California Employers Now Subject to Additional COVID-19-Related Laws Related to Cal/OSHA Reporting and Worker's Compensation

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The addition of even more employee-leaning laws in the Golden State continues. As Michelman & Robinson reported earlier this month, the California legislature passed—and Governor Gavin Newsom signed into law—AB 1867, giving an increased number of employees in California access to paid sick leave as it relates to the novel coronavirus pandemic through the remainder of 2020. Late last week, Governor Newsom placed his signature on two other bills: AB 685, which requires employers to report COVID-19 cases to Cal/OSHA within a prescribed period of time, and SB 1159, a law that makes worker's compensation benefits more accessible to employees by creating a "disputable presumption" that an illness or death resulting from COVID-19 has arisen out of and in the course and scope of employment. The latter bill is likely to cause worker's compensation premiums to skyrocket for many employers already trying to manage increased claims following pandemic-related furloughs and layoffs.

These new laws undoubtedly raise many questions for employers. Here, M&R provides answers to a few that may be top of mind.

Q. What are the specific reporting requirements mandated by AB 685?

A. The requirements set forth in AB 685 are twofold:

Employee Notice

First, an employer must provide written notification to all of its employees (as well as the employees of any subcontractors) who were at the employer's worksite when an individual potentially infected with the novel coronavirus was also there. Those employees who may have been exposed to COVID-19 as a result must be given such notice *within one business day* of the employer learning about the potential exposure.

Note that the required notice under AB 685 must protect employee privacy and should not include any personally identifiable (or personal health) information. Also, the notice must include (1) information on any COVID-19 benefits the exposed employee may be entitled to, and (2) the disinfection and safety plan the employer has implemented or intends to implement in accordance with CDC guidance.

Cal/OSHA

AB 685 also requires employers to report COVID-19 cases to Cal/OSHA within 48 hours of an "outbreak" as defined by the California Department of Public Health (see below). Toward that end, employers must implement a process for employees to report (1) potential exposures to COVID-19, or (2) if they have tested positive for or are having symptoms of COVID-19. Employers are also obligated to assess any employee COVID-19 case to determine whether reporting on the case is required under Cal/OSHA regulations.

For its part, Cal/OSHA has explicit authority under AB 685 to (1) prohibit entry or access to a worksite, (2) prohibit performance of an operation or process at the worksite, and (3) require posting of an imminent hazard notice if employees there have been exposed to the novel coronavirus.

Q. What is considered an "outbreak"?

A. An outbreak for purposes of AB 685 exists if within 14 calendar days one of the following occurs:

- Where an employer has 100 employees or fewer at a specific place of employment, four employees test positive for COVID-19
- Where the employer has more than 100 employees at a specific place of employment, 4% of the number of employees who reported to that workplace test positive for COVID-19
- If 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

For the rebuttable presumption created by SB 1159 (addressed below) to apply, the employee must test positive for COVID-19 *during an outbreak*. If there is no outbreak, no such presumption exists.

Q. When must employers begin to abide by the mandates of AB 685?

A. AB 685 goes into effect in January 2021.

Q. How does SB 1159 impact worker's compensation claims?

A. By virtue of SB 1159, there is now a codified rebuttable presumption that a covered worker's illness or death from COVID-19 is work-related and entitles him/her/they to worker's compensation. If the mandates of SB 1159 sound familiar, they should. Governor Newsom had previously created a similar, yet temporary, presumption back in May when he signed Executive Order N-62-20, but that EO expired on July 5. The new law, which runs through January 1, 2023, is likely to result in significantly increased worker's compensation insurance premiums.

Q. What specifically is the presumption created by SB 1159?

A. As referenced above, SB 1159 creates a "disputable presumption" that an illness or death resulting from COVID-19 has arisen out of and in the course and scope of employment, which would mean the effected employee is entitled to workers' compensation. Pursuant to the law, it is the employer's burden to rebut the presumption, but it can do so *only with evidence discovered subsequent to the applicable investigation period*.

The presumption applies to all employees who test positive during an outbreak at the employee's specific place of employment on or after July 6 and within 14 days after the employee performed labor or services at the employee's place of employment and at the employer's direction, but only if the employer has five or more employees.

Q. What if the employee claiming worker's compensation benefits works remotely?

A. SB 1159's rebuttable presumption does not apply where an employee works from home, unless that employee performs home health care services from his/her/their residence.

Q. How can an employer rebut the presumption imposed by SB 1159?

A. An employer may dispute the presumption with evidence of the following:

- Measures in place to reduce potential transmission of COVID-19 in the employee's place of employment
- The employee's non-occupational risks of COVID-19 infection
- Statements made by the employee
- Any other evidence normally used to dispute a work-related injury
- For workers in health care facilities, no presumption exists if the employer can establish that the employee did not come into contact with a patient who tested positive for COVID-19 within the last 14 days

Q. When does SB 1159 take effect and how long will its rebuttable presumption last?

A. SB 1159 is effective immediately, and the rebuttable presumption created under the law will remain in place until January 2023.

Q. Are there specific claims and reporting requirements tied to SB 1159?

A. Yes. If an employee's date of injury is before July 6, the claim administrator has 30 days to deny it, but if the date of injury is on or after July 6, the claim administrator *now has 45 days to deny the claim*, or the injury is presumed compensable. That being said, if the employee is "essential" as specified in the California Labor Code (e.g., a firefighter, peace officer, frontline healthcare provider or healthcare facility worker), then the 30-day denial period applies regardless of the date of injury.

In terms of reporting, when an employer "knows or reasonably should know that an employee has tested positive for COVID-19," the employer must report certain specified information to its claims administrator *within three business days*, via e-mail or fax.

Of course, the labor and employment attorneys at M&R are always available to answer your specific questions, whether or not they relate to COVID-19 or the legislation discussed above.

We are working diligently to keep our clients up to date on coronavirus-related developments. Nevertheless, these developments are changing daily and, in some cases even hourly, so it is important that you make sure you are dealing with the most current information. That being said, this alert is not offered, and should not be relied on, as legal advice. You should consult an attorney for guidance and counsel regarding any specific concern or situation.