

Workers Compensation

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Legislative Action Update:

SB-1159: Workers Compensation: COVID-19: Critical Workers and AB-685: COVID-19: Imminent Hazard to Employees: Exposure: Notification: Serious Violations

These bills will create, insert, and/or delete language in current labor laws. See details below.

These are two of the most important legislative actions that have been taken recently which will directly affect all California employers trying to get back to some semblance of normalcy since the COVID-19 pandemic. This information is critical for employers to know as they bring their businesses back up to speed.

There are two sections in this newsletter. First, you will find information relating to what the direct and immediate effects of those new laws are and how they directly impact our employers; second, we include all of the particulars that are included in the bills for your analysis.

SB-1159: Workers Compensation: COVID-19: Critical Workers

This bill creates rebuttable presumption that illness or death related to COVID-19 (novel coronavirus) is an occupational injury and therefore eligible for workers compensation benefits.

AB-685: COVID-19: Imminent Hazard to Employees: Exposure: Notification: Serious Violations

Requires employers to provide written notice and instructions to employees who may have been exposed to COVID-19 at their worksite and enhances the Division of Occupational Health and Safety's (Cal/OSHA) ability to enforce health and safety standards to prevent workplace exposure to and the spread of COVID-19.



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Pandemic Presumptions

CA Workers Compensation COVID-19 Legislation

These changes to California Workers Compensation laws related to COVID-19 claims were promulgated into Labor Law. They were passed by the California Legislature on 8/31/2020 and signed into law by Governor Newsom on 9/17/2020. They apply retroactively to July 6, 2020 and remain effective until January 1, 2023. The information below provides details of the new laws, which are broken into three Labor Code sections.

We are advising all clients to report all test positive COVID-19 cases to your workers compensation insurer within 3 business days. See the Reporting Requirements section within this bulletin for further direction.

COVID-19 cases between 3/19/20 and 7/5/20:

Governed by Labor Code 3212.86

—Newsom first executive order

For a claim to be presumed compensable for workers compensation during this time period an answer of yes must be applied to all factors below:

- 1** Did the employee perform work, outside of their home, at the employers' direction between 3/19/20—7/5/20?
- 2** Within 14 days of the last day worked between 3/19/20—7/5/20 did the employee test positive for COVID-19?
- 3** If there was not a positive test for COVID-19, was the employee diagnosed with COVID-19 by a licensed medical doctor?

If YES for all of the above, the COVID-19 claim would be presumed compensable under workers compensation.

- Rebuttable within 30 days
- Date of injury is defined as the last date the employee performed work at the employers' direction

COVID-19 between 7/6/20 and 9/17/20

Reporting Requirements

Employers **MUST RETROACTIVELY REPORT ANY TEST POSITIVE COVID-19** employees between 7/6/20 and 9/16/20 by **OCTOBER 30, 2020**.

- Employers are required to report to their workers compensation carriers of the following:
 - » For each separate location, any employees who tested positive for COVID-19
 - » For each test positive location, the highest number of employees per location who worked within the same location of test positive case
- Reporting is done by:
 - » Fax or email to workers compensation insurer by OCTOBER 30, 2020
 - » Must include TEST DATE of COVID-19 test positive (not the date results came back)
 - » Employers are to omit personal information of COVID-19 test positive employee unless the employee is filing a workers compensation claim



Failure to comply with the above is subject to civil penalty up to \$10,000 by Labor Commissioner.

Employer Reporting Requirements for any TEST POSITIVE AFTER 9/17/20

Within 3 BUSINESS DAYS OF ANY TEST POSITIVE:

- For each test positive employee, the employer must provide to the claim's administrator:
 - » The address of the where the test positive employee worked for the 14 days prior to COVID-19 test positive
 - » The highest number of employees who worked at that location(s) on any given day for the 45 days prior to the test positive employee's last day of work
- The above information is to be reported:
 - » Via FAX or EMAIL only
 - » Include the COVID-19 TEST DATE of the employee
 - » Omit personal information of the employee unless a WC claim is being filed
- Negative COVID-19 tests do not need to be reported
- Any POSITIVE test, regardless if work-related or not, is to be reported
- If any employer knows or reasonably should have known about a test positive it is to be reported

COVID-19 cases from 9/17/20 to 1/1/2023:

Labor Code 3212.88:

- Applies to employers with 5 or more employees
- Employers with 5 or greater if YES applies to the following:
 - » Work occurred outside of employee's home at employer's direction
 - » Work occurred between 7/6/20 and 1/1/23
 - » Specific place of employment is defined as employer's building, store, facility, field
 - » Employee received POSITIVE COVID-19 VIRAL TESTING (not antibody) within 14 days of the last day working for the employer
 - » By reporting of all positive COVID-19 cases per the REPORTING REQUIREMENTS, was an OUTBREAK determined by the claims' administrator?

IF YES TO THE ABOVE and an OUTBREAK is determined by the CLAIMS ADMINISTRATOR, any COVID-19 CLAIM UNDER WORKERS COMPENSATION IS PRESUMED COMPENSABLE.

Outbreak defined by:

- Employers with 100 or fewer employees have 4 or more test positive cases within 14 days of each other
- Employers with greater than 100 employees have 4% or greater test positive cases within 14 days of each other
- Or when OSHA, County Health Department, State Department of Health or any like agency has ordered closure of specific place of employment

IF an OUTBREAK is determined and a workers compensation claim for COVID-19 is filed:

Insurance companies have 45 days to rebut industrial causation

Rebuttal can be by demonstrating:

- » The safety measures the employer has in place (mask requirements, sanitization stations, temperature taking prior to access to worksite)
- » The employee's non-occupational risks (family member has COVID-19)

Benefits, if accepted:

- » No 3-day waiting period for temporary disability
- » If an employer provides paid COVID-19 leave, temporary disability would not start until employer paid leave is exhausted
- » If employee alleges death as a result of COVID-19, there is no presumption for industrial death; the legal standard is if the employment was the contributing cause of death, the claim for death benefits would be compensable

Insurance Company COVID-19 reporting resources:

Republic Indemnity:

COVID-19 form tracking link: <https://republicindemnity.com/employers/about-workers-comp/sb189-ab2883>

Email to: SB1159@ri-net.com

Fax: 866.448.1159

Berkshire Hathaway:

COVID-19 tracking forms: <https://bhccovid19.com/2020/09/18/sb1159-information-for-policyholders/>

Report COVID claims via email to: CovidReporting@bhcc.com

State Fund:

COVID-19 resource page: <https://statefundca.scif.com/Home/StaticIndex?id=https://content.statefundca.com/news/News2020/092420-SB1159.asp>

COVID-19 tracking form: <https://content.statefundca.com/pdf/COVID-19PositiveTestReport.pdf>

Report via email to: COVID@scif.com

Fax to: 800.325.1284

Pacific Comp:

COVID-19 tracking form 7/6/20-9/16/20: [Retroactive COVID-19 employer reporting form](#)

COVID-19 tracking form 9/17/20-1/1/2023: [Go-forward COVID-19 employer reporting form](#)

Email to: COVIDREPORTS@pacificcomp.com

ICW:

COVID-19 tracking form: [SB 1159 California Employer Reporting Form](#)

Email to: firstnotice@icwgroup.com

Fax: 858.436.8916

Travelers:

COVID-19 tracking form: <https://www.travelers.com/iw-documents/claim/manage-claim/TRV-CA-SB1159-COVID-Exposure-Reporting-Form.pdf>

Email to: covidexposure@travelers.com

Compwest Insurance:

COVID-19 tracking form: https://www.afgroup.com/wp-content/uploads/2020/09/AF-Group_CA-SB-1159-Reporting-Form_Final.pdf

Email: COVID19@AFGroup.com

Fax: 844.618.3636

Detailed Summary of SB-1159

All of the information below can be found at the California Legislative Information website: <http://leginfo.legislature.ca.gov/faces/home.xhtml>



SB-1159 Workers Compensation

COVID-19: Critical Workers

This bill creates rebuttable presumption that illness or death related to COVID-19 (novel coronavirus) is an occupational injury and therefore eligible for workers compensation benefits.

Existing Law:

1. Establishes a workers compensation system that provides benefits to an employee who suffers from an injury or illness that arises out of and in the course of employment, irrespective of fault. This system requires all employers to secure payment of benefits by either securing the consent of the Department of Industrial Relations to self-insure or by securing insurance against liability from an insurance company duly authorized by the state.
2. Creates a series of disputable presumptions of an occupational injury for peace and safety officers for the purposes of the workers compensation system. These presumptions include:
 - » Heart disease
 - » Hernias
 - » Pneumonia
 - » Cancer
 - » Meningitis
 - » Tuberculosis
 - » Bio-chemical illness
3. The compensation awarded for these injuries must include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by workers compensation law. (Labor Code §§3212 to 3213.2)
4. Provides, until January 1, 2025, a disputable presumption that a diagnosis of post-traumatic stress disorder (PTSD) for specified peace officers and firefighters is an occupational injury, running for up to 5 years. The benefit includes full hospital, surgical, medical treatment, disability indemnity, and death benefits, but only applies to peace officers who have served at least 6 months. (Labor Code §3212.15)

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This Bill:

1. Codifies a recent executive order (N-62-20) to create a rebuttable presumption that illness or death related to COVID-19 (novel coronavirus) is an occupational injury and therefore eligible for workers compensation benefits.
2. Provides a rebuttable presumption that a peace officer, firefighter, specified frontline employee, and certain health care employees, as defined, who contract COVID-19 were infected with the virus via a workplace exposure.
3. Provides that all of the normal workers compensation benefits are available to these employees who become presumptively eligible for workers compensation benefits.
4. Provides that the presumptions established by the bill continue for 14 days after the last day of employment with an employer.
5. Establishes a presumption of compensability for employees who contract COVID-19 from any employer that experiences an “outbreak” of COVID-19 cases at a particular work location.
6. Defines an “outbreak” as follows:
 - For employers with 5-100 employees
 - » 5 or more employees who worked at a specific work location contracted the disease within a 14-day period;
 - For employers with more than 100 employees
 - » 5% or more of the employees who worked at a specific work location contracted the disease within a 14-day period.
7. Specifies that this presumption is rebuttable, and the evidence to rebut the presumption includes, but is not limited to, evidence of measures in place to prevent transmission of COVID-19 and evidence of an employee’s nonoccupational exposure to COVID-19.
8. Provides that the presumptions established by the bill sunset on January 1, 2023.

SB 1159 creates two presumptions: one that is specific to frontline workers (peace officers, firefighters, healthcare providers, homecare workers, and IHSS workers) and a general presumption for employees who contract COVID-19 in the midst of a workplace outbreak.



AB-685

New COVID-19 Notice Requirements and Exposure Reporting/ Cal-OSHA COVID-19 Enhanced Enforcement

New COVID-19 Notice Requirements and Exposure Reporting

AB-685's new notice requires employers to provide the following notices within one business day of a "potential exposure" due to a positive confirmed case of COVID-19 in the workplace:

- Provide written notice to all employees, and employers of subcontracted employees, who were at the worksite within the infectious period.
 - » As a best practice, we recommend employers to notify any third parties who were at the worksite during the infectious period.
- Provide written notice to employee representatives, including unions and sometimes attorneys, who may represent employees.
- Provide written notice to employees and/or employee representatives regarding COVID-19-related benefits available, including workers compensation benefits, COVID-19 leave, paid sick leave, and the company's anti-discrimination, anti-harassment, and anti-retaliation policies; and
- Provide notice to employees regarding the company's disinfection protocols and safety plan to eliminate any further exposures, per CDC guidelines.

AB-685 requires an employer with a large number of cases that meet the definition of "outbreak" as defined by CDPH to report certain information to the local public health agency within 48 hours of learning of the outbreak.

In addition, for COVID-19-related fatalities, the employer must notify the local health department with the following information:

- Names, numbers, occupation, and worksite of employees who died due to a COVID-19 exposure; and
- The business address and North American Industry Classification System (NAICS) code of the worksite where the COVID-19-positive employee worked.

Cal-OSHA Enforcement Aspects and COVID-19 Enhanced Enforcement

AB-685 enhances Cal/OSHA's enforcement of COVID-19 infection prevention requirements by allowing for orders prohibiting use (OPUs), and citations for serious violations related to COVID-19 to be issued more quickly.

1. Cal/OSHA can issue an OPU to shut down an entire worksite or a specific worksite area that exposes employees to an imminent hazard related to COVID-19.
 - » An OPU allows Cal/OSHA to prohibit entry into a place of employment, or the use of something in a place of employment, which they determine constitutes an imminent hazard.
 - » An imminent hazard is defined as any hazard to employees which could reasonably be expected to cause death or serious physical harm immediately, or before the imminence of such hazard can be eliminated through normal enforcement procedures.
2. Cal/OSHA can issue citations for serious violations related to COVID-19 without giving employers the previously required 15-day notice before issuance.
 - » Prior to AB-685, when Cal/OSHA planned to issue serious citations, it must first have provided a rebuttal form (known as the 1BY form) to the employer at least 15 days prior to issuing a serious citation. This form allowed the employer to state why the citation should not be classified as serious.



**These changes will be in effect
January 1, 2021 until January 1, 2023.**

Detailed Summary of AB-685

All of the information below can be found at the California Legislative Information website: <http://leginfo.legislature.ca.gov/faces/home.xhtml>

AB-685 COVID-19

Imminent Hazard to Employees: Exposure: Notification: Serious Violations

Requires employers to provide written notice and instructions to employees who may have been exposed to COVID-19 at their worksite, and enhances the Division of Occupational Health and Safety's (Cal/OSHA) ability to enforce health and safety standards to prevent workplace exposure to and the spread of COVID-19.

This bill:

1. Provides definitions for:
 - » COVID-19
 - » Infectious period
 - » Notice of potential exposure
 - » Qualifying individual
 - » Worksite
2. Provides that an employer must take all of the following actions within one business day of receiving a notice of potential exposure:
 - » Provide written notice to all employees and the employers of subcontracted employees who were on the premises at the same worksite as the qualifying individual within the infectious period.
 - » Provide written notice to the exclusive representative of the employees who were on the premises at the same worksite as the qualifying individual which shall contain the same information as would be required in a Cal/OSHA Form 300 injury and illness log.
 - » Provide all employees who may have been exposed and their exclusive representative with information regarding COVID-19-related benefits to which the employee may be entitled, including, but not limited to, workers compensation, COVID-19-related leave, company sick leave, state-mandated leave, or supplemental sick leave.
 - » Notify all employees, the employers of subcontracted employees, and the exclusive representative on the disinfection and safety plan the employer intends to implement.
3. Provide that if an employer or representative of the employer is notified that the number of cases meet the definition of a COVID-19 outbreak as defined by CDPH, within 48 hours, the employer shall notify the local public health agency of the names, number, occupation, and worksite of employees who are qualifying individuals.
4. Provide that an employer shall not retaliate against a worker for disclosing a positive COVID-19 test or diagnosis or order to quarantine.
5. Provide that these provisions apply to private and public employers.
6. Provide that these provision do not apply to:
 - » A health facility as defined in Section 1250 of the Health and Safety Code.
 - » An employee who, as part of their duties, conduct COVID-19 testing or screening or provide direct patient care or treatment to those who are known to have tested positive for COVID-19.
7. Provide that Cal/OSHA shall enforce these provisions by using its citation procedures.

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Imminent Hazard Provisions

1. Provide that Cal/OSHA may prevent entry to a place of employment or prohibit an operation or process if it determines that the place of employment, operation, or process exposes workers to the risk of infection with COVID-19, so as to constitute an imminent hazard.
2. Provide that any prohibition of use by Cal/OSHA shall be limited to the immediate area in which the imminent hazard exists.
3. Provide that the prohibition shall be executed in a manner so as not to materially interrupt the performance of critical governmental functions essential to ensuring public health and safety or the delivery of electrical power or water.
4. Provide that these provisions are in effect only until January 1, 2023 and are repealed as of that date.

Citations Alleging a Serious Violation Regarding COVID-19

1. Provide that a citation alleging a serious violation relating to the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) may be issued by Cal/OSHA before considering any mitigating factors that may be presented by the employer, including the employer's explanation of the circumstances surrounding the alleged violative events, why the employer believes a serious violation does not exist, and why the employer believes its actions related to the alleged violative events were reasonable and responsible.
2. Provide that these provisions are in effect only until January 1, 2023 and are repealed as of that date.



On June 16, 2020, CDPH issued guidance to local health departments (LHD), which included a checklist for LHDs assisting workplaces experiencing an outbreak of COVID-19.

The guidance recommended that an employer “notify all employees who were potentially exposed to individuals with COVID-19.”

Despite this guidance, a number of businesses throughout California have experienced serious outbreaks of COVID-19, including a poultry processing plant where eight workers died of COVID-19 and at least 358 of the plant's employees tested positive for the virus; three food distribution facilities in Los Angeles County; and six outbreaks among employers who employ guest workers, infecting more than 350 workers with the virus. This bill adopts some of the guidance provided by CDPH on notifying employees of exposures to COVID-19 and reporting outbreaks.