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LEGAL UPDATE

September 23, 2020

To: Superintendents, Member School Districts (K-12)
From: Steven P. Reiner, Associate General Counsel *SPR*
Subject: **SB 1159 – Workers’ Compensation Disputable Presumption – COVID Update**
Memo No. 54-2020

On September 17, 2020, Governor Newsom signed into law SB 1159, which creates a “disputable presumption” that employees who contract COVID-19 did so in the course of employment for the purpose of obtaining workers’ compensation benefits under certain conditions.

The legislation follows the Governor’s Executive Order N-62-20¹ signed on May 6, 2020, which created a disputable presumption that employees contracted COVID-19 at work and would be eligible for workers’ compensation benefits under specific circumstances. The Executive Order expired on July 5, 2020. The new law incorporates the Executive Order into the statute for the period between March 19, 2020 through July 5, 2020,² and adds additional framework for COVID-19-related illness that occur between July 6, 2020 and January 1, 2023, at which point the presumption will no longer apply. The law goes into effect immediately as emergency legislation.

Requirements for Coverage

The disputable presumption applies to all employees who test positive during an “outbreak” at the employee’s “specific place of employment,” as long as the employer has 5 or more employees³ and the following circumstances apply:

1. The employee tests positive for COVID-19 within 14 days after a day that the employee performed labor or services at the employee’s place of employment at the employer’s direction.

¹ <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.6.20-EO-N-62-20-text.pdf>

² Labor Code section 3212.86

³ Labor Code section 3212.88(a)



2. The day on which the employee performed labor or services at the employee's place of employment at the employer's direction was on or after July 6, 2020. The date of injury is the last date the employee performed labor or services at the employee's place of employment at the employer's direction prior to the positive test.
3. The employee's positive test occurred during a period of an outbreak at the employee's specific place of employment.

"Specific Place of Employment"⁴

The law defines a "specific place of employment" as a building, store, facility, or agricultural field where an employee performs work at the employee's direction. This does not include the employee's home or residence, unless providing home health care services to someone else in the employee's home.

For an employee who performs work at the employer's direction in multiple places of employment within 14 days of the employee's positive test, the employee's test shall be counted for the purpose of determining the existence of an outbreak at each of those places of employment, and if an outbreak exists at any one of those places of employment, that shall be the employee's "specific place of employment."

"Outbreak"⁵

An "outbreak" exists if within 14 calendar days one of the following occurs at a specific place of employment:

1. For employers with 100 employees or fewer, 4 employees test positive for COVID-19.
2. For employers with 100 employees or more, 4 percent of the number of employees who reported to the specific place of employment test positive for COVID-19.
3. A specific place of employment is ordered closed by a local/state public health department, CAL-OSHS, or a school superintendent.

There must be an "outbreak" for the presumption to apply, during which an employee tests positive. If there is no "outbreak," then the presumption does not apply.

Employer's Duty to Report COVID-19 Claims⁶

From September 17, 2020 forward, when an employer knows or has reason to know that an employee has tested positive for COVID-19, the employer shall report to their workers' compensation claims administrator in writing via electronic mail or facsimile within three business days all of the following:

1. An employee has tested positive. The employer shall 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 workplace injury claim form.

⁴ Labor Code section 3212.88(m)(3)

⁵ Labor Code section 3212.88(m)(4)

⁶ Labor Code section 3212.88(i)



2. The date the employee tests 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.
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.

When an employer is aware of an employee who tests positive on or after July 6, 2020 and prior to September 17, 2020, the employer must report the required information in numbers 1-4 to the claims administrator within 30 business days from September 17, 2020 (as opposed to the 3 business day requirement for reporting after September 17, 2020). For the information contained in number 4, above, the employer shall instead report the highest number of employees who reported to work at each of the employee's specific places of employment on any given work day between July 6, 2020 and September 17, 2020.⁷

Penalties for intentionally submitting false or misleading information or failing to submit information may lead to a civil penalty of up to \$10,000.⁸

Benefits Payable

Compensation payable under the law where the presumption is not overcome includes full hospital, surgical, medical treatment, disability indemnity, and death benefits.⁹

The law requires an employee exhaust paid sick leave benefits specifically available in response to COVID-19, such as those under the Families First Coronavirus Response Act,¹⁰ and sick leave benefits under Education Code sections 44977, 44984, 45192, or 45196 are due and payable, prior to receiving any temporary disability benefits. If an employee does not have sick leave benefits, the employee shall be provided temporary disability benefits without a waiting period.¹¹

Disputing the Presumption

An employer can dispute the presumption if it can provide evidence there were measures in place to reduce the transmission of COVID-19 and evidence of an employee's non-occupational risks of COVID-19 infection.¹²

The workers' compensation claim carrier has 45 days to reject the claim after the date it is filed, or the illness shall be presumed compensable (non-COVID-19 related claims provide 90 days to reject a claim).¹³ The Governor's Executive Order that was incorporated into the statute for the

⁷ Labor Code section 3212.88(k)(2)

⁸ Labor Code section 3212.88(j)

⁹ Labor Code section 3212.88(c)

¹⁰ See Legal Update No. 23-2020 – REVISED, Emergency Family and Medical Expansion Act and Emergency Paid Sick Leave Act

¹¹ Labor Code section 3212.88(d)

¹² Labor Code section 3212.88(e)

¹³ Labor Code section 3212.88(f)



period covering March 19, 2020 to July 5, 2020 maintains the 30 day period for a claim to be rejected after the date it is filed.¹⁴

Conclusion

It is critically important that districts work with their workers' compensation claims carriers and follow the reporting requirements as outlined in this Legal Update in the unfortunate event that an employee tests positive for COVID-19. The law provides further incentives for districts to follow health and safety guidelines of public health officials and take preventative measures to restrict the spread of COVID-19 at each specific place of employment. If a district has reason to believe an employee has tested positive for COVID-19, the district must work quickly to provide the required information to its workers' compensation claims carrier in a timely manner.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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¹⁴ Labor Code section 3212.86(f)