Mother of Presumptions: Employees With COVID-19 Presumed to Have Contracted Virus From Exposure at Work

On May 6, 2020, California Governor Gavin Newsom issued Executive Order N-62-20 (the “Order”), which states employees that test positive for COVID-19 are presumed to have contracted the virus in the course of employment for purposes of awarding workers’ compensation benefits, if certain requirements are met.

As noted in our previous blog, workers’ compensation claims associated with COVID-19 related illnesses are on the rise. Until now, it was unclear whether such claims would be compensable in California under Workers Compensation statutes and regulations. The Order now creates a rebuttal presumption that COVID-19 illnesses arise from exposure at work if four requirements are met. Newsom explains that employees who report to work are frequently exposed to an increased risk of contracting COVID-19 and the Order will promote the health of employees and mitigate the effects of COVID-19.

What Requirements Must Be Met to Create a Presumption COVID-19 Arose in the Course of Employment?
The Order indicates that any COVID-19 related illness that occurs between March 19 through July 5, 2020 is presumed to have arisen out of and in the course of employment for purposes of awarding workers’ compensation benefits if all four of the following requirements are met:

1. Employee tests positive for or was diagnosed with COVID-19 within 14 days after employee performed work at their place of employment and at the employer’s direction;

2. The day the employee performed work was on or after March 19, 2020;

3. The place of employment where the employee performed work was not the employee’s home or residence; and

4. If the employee was diagnosed with COVID-19 (as opposed to testing positive), the diagnosis must be “done by a physician who holds a physician and surgeon license with the California Medical Board, and the diagnosis is confirmed with further testing within 30 days of the diagnosis.”

(hereinafter referred to as the “Presumption”).

Can the Presumption Be Disputed?

Yes. The Presumption that a COVID-19 related illness arose out of and in the course of employment can be disputed by other evidence. However, the Order notes that unless controverted, the Workers’ Compensation Appeals Board is bound to find in accordance with the presumption.

How Long Will the Presumption Last?

The Presumption applies to dates of illness/injury from March 19, 2020 through July 5, 2020.

What If an Employee Already Has Paid Sick Leave Benefits Available?

If an employee has paid sick leave benefits available to them in response to COVID-19, the paid sick leave benefits must be used before any temporary disability benefits or benefits under Labor Code Section 4850 are due and payable. If an employee does not have paid sick leave benefits available to them in response to COVID-19, they shall be provided temporary disability benefits or benefits under Labor Code Section 4850 if applicable, from the date of disability. There shall be no waiting period for temporary disability benefits.

Can Insurance Carriers Continue to Adjust the Costs of Their Policies?

Yes. The Order does not limit the existing authority of insurance carriers to do so.

What If a Claim of a COVID-19 Related Illness Is Not Rejected
Within 30 Days?

If a claim of a COVID-19 related illness is not rejected within 30 days after the date the claim form is filed under Labor Code Section 5401, the illness is presumed compensable unless rebutted by evidence discovered subsequent to the 30-day period.

What Benefits Do Employees Get If COVID-19 Is Covered by Workers’ Compensation?

If a claim of a COVID-19 related illness is accepted, the employee would be eligible for all benefits under California’s workers’ compensation laws. These benefits include medical treatment, hospital, surgical, disability indemnity, and death benefits. Except as otherwise provided in the Order, the claim would be subject to California’s workers’ compensation laws, including Labor Code Sections 4663 and 4664. These code sections generally cover the apportionment of permanent disability.

How Does an Employee Qualify for Temporary Disability Under the Order?

To qualify for temporary disability benefits or benefits under Labor Code Section 4850, the employee must meet one of the following: (1) If the employee tests positive for or is diagnosed with COVID-19 such that the above presumption is met, on or after the May 6, 2020 Order, the employee must be certified for temporary disability benefits within the first 15 days after the initial diagnosis and recertified every 15 days thereafter, for the first 45 days after the diagnosis; or (2) If the employee tested positive for or was diagnosed with COVID-19 such that the above presumption is met, prior to the May 6, 2020 Order, the employee must obtain a certification, within 15 days of the May 6, 2020 Order, noting the period the employee was temporarily disabled and unable to work, and must be recertified every 15 days thereafter, for the first 45 days after the diagnosis. Labor Code Section 4850 referenced herein generally indicates that certain employees who are disabled by illness/injury arising out of and in the course of employment, may be entitled to a leave of absence in lieu of disability payments for a certain period of time.

Who Can Certify an Employee for Temporary Disability Under the Order?

The employee must be certified by a physician who holds a physician and surgeon license with the California Medical Board. The physician can be a predesignated workers’ compensation physician, a physician within the employee’s group health plan, or a designated workers’ compensation physician in an applicable Health Care Organization or Medical Provider Network. If there is no predesignated workers’ compensation physician or group health plan, the employee should be certified by a physician of the employee’s choosing, and that physician must hold a physician and surgeon license.
What About the Collection of Death Benefit Payments Due?

The Department of Industrial Relations must waive the collection of death benefit payments due under Labor Code Section 4706.5 arising out of claims covered by the Order. Labor Code Section 4706.5 generally indicates that when fatal injuries are suffered and there is no surviving person entitled to compensation/benefits, the payment is made to the Department of Industrial Relations.

How Will the Order Be Implemented?

The Administrative Director of the Division of Workers’ Compensation shall adopt, amend, or repeal regulations necessary to implement the Order. Regulations promulgated by the Administrative Director will be exempt from the Administrative Procedures Act, but they must be submitted to the Office of Administrative Law for publication in the California Regulatory Notice Register.

How Does the Order Affect Other Laws/Rights/Benefits, Including the Families First Coronavirus Recovery Act (“FFCRA”)?

Workers’ compensation statutes or regulations that are not in conflict with the Order will not be modified or suspended by the Order. Nor will the Order reduce or eliminate any other right/benefit to which the employee is otherwise entitled under the law, including the FFCRA, a collective bargaining agreement, or Employee Benefit Plan including group health insurance, that was in effect before March 19, 2020.

Employer Takeaways

- Prepare COVID-19 policies that require employees to immediately report COVID-19 related illnesses;
- Require employees to follow normal protocols to submit worker’s compensation claims;
- Confer with your insurance carrier or broker to discuss new protocols or notices they may require for COVID-19 related illnesses;
- Provide employees with any mandated paid sick leave or extended FMLA as required by federal, state and local laws; and
- Do not retaliate against an employee that files a COVID-19 Workers Compensation claim.

As you are aware, things are changing quickly and there is no clear-cut authority or bright line rules. This is not an unequivocal statement of the law, but instead represents our best interpretation of where things currently stand. This article does not address the potential impacts of the numerous other local, state and federal orders that have been issued in response to the COVID-19 pandemic, including, without limitation, potential liability should an employee become ill, requirements regarding family leave, sick pay and other issues.