Effective immediately, Senate Bill (SB) 1159 is a new California law that establishes presumptions about workers’ compensation benefits for employees who contract COVID-19. This article explains in a series of questions and answers what employers need to know about workers’ compensation under this new law if an employee tests positive for COVID-19.

**NEWSOM’S EXECUTIVE ORDER IS NOW LABOR CODE SECTION 3212.86**

The new law codifies presumptions in Governor Newsom’s Executive Order N-62-
20 (the “Order”) issued on May 6, 2020 into a new Labor Code Section 3212.86. As previously summarized in our blog, this Section indicates that all employees, regardless of industry, who suffered a COVID-19 related illness between March 19, 2020 and July 5, 2020 are presumed to have contracted the virus at work for purposes of awarding workers’ compensation benefits if various requirements are met.

Minor changes to the previous Order include: (1) COVID-19 diagnosis can be made not only by a licensed physician and surgeon, but also by a state licensed physician assistant or nurse practitioner acting under the supervision of a physician and surgeon pursuant to standardized procedures/protocols within their lawfully authorized scope of practice; and (2) available paid sick leave benefits in response to COVID-19 must be used before any benefits under Labor Code Sections 4800, 4800.5, and 4850 are due and payable.

Section 3212.86 applies to pending claims, including those relying on the Order. The new law is not a basis to rescind, alter, amend, or reopen any final award of workers’ compensation already issued. Section 3212.86 remains in effect until January 1, 2023.

New Presumption for Frontline Workers

Labor Code Section 3212.87 expands the above presumption to frontline workers who suffer a COVID-19 related illness between July 6, 2020 and January 1, 2023 if certain requirements are met.

- **Which Frontline Workers Are Covered?**

  This Section covers (1) active firefighting members, (2) peace officers, (3) fire and rescue service coordinators, (4) employees who provide direct patient care, or custodial employees in contact with COVID-19 patients who work at a health care facility, (5) authorized registered nurses, (6) emergency medical technicians-I, -II, and -paramedics, (7) employees who provide direct patient care for home health agencies, (8) other employees of health facilities other than those described under No. 4 above, unless the employer can establish that the employee had no contact with a COVID-19 positive patient in the previous 14 days, and (9) providers of in-home supportive services when they provide services outside of their own home.

- **What Requirements Must Be Met to Create a Presumption COVID-19 Arose in the Course of Employment?**

  Under Section 3212.87, a COVID-19 related illness is presumed to have arisen out of and in the course of employment for purposes of awarding workers’ compensation benefits if the following three requirements are met:

  1. The employee tests positive for COVID-19 within 14 days after the 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 July 6, 2020; and

  3. The place of employment where the employee performed work was not the employee’s home or residence.
What Type of Positive “Test” is Required? The “test” may be a PCR (Polymerase Chain Reaction) test approved for use or emergency use by the United States Food and Drug Administration to detect viral RNA, or any other viral culture test approved for use or emergency use by the United States Food and Drug Administration to detect viral RNA which has the same or higher sensitivity and specificity as the PCR Test. The “test” may not include serologic testing, also known as antibody testing.


Can the Frontline Presumption Be Disputed? The Frontline Presumption that a COVID-19 related illness arose out of and in the course of employment can be disputed by other evidence. However, this Section indicates that unless controverted, the Workers’ Compensation Appeals Board is bound to find in accordance with the Frontline Presumption.

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 full hospital, surgical, medical treatment, disability indemnity, and death benefits.

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 Sections 4800, 4800.5, or 4850 are due and payable. If an employee does not have paid sick leave benefits available, 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.

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 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 this Section. 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.

Does This Section Alter Previous Awards? This Section applies to pending matters, but it does not rescind, alter, amend, or reopen any final award of workers’ compensation already issued.
NEW PRESUMPTION FOR OTHER, NON-FRONTLINE WORKERS

Labor Code Section 3212.88 creates a presumption for non-frontline workers who suffer a COVID-19 related illness between July 6, 2020 and January 1, 2023 if certain factors are met.

- **Who Is Covered?**

This Section covers employees who are not frontline workers under Labor Code Section 3212.87, but who work for an employer with five or more employees and who test positive during an “outbreak” at their specific place of employment.

- **What Requirements Must Be Met to Create a Presumption COVID-19 Arose in the Course of Employment?**

This Section indicates that a COVID-19 related illness is presumed to have arisen out of and in the course of employment for purposes of awarding workers’ compensation benefits if the following three requirements are met:

1. The employee tests positive for COVID-19 within 14 days after the 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 July 6, 2020; and

3. The positive test occurred during a period of an “outbreak” at the employee’s specific place of employment.

An “outbreak” occurs if within 14 calendar days one of the following is present:

a. For employers with 100 or fewer employees at a specific place of employment, 4 employees test positive for COVID-19; or

b. For employers with more than 100 employees at a specific place of employment, 4% of the employees test positive for COVID-19; or

b. A specific 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 a risk of infection with COVID-19.

(Hereinafter the “Outbreak Presumption”).

- **What Type of Positive “Test” Is Required?** Same as the Frontline Presumption.

- **What Is a Specific Place of Employment?** It is the facility where an employee performs work at the employer’s direction. It does not include the employee’s home or residence unless the employee provides home health care services at their home or residence.

- **What If an Employee Works at Multiple Locations for the Employer Within 14 Days of the Positive Test?** The positive test is counted at each of
those places of employment for purposes of determining whether there is an outbreak. If an outbreak exists at any of those places of employment then that shall be the employee’s “specific place of employment.”

- **How Long Will the Outbreak Presumption Last?** Same as the Frontline Presumption.

- **Can the Outbreak Presumption Be Disputed?** Same as the Frontline Presumption. In addition, this Section indicates that evidence relevant to rebutting the Outbreak Presumption includes measures put in place to reduce potential transmission of COVID-19 and evidence of an employee’s nonoccupational risks of COVID-19 infection.

- **What Benefits Do Employees Get If COVID-19 Is Covered by Workers’ Compensation?** Same as the Frontline Presumption.

- **What If an Employee Already Has Paid Sick Leave Benefits Available?** Same as the Frontline Presumption. In addition, paid sick leave benefits must be used before any benefits under Education Code Sections 44977, 44984, 45192, 45196, 87780, 87787, 88192, or 88196 are due and payable.

- **What If a Claim of a COVID-19 Related Illness Is Not Rejected Within 45 Days?** If a claim of a COVID-19 related illness is not rejected within 45 days after the date the claim form is filed under Labor Code Section 5401, the injury is presumed compensable unless rebutted by evidence discovered subsequent to the 45-day period.

- **What About the Collection of Death Benefit Payments Due?** Same as the Frontline Presumption.

- **Does the Employer Have a Duty to Report Positive Cases?** When the employer knows or reasonably should know that an employee has tested positive for COVID-19, the employer must report to the claims administrator the following in writing via email or facsimile within three business days:

  1. An employee has tested positive. No personally identifiable information shall be provided unless the employee asserts the infection is work-related or has filed a claim form pursuant to Labor Code Section 5401;

  2. The date the employee tested positive. This means the date the specimen was collected for testing;

  3. The specific address(es) of the employee’s specific place of employment during the 14-day period preceding the positive test; and

  4. The highest number of employees who reported to work at the employee’s specific place of employment in the 45 days preceding the last day the employee worked at each specific place of employment.

- **Does the Employer Have a Duty to Retroactively Report Positive Cases Between July 6, 2020 and September 17, 2020?** If an employer is aware
that an employee tested positive on or after July 6, 2020 and prior to September 17, 2020, the employer must report to the claims administrator in writing via email or facsimile within 30 business days of September 17, 2020 (by October 29, 2020) the first three items directly above, as well as 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.

- **Could a Civil Penalty or Citation Be Imposed for Failure to Report?** If the employer intentionally submits false or misleading information, or fails to submit information, the employer is subject to a civil penalty in the amount of up to $10,000 to be assessed by the Labor Commissioner. If the Labor Commissioner finds that the employer submitted false or misleading information, it may issue a citation. The citation shall be in writing and describe the nature of the violation. The citation may be served personally, by certified mail with return receipt requested, or by registered mail.

- **Could a Civil Penalty or Citation Be Challenged?** The employer has 15 business days after service of the citation to notify the office of the Labor Commissioner which appears on the citation of its request for an informal hearing. The Labor Commissioner shall hold a hearing within 30 days, at which time the citation or civil penalty will be affirmed, modified, or dismissed. The decision shall consist of a notice of findings, findings, and order, which shall be served within 15 days after the hearing by regular first-class mail. Any amount found due shall be due and payable within 45 days after notice has been mailed.

- **Could a Writ of Mandate Be Taken?** Once the Labor Commissioner makes its finding, a writ of mandate may be taken to the appropriate superior court, but the party must agree to pay any judgment and costs ultimately rendered by the court against the party for the assessment. The writ of mandate must be taken within 45 days of service of the notice of findings, findings, and order. If the party filing the writ is unsuccessful, the Labor Commissioner shall recover its costs and attorneys’ fees.

- **What If the Employer Does Not Contest the Citation?** The employer shall transmit to the office of the Labor Commissioner designated on the citation the amount specified within 15 business days after issuance of the citation.

- **Does This Section Alter Previous Awards?** Same as the Frontline Presumption.

**HOW WILL THE IMPACT OF COVID-19 ON WORKERS’ COMPENSATION BE STUDIED?**

Labor Code Section 77.8 indicates that the Commission on Health and Safety and Workers’ Compensation shall conduct a study regarding the impact COVID-19 has had on the workers’ compensation system. A preliminary report shall be delivered to the Legislature and Governor Newsom by December 31, 2021. Further, a final report shall be delivered to the Legislature and Governor Newsom by April 30, 2022.

**EMPLOYER TAKEAWAYS**
• Review your current COVID-19 policies to ensure they require employees to immediately report illnesses;

• Develop checklists and protocols for managing positive COVID-19 cases including submitting Worker’s Compensation claims;

• Confer with your insurance carrier or broker to discuss these new protocols; and

• Do not retaliate against employees who file COVID-19 related workers’ compensation claims.

As you are aware, things are changing quickly and there is a lack of clear-cut authority or bright line rules on implementation. This article is not intended to be an unequivocal, one-size fits all guidance, but instead represents our interpretation of where things currently and generally 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.

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