uses to communicate employment-related information, including personal service, email, or text message if it can reasonably be anticipated to be received by the employee within one business day of sending. The notice must be in both English and the language understood by the majority of the employees.

2. If the employee is represented, *e.g. by an attorney or union*, the notice must be provided to the employee's representative.

3. The employer must also provide the same employees with information regarding COVID-19 related benefits to which the employee may be entitled under applicable federal, state, or local laws, including but not limited to workers' compensation benefits, FFCRA leave, company sick

leave, and any other applicable leave benefit, as well as the company's anti-retaliation and anti-discrimination policies.

4. The employer must also send to all the same employees the Company's disinfection and safety plan per the guidelines of the federal Centers for Disease Control.

Employers are required to maintain records of these notices for at least three years. Failure to comply with any of these requirements will subject the employer to a civil penalty.

B. Employers Must Report COVID-19 Outbreaks to Local Health Agency

If an employer is notified of the number of cases that meet the definition of a COVID-19 "outbreak," as defined by the State Department of Public Health, ***within 48 hours***, the employer must notify the local health agency in the jurisdiction of the worksite of the names, occupation, and worksite of all the confirmed COVID-19 cases. The employer must also report the business address and North American Industry Classification System (NAICS) code of the worksite where the COVID-19 positive employees work. The employer must also keep the local health department apprised of any subsequent laboratory-confirmed cases of COVID-19 at the worksite.

An "outbreak" is currently defined by CDPH as "three or more laboratory-confirmed cases of COVID-19 within a two-week period among employees who live in different households." (See CDPH's "COVID-19 Employer Playbook: Supporting a Safer Environment for Workers and Customers," at page 2, here: https://files.covid19.ca.gov/pdf/employer-playbook-for-safe-reopening--en.pdf.) This definition of "outbreak" differs from that regarding the workers' compensation presumption, under SB 1159.

These new notice and reporting requirements apply to all private and public employers, with two exception. First, Health Facilities, as defined in Health and Safety Code section 1250, are exempt from the 48-hour outbreak reporting requirement. Second, the notice requirements do not apply to employee's whose duties include testing or screening for COVID-19, unless the qualifying individual with COVID-19 works at their same worksite.

C. Increases Cal/OSHA's Authority to Shut Down a Company's Operations For COVID-19 Related Reasons

AB 685 extends significant authority to Cal/OSHA to shut down a "place of employment, operation, or process, or any part thereof" and to prohibit entry thereto, when "in its opinion," the working conditions expose the workers to imminent risk of COVID-19 infection. Cal/OSHA can also require posting of an imminent hazard notice at the worksite. If Cal/OSHA applies such a workplace restriction, it must then provide the employer with notice of the designation and post that notice in a conspicuous place at the worksite.

Cal/OSHA must limit the restrictions to the immediate area where the imminent hazard was identified. Further, Cal/OSHA's restrictions must not "materially interrupt the performance of

critical governmental functions essential to ensuring public health and safety functions or the delivery of electrical power or water."

D. Streamlines Cal/OSHA's "Serious Violation" Citation Process for COVID-19

Currently, Cal/OSHA regulations involve a stringent procedure for "serious violations," in which Cal/OSHA creates a rebuttable presumption of a serious violation following an inspection. The employer's rebuttal may then be used in defense of the violation in an appeal or hearing on the matter. Generally, this procedure is satisfied by Cal/OSHA sending a form containing descriptions of the suspected serious violation and soliciting information to rebut the presumption to the employer at least 15 days before issuing the citation. AB 685 streamlines this process for COVID-19 related violations, by allowing Cal/OSHA to issue a citation alleging a serious violation without requiring the agency to request information rebutting the presumption of a serious violation. Accordingly, Cal/OSHA would not need to notify an employer 15 days before issuing a serious violation related to COVID-19. Employers would therefore be wise to produce all relevant evidence to Cal/OSHA during an investigation because there will not be an opportunity to raise defenses after the document request process is complete and a serious violation citation is issued.

E. AB 685's Effective Dates

AB 685 is not effective until January 1, 2021, so employers have some time to prepare for the many changes it will bring. AB 685, and the statutes it creates (including Labor Code sections 6325, 6409.6, 6432), will automatically repeal on January 1, 2023, unless they are extended further by the Legislature.