

A PANDEMIC OF PRESUMPTIONS: SB 1159 AND AB 685

PRESENTED BY: JAYA KAPOOR AND JIM COTTER

THIS WEBINAR DOES NOT AND IS NOT INTENDED TO CONSTITUTE LEGAL ADVICE. ALL INFORMATION, CONTENT, AND MATERIALS ARE PRESENTED FOR GENERAL INFORMATIONAL PURPOSES ONLY. PLEASE CONTACT YOUR FAVORITE MULLEN & FILIPPI ATTORNEY FOR ADVICE AS TO A PARTICULAR LEGAL ISSUE.



LABOR CODE § 3212.86

This section codifies the Executive Order from the Governor that issued in May of 2020.

LABOR CODE § 3212.86

- Did the work occur outside of the workers' home at the employer's direction?
- Did the day the work performed for the employer occur on or after 3/19/20 and before 1/1/23?
- Did the day the work was performed for the employer occur on or before 7/5/20?

LABOR CODE § 3212.86

- Did the worker receive a positive test for COVID that was taken within 14 days of working for the employer outside the home at the employer's direction?
- If yes, COVID presumed industrial.

LABOR CODE § 3212.86

- What if the worker did not receive a positive test for COVID?
 - If the worker did not receive a positive test, did they receive a diagnosis from a medical doctor holding a physician or surgeon license issued by the California Medical Board or a P.A./N.P. under physician review and supervision?
 - Was the diagnosis confirmed with a positive serologic (antibody) virus test or antibody test within 30 days?

LABOR CODE § 3212.86

- If the aforementioned questions are responded in the affirmative, COVID is presumed industrial, subject to rebuttal by other evidence.
- 30 days to accept or deny the claim after filing of a claim form or it will be presumed compensable.
- DOI now defined as the last date employee performed labor or services at the employer's place of employment.

LABOR CODE § 3212.87

This new code section applies to specified first responders, firefighters, peace officers, health facility workers or home healthcare workers. (Labor Code 3212.87(a)(1-11)).

LABOR CODE § 3212.87

- *In general, first responders* are police officers, active firefighters, fire and rescue service coordinators, safety dispatchers (per AB1945 which adds Government Code § 8562) and custodial employees.
 - Did the worker receive a positive test for COVID that was taken within 14 days of working for the employer at employer's place of employment at direction of employer? If yes, COVID presumed industrial – 30 days to accept or deny the claim.

LABOR CODE § 3212.87

- *In general, healthcare facility workers* such as nurses, doctors, clerks, food service workers and the like.
 - Did the facility healthcare facility worker have contact with a patient who tested positive with COVID in the past 14 days?

LABOR CODE § 3212.87

- Did the healthcare facility worker receive a positive test for COVID that was taken within 14 days of working for the employer?
- If the aforementioned questions are responded in the affirmative, COVID is presumed industrial.
- DOI is the last date the employee performed labor at the employer's direction prior to the positive test. Test must be viral test approved by FDA (such as Polymerase Chain Reaction) and not serologic antibody test.
- 30 days to accept or deny the claim.

LABOR CODE § 3212.87

- *In general, home healthcare worker* is anyone who provides home healthcare.
 - Did the home healthcare worker receive a positive test for COVID that was taken within 14 days of working for the employer?
- If the aforementioned question is affirmative, COVID is presumed industrial - 30 days to accept or deny.

LABOR CODE § 3212.88

This provision is to be considered if the prior sections are not applicable and the employer has 5 or more employees. The section generally applies to employees who test positive for COVID-19 during an outbreak at the employee's specific place of employment.

LABOR CODE § 3212.88

- Did the work occur outside of the workers' home at the employer's direction?
- Specific place of employment is defined as the building, store, facility, or field where the employee performs work at the employer's direction.
- Can include employee's home if home health care services are provided to another individual at the employee's residence.
- Did the day the work performed for the employer occur on or after 7/6/2020 and before 1/1/23?
- Did the worker receive a positive test for COVID that was taken within 14 days of working for the employer? Test must be viral testing, and not antibody testing.
- DOI is the last date the employee performed work at specific place of employment on or after 7/6/2020 prior to a positive test.

LABOR CODE § 3212.88

- Was there an “outbreak” at the employee’s specific workplace?
- Outbreak is determined by:
 - If an employer has 100 or less employees and 4 or more employees receive a positive test within 14 days of each other.

LABOR CODE § 3212.88

- Was there an “outbreak” at the employee’s specific workplace?
- Outbreak is also determined by:
 - If an employer has more than 100 employees and 4% or more receive a positive test within 14 days of each other.
- Third route to outbreak is when the specific place of employment is ordered closed by a local health department, OSHA, a school superintendent, or the State Department of Public Health due to risk of COVID-19 infection.

LABOR CODE § 3212.88

- If either of the aforementioned outbreak definitions are affirmative, COVID is presumed industrial.
 - Who determines if there was an outbreak?
 - Internal policy decision.
- **45 days to accept or deny.**

REPORTING REQUIREMENTS

The purpose of the employer reporting requirements is to determine whether an employee qualifies for the presumption accounted for in the bill. Failure to report can result in civil penalties up to \$ 10,000.00 assessed by the Labor Commissioner. Employer must pay penalty assessment within 45 days after Notice or file a Writ of Mandate. A citation can issue for intentionally false or misleading reporting.

REPORTING REQUIREMENTS

POSITIVE TEST ON OR BEFORE 9/17/2020

The employer must report to the claims administrator within 30 business days:

For each separate location employee worked 14 days prior to the test date, the employer must provide to the claims administrator the address and the highest number of employees who reported to the work location on any given day between July 6th and September 17th. The claims administrator is to determine if an outbreak occurred.

REPORTING REQUIREMENTS

POSITIVE TEST ON OR BEFORE 9/17/2020

Reporting is done by:

- Report must be sent via fax or email.
- Include the test date of when the specimen was collected.
- Omit personally identifiable information unless the employee is filing a claim.

REPORTING REQUIREMENTS POSITIVE TEST ON OR AFTER 9/18/20

The employer must report to the claims administrator within 3 business days:

For each separate location employee worked 14 days prior to the test date, the employer must provide to the claims administrator the address and the highest number of employees who reported to the work location on any given day the 45 day period preceding the employee's last day at the location. The claims administrator is to determine if an outbreak occurred.

REPORTING REQUIREMENTS POSITIVE TEST ON OR AFTER 9/18/2020

Reporting is done by:

- Report must be sent via fax or email.
- Include the test date of when the specimen was collected.
- Omit personally identifiable information unless the employee is filing a claim.

REPORTING REQUIREMENTS

CURRENT INQUIRIES

- Negative COVID tests do not need to be reported.
- Positive COVID tests, regardless of whether or not it is work related are to be reported.
- If any employer knows or reasonably should know of a positive COVID test, it is to be reported.

REPORTING REQUIREMENTS CURRENT INQUIRIES

- If the claim is deemed compensable and benefits provided, reporting is required.
- If a worker chooses not to file a claim for a positive COVID test, it is to be reported.

REBUTTING THE PRESUMPTION

During the investigative period, of either 30 or 45 days, depending upon which statute applies, defendant can develop evidence to rebut the presumption. Such evidence can take into consideration:

REBUTTING THE PRESUMPTION

- Demonstrating that measures were in place to reduce potential transmission of COVID.
- Demonstrating the employee's non-occupational risks of COVID.
- Utilize our Top 12 COVID Claim Investigative Questions at www.mulfil.com/case-briefs

COMPENSABLE CLAIM

Should the claim be deemed compensable, generally the same benefits are owed as in a regular Workers' Compensation case. Differences are as follows:

COMPENSABLE CLAIM TEMPORARY DISABILITY

- If the employer is providing COVID leave pay, temporary disability or 4850 benefits do not commence until such leave benefits are exhausted.
 - If COVID leave is not provided and the claim does not fall under Labor Code § 3212.86, benefits are owed. There is no waiting period under any of these sections.

COMPENSABLE CLAIM TEMPORARY DISABILITY

- If the claim falls under Labor Code § 3212.86 determine the following:
 - If the worker missed work due to COVID prior to 5/6/20, the worker must have obtained a certification no later than 5/21/20, documenting the period of TD and has to recertify the TD every 15 days during the first 45 days following diagnosis.

COMPENSABLE CLAIM TEMPORARY DISABILITY

- If the claim falls under Labor Code § 3212.86 determine the following:
 - If the worker did not miss work, any ongoing claims of TTD entitlement must have a medical doctor certify that the worker is TTD every 15 days within the first 45 days of the diagnosis.

COMPENSABLE CLAIM DEATH BENEFITS

There is no presumption of industrial death, even if the COVID is industrial. The standard is whether the employment was a contributing cause of the death, and if so, compensable.

COMPENSABLE CLAIM DEATH BENEFITS

- If no dependents, there is no recovery of the \$250,000 death benefit by the Death Without Dependents Unit.
- If there are dependents, benefits are owed as they otherwise would be for an industrial injury resulting in death.

ANCILLARY ISSUES

- **Compensable consequence** - can be established with substantial medical evidence finding the COVID caused the alleged compensable consequences.
- **Apportionment provisions** - Labor Code §§ 4663 and 4664 still apply.

AB 685 REPORTING REQUIREMENTS

EFFECTIVE 1/1/2021 AND SUNSETTING ON 1/1/2023

LABOR CODE SECTIONS 6325, 6409.6, AND 6432

AB 685 (CONT.)

- If an employer has notice that a worker has potentially been exposed to COVID-19, the employer **MUST** notify all other employees, subcontractors, and exclusive representatives (Union) in writing within 1 business day that they have been exposed to COVID-19 as to a particular worksite (other buildings, or locations where the qualifying individual did not work do not require notice).
- Existing law requires an employer to report every occupational injury or illness, but the bill requires reporting to anyone who were on the premises at the same worksite as a qualifying individual.
- The employer must notify all employees, subcontractors, and exclusive representatives of the disinfection and safety plan the employer intends to implement per CDC guidelines.
- Records must be kept for 3 years of all notifications provided.

AB 685 (CONT.)

- A qualifying individual is:
 - A person who has positive COVID-19 test results as defined by the State Department of Public Health
 - A positive COVID-diagnosis from a licensed healthcare provider.
 - An individual subject to an order to isolate/quarantine due to COVID-19 issued by a public health official.
 - An individual who has died due to COVID-19 as determined by the county public health department or who is included in COVID-19 county statistics.

AB 685 (CONT.)

- Notice of a potential exposure includes:
 - Notification to the employer from a public health official or medical provider that an employee was exposed to a qualifying individual at the worksite.
 - Notification to the employer from the employee that the employee is a qualifying individual.
 - Notification through testing protocols that an employee is a qualifying individual.
 - Notification from a subcontractor that a qualifying individual was on the worksite.

AB 685 (CONT.)

- Notification to the employer is to be in writing, and can be provided in the manner normally used by the employer including mailed correspondence, hand delivered correspondence, email, or text message. Notice should be in English and any other majority language for that worksite.
- Notification must advise the employees of all benefits available due to COVID-19 including supplemental sick leave, workers' compensation benefits, and any other benefits available under federal, state, or local law. Employer must also notify the employee as to protections against retaliation and discrimination.
- If an employer is aware of enough cases that the Department of Public Health's definition of an outbreak (different definition than LC 3212.88) is met, it must report to the local public health agency within 48 hours. The employer must report the names, number, occupation, and worksite of qualifying individual employees., as well as the business address of the worksite where the qualifying individuals work.
- CDPH defines an outbreak as "three or more laboratory-confirmed cases of COVID-19 within a two-week period among employees who live in different households."
- Failure to comply may result in a civil penalty. Consistent with Labor Code section 6319.

AB 685 (CONT.)

- The notice requirements do not apply to health facilities, who are exempt from reporting an “outbreak” within 48 hours.
- The notice requirements do not apply to employees whose duties require COVID-19 testing or screening or patient care unless the qualifying individual is also an employee.
- OSHA can shut down a workplace or operation/process within a workplace for serious violations that expose employees to a risk of COVID-19 infection. Employer must be provided with notice by OSHA, who must limit the shutdown to the immediate area of the hazard.
- No 15-day warning period as with standard violation citations – OSHA can immediately issue a citation, subject to its normal appeal procedures.



MULLEN & FILIPPI

ESTABLISHED 1949