California Governor Enacts Legislation to Expand COVID-19 Protections for California Employees and Impose Additional Requirements on California Employers

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Who Needs to Know
All employers with California employees.

Why It Matters
California's newest legislation, some of which went into effect immediately, imposes stringent reporting requirements, creates presumptions for workers' compensation benefits, and expands protections for California employees. California employers should be prepared to revise their current practices and policies and develop new processes to comply with these newly enacted laws.

Since the emergence of the COVID-19 pandemic, employers have had to learn about and comply with newly enacted legislation and requirements that affect their employees and operations. As we enter the final quarter of 2020, California employers must again be prepared to quickly respond to new legislation that expands COVID-19 protections for California employees and imposes stringent requirements on California employers. This month, California Governor Gavin Newsom signed three COVID-19-related bills into law which affect employee rights — two of which became effective immediately upon signing: 1) SB 1159; 2) AB 659; and 3) AB 1867.

Senate Bill 1159: "Workers' Compensation: COVID-19"

Overview

- **Who is affected**: All California employers with five or more employees
- **Effective date**: September 17, 2020, and applies to COVID-19 infections after July 6, 2020
- **End date**: Infections through January 1, 2023
- **Effect**:
  - Creates a presumption of entitlement to workers' compensation benefits for employees infected with COVID-19 if:
    - The employee tested positive for or was diagnosed with COVID-19 within 14 days after performing labor or services at the employee's "place of employment" (excluding the employee's residence) at the employer's direction;

- The employee tests positive during an "outbreak" at the specific place of employment (as determined by the employer's claims administrator); and
- The employer has five or more employees.

- Shortens timeframe to make a workers' compensation liability determination from 90 to 45 or 30 days, depending on the type of employee.
- Imposes employer reporting obligations within three (3) business days to an employer's workers' compensation claims administrator when the employer "knows or reasonably should know that an employee has tested positive for COVID-19."

Conditions for Presumption of COVID-19 Work-Related Injury

On May 6, 2020, Governor Newsom issued Executive Order N-62-20, which created a presumption of workplace injury for the purposes of awarding workers' compensation benefits if an employee tested positive for or was diagnosed with COVID-19 within 14 days of working at an employer's place of employment. The presumption remained in effect for infections that occurred through July 5, 2020, or 60 days from the date of the Executive Order, and has therefore since expired.

Governor Newsom has now signed SB 1159, which extends the requirements of his earlier Executive Order and includes additional requirements. As an urgent bill, SB 1159 went into effect immediately, meaning employers must act quickly to understand and comply with it.

Like the earlier Executive Order, SB 1159 creates a disputable presumption that an employee's illness or death resulting from COVID-19 is work-related for purposes of awarding workers' compensation benefits if the following conditions are met:

- The employee tested positive for or was diagnosed with COVID-19 within 14 days after performing labor or services at the employee's "place of employment" (excluding the employee's residence) at the employer's direction;
- The employee tests positive during an "outbreak" at the specific place of employment (as determined by the employer's claims administrator); and
- The employer has five or more employees.

For purposes of determining what constitutes an "outbreak," the bill creates Labor Code section 3212.88, which sets forth the following circumstances that constitute an "outbreak" if they occur within 14 calendar days at the place of employment:

- If the employer has 100 employees or fewer at a place of employment, four (4) employees test positive for COVID-19;
- If the employer has more than 100 employees at a place of employment, 4% of the number of employees who reported to the place of employment test positive for COVID-19; or
- A 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 risk of infection with COVID-19.

The presumption applies to infections that occur on or after July 6, 2020 and will remain in effect through January 1, 2023.

Benefits and Shortened Timeframe for Liability Determination

Available workers' compensation benefits under SB 1159 include "full hospital, surgical, medical treatment, disability indemnity, and death benefits." An employee must first exhaust all available

paid sick leave before receiving temporary disability benefits.

While the presumption of work-relatedness is disputable, the bill shortens the standard 90-day timeframe to 45 or 30 days, depending on the type of employee, in which employers must accept or reject liability for COVID-19 workers' compensation claims. For certain categories of essential employees, such as certain firefighters, peace officers, health care providers and health facility employees, employers will have just 30 days to make the determination. All other employers will have 45 days to make a determination. However, if an employer fails to make the determination within the prescribed timeframe, the infection will be presumptively compensable.

Evidence to Dispute Presumption

In order to dispute the presumption, employers may present evidence including, but not limited to, "measures in place to reduce potential transmission of COVID-19 in the employee's place of employment and evidence of an employee's nonoccupational risks of COVID-19 infection." Employers of health facility employees who do not provide direct patient care or custodial employees who are not in contact with COVID-19 patients can overcome the presumption if they can establish there was no contact with any patient who tested positive for COVID-19 in the 14 days prior to the infection.

Reporting Obligations

SB 1159 also imposes reporting requirements when an employer "knows or reasonably should know that an employee has tested positive for COVID-19" for purposes of determining whether an "outbreak" has occurred. In the case of an employee who tests positive for COVID-19 on or after September 17, 2020, employers must provide written notice via email or facsimile to their claims administrator within three (3) business days, which includes all of the following:

- The fact that an employee has tested positive (employers shall only provide personally identifiable information if the employee asserts that the infection is work related or has filed a workers' compensation claim form);
- The date the employee tested positive (*i.e.,* the date that specimen was collected for testing);
- The address(es) of the employee's place of employment during the 14-day period preceding the positive test; and
- The highest number of employees who reported to work at the place of employment in the 45 days prior to the last day the employee worked at each place of employment.

To satisfy reporting obligations for COVID-19 infections that occurred between July 6, 2020 through September 17, 2020, employers must provide the same written notice above, except by reporting the highest number of employees who reported to work at each place of employment on any given day between July 6, 2020, and September 17, 2020. Employers will have until October 29, 2020 to provide the required notice. Failure to meet reporting obligations or providing false or misleading information may subject employers to civil penalties of up to $10,000.00.

Best Practices

Employers must create and maintain reliable and documented processes in order to comply with reporting obligations and dispute the presumption of injury for COVID-19 infections. In light of the tight deadlines, employers and their claims administrators should be prepared to respond quickly upon receipt of a workers' compensation claim related to COVID-19. In addition to documenting COVID-19 prevention practices and maintaining records of employee positives, employers should develop accurate, reliable means to track employee work locations and assignments in order to

satisfy reporting obligations and potentially defend against COVID-19 workers' compensation claims. Employers may consider developing a process to investigate whether an employee's exposure was outside of the workplace in order to defend against the presumption that the infection occurred at work, while also balancing the employee's privacy interests.

Assembly Bill 685: "COVID-19: Imminent Hazard to Employees: Exposure: Notification: Serious Violations"

Overview

- **Who is affected**: All California employers
- **Effective date**: January 1, 2021
- **End date**: January 1, 2023
- **Effect**:
  - Requires employers to provide written notice within one (1) business day to all employees, employers of subcontracted employees, and employee representatives in the event of potential COVID-19 exposure in the workplace
  - Requires employers to notify local public health officials within 48 hours if the number of cases meets the state definition of an "outbreak"
  - Eliminates the Cal/OSHA notice requirement prior to issuing a citation for a "serious violation" related to COVID-19
  - Expands Cal/OSHA authority to limit operations if there is a risk of COVID-19 infection

Reporting Obligations

On September 17, 2020, Governor Newsom signed AB 685 into law, which imposes reporting requirements when an employer has "notice of a potential COVID-19 exposure" in the event that an employer receives or learns of any of the following:

- Notification from a public health official or licensed medical provider that an employee was exposed to a "qualifying individual" at the worksite;
- Notification from an employee, or their emergency contact, that the employee is a "qualifying individual";
- Notification through an employer's testing protocol that an employee is a "qualifying individual"; or
- Notification from a subcontracted employer that a "qualifying individual" was on the worksite of the employer receiving notification.

AB 685 adds Labor Code section 6409.6, which defines a "qualifying individual" as any person who has experienced any of the following:

- A laboratory-confirmed case of COVID-19, as defined by the State Department of Public Health;
- A positive COVID-19 diagnosis from a licensed health care provider;
- A COVID-19-related order to isolate provided by a public health official; or
- Death due to COVID-19, in the determination of a county public health department or per inclusion in the COVID-19 statistics of a county.

In essence, employers must provide the required notice whenever an employee tests positive for, is diagnosed with, or passes away from COVID-19. In the event that an employer is deemed to have

"notice of a potential COVID-19 exposure," it must quickly act to provide written notice to its employees and determine whether further notice must be provided to the local health department, as follows:

- Employee Notices. Within one (1) business day, employers must provide written notice to all employees, employers of subcontracted employees, and representatives of employees who were present at the same worksite as the "qualifying individual" within the infectious period (as defined by the State Department of Public Health). The notice must contain all of the following information:
  - That employees or subcontracted employees may have been exposed to COVID-19;
  - For employees and employee representatives only: provide information regarding COVID-19-related benefits that employees may be entitled to under federal, state, or local laws including, but not limited to, workers' compensation, options for exposed employees (including COVID-19-related leave, company sick leave, state-mandated leave, supplemental sick leave, or negotiated leave provisions), and anti-retaliation and anti-discrimination protections;
  - For employee representatives only: provide all information required in a Cal/OSHA Form 300 injury and illness log incident report unless the information is inapplicable or unknown; and
  - The disinfection and safety plan that the employer plans to implement and complete per federal Centers for Disease Control guidelines.
  - Employee-related notices must be distributed in a manner the employer normally uses to communicate employment-related information including, but not limited to, personal service, email, or text message. However, the means of communication must be reasonably expected to reach employees within one (1) business day of sending and must be in both English and any other language understood by a majority of the workforce.
- Public Health Notices. Within 48 hours, if the employer is notified that its number of cases meets the definition of an outbreak (as defined by State Department of Public Health), the employer must provide notice to the local public health agency in the jurisdiction of the worksite that contains all of the following information:
  - Names, number, occupation, and worksite of employees who meet the definition of a "qualifying individual";
  - The business address and NAICS code of the worksite where the "qualifying individuals" work; and
  - Employers must continue to give notice to the local health department of any subsequent laboratory-confirmed cases of COVID-19.

Employers must be mindful to protect against public disclosure of personally identifiable employee information in providing the required notices.

Cal/OSHA Processes

Cal/OSHA generally imposes a rebuttable presumption that a "serious violation" exists if it demonstrates a realistic possibility of death or serious physical harm that could result from the cited hazard. However, before issuing a "serious violation," Cal/OSHA must typically make a reasonable attempt to determine and consider certain facts by sending a 15-day notice containing a description of the allegations. Thereafter, the employer has time to provide mitigating information in support of its defenses before the citation is actually issued.

AB 685 alters this process for "serious violations" related to COVID-19 by removing the 15-day notice requirement, thereby depriving employers of the opportunity to learn what "serious violations" are being alleged against them and to present mitigating evidence towards the violations before the citation is issued. As a result, employers should act quickly to assess the best response to any serious COVID-19-related violations, such as assessing the need to modify current practices and appealing serious citations when appropriate.

AB 685 also increases Cal/OSHA's discretionary power to shut down operations, processes, or entry into the workplace in the event that COVID-19 exposure creates an imminent hazard, as determined by Cal/OSHA. If Cal/OSHA makes such a determination, the employer must post the Cal/OSHA notice in the workplace.

Best Practices

Employers have some breathing room through the end of the year to develop prompt and reliable processes to satisfy AB 685's demanding reporting obligations. For example, employers should ensure that employee contact information is accurate and up to date, especially for workforces without work-issued emails or phones. Employers should also consider preparing template communications to employees, employers of subcontracted employees, employee representatives and local public health authorities so they are ready to comply with reporting obligations come January 1. In anticipation of workplace safety challenges, employers should also ensure that they have a written COVID-19 response plan that identifies potential risks, the steps taken to mitigate those risks, and the consideration of applicable Cal/OSHA and public health authority guidance.

Assembly Bill 1867: "Small Employer Family Leave Mediation: Handwashing: Supplemental Paid Sick Leave"

Overview

- **Who is affected**: Private employers in California which employ 500 or more employees nationwide, and public employers of certain health care providers and emergency responders (regardless of the number of employees)
- **Effective date**: September 9, 2020, with COVID-19 Supplemental Paid Sick Leave (PSL) to be provided to employees by September 19, 2020
- **End date**: December 31, 2020 or extension of the Families First Coronavirus Response Act (FFCRA), whichever is later
- **Effect**:
  - Provide COVID-19 Supplemental PSL to eligible employees who must leave their home to perform work and are unable to work because they are:
    - Subject to a federal, state, or local quarantine or isolation order related to COVID-19;
    - Advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or
    - Prohibited from working by the employer due to health concerns related to the potential transmission of COVID-19
  - Allows offset or catch up for any paid sick leave benefits related to COVID-19 provided prior to enactment
  - Requires that employers include information on available COVID-19 Supplemental PSL on employee wage statements

- Requires that food facility employees be permitted to wash their hands every 30 minutes and additionally as needed
- Requires posting or dissemination of Labor Commissioner notice

COVID-19 Supplemental Paid Sick Leave (PSL)

Governor Newsom previously issued Executive Order N-51-20 on April 16, 2020, which provides supplemental paid sick leave for COVID-19-related reasons to food sector workers of companies with 500 or more employees nationwide.

AB 1867 codifies this earlier Executive Order and requires COVID-19 Supplemental Paid Sick Leave for all eligible California employees (both food sector and non-food sector) who must leave their home to perform work and are unable to work for any of the following reasons:

- The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- The employee is advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or
- The employer prohibits the employee from working due to health concerns related to the potential transmission of COVID-19.

AB 1867 applies to private employers with 500 or more employees nationwide. It also extends to employers of healthcare providers and emergency responders regardless of the number of employees to the extent that they were excluded from Emergency Paid Sick Leave under the Families First Coronavirus Response Act (FFCRA). Employers subject to AB 1867 must provide COVID-19 Supplemental PSL by September 19, 2020.

An employee's amount of COVID-19 Supplemental PSL is determined by the number of hours that the employee works or is scheduled to work in the two weeks prior to leave. Subject to limited exceptions for certain firefighters, full-time employees who work or are scheduled to work at least 40 hours per week will receive up to 80 hours of COVID-19 Supplemental PSL. Part-time employees with regular hours are entitled to leave in the amount equal to the total hours normally worked or scheduled to work in a two-week period. If a part-time employee has a variable schedule, the amount of the leave is determined by the number of hours worked or scheduled in the two weeks before leave, depending on whether the part-time worker has worked for the employer for longer or lesser than 14 days.

COVID-19 Supplemental PSL is paid at the highest hourly rate of (1) the employee's regular rate of pay for the last pay period; (2) state minimum wage; or (3) local minimum wage, subject to a cap of $511 per day and $5,110 total.

Wage Statement Requirements

AB 1867 requires that employers include information on any available COVID-19 Supplemental PSL for each pay period in employee wage statements, which the Labor Commissioner may begin to enforce on the first full pay period following September 9, 2020.

Available Offset

Offsets are available for employers who may have provided COVID-19-related PSL or other supplemental paid leave benefits prior to AB 1867's enactment, which will count towards an employee's total hours of COVID-19 Supplemental PSL. Likewise, if the employer provided COVID-

19-related PSL or other paid leave benefits but did not pay the required rates, employers may retroactively provide supplemental pay to any covered workers to satisfy compensation requirements.

Handwashing Requirements for Food Facility Employees

AB 1867 also requires that food facility employees be permitted to wash their hands every 30 minutes and additionally as needed.

Notice Requirements and Enforcement

AB 1867 authorizes the Labor Commissioner to enforce its provisions. Since the bill went into effect, the Labor Commissioner has issued a model notice addressing COVID-19 Supplemental PSL, which should be either posted in the workplace or electronically disseminated to employees by September 19, 2020, in addition to FAQs.

Best Practices

Employers must act quickly to ensure that they have satisfied notice and/or distribution requirements and promptly roll out their COVID-19 Supplemental PSL policies while being mindful of the available guidance from the Labor Commissioner's FAQs.

Please contact a Troutman Pepper Labor and Employment attorney for more guidance specific to your workplace and workforce, and visit the Troutman Pepper COVID-19 Resource Center for additional COVID-19-related news and developments.

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