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Governor Newsom Signs SB 1159 Relating to COVID-19 & Workers' Compensation
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On September 17, 2020, Governor Newsom signed SB 1159 into law. For employers with more than 5 employees, the bill establishes a workable presumption of compensability for employees who contract COVID-19 from any employer that experiences an "outbreak" of COVID-19 cases at a particular work location. The bill was passed with bipartisan support and was the employer-preferred COVID-19 related workers' compensation legislation being contemplated this year. We opposed prior versions of the bill, but did not oppose the final version, due to the amendments that established a sunset date, created an evidentiary standard for employers to controvert a claim, set an "outbreak" threshold trigger and continued a reasonable claim rejection timeline. In contrast, the industry was able to defeat AB 196 (Gonzalez). That measure similarly would have created a rebuttable presumption for COVID-19 workers' compensation claims, but it did not contain any industry requested amendments. For example, that bill did not have a sunset date — the presumption would exist in perpetuity — nor did it have a threshold trigger of an "outbreak," meaning any single employee could submit a presumed claim.

Industry Impact:

As it relates to our industry, the measure defines an "outbreak" as 4 or more employees who worked at the same jobsite and contracted COVID-19 within a 14-day period (for employers with more than 100 employees at a job site, at least 4% of the employees contracted COVID-19 within a 14-day period). The measure was amended to ensure that this presumption is rebuttable and the evidence to rebut the presumption includes, but is not limited to, evidence of measures in place to prevent transmission of COVID-19 and evidence of an employee's nonoccupational exposure to COVID-19. The presumption established by the bill expires on January 1, 2023.

It should be noted that this bill does not remove or change the recent industry amendments to the California Workers' Compensation Uniform Statistical Reporting Plan—1995 (USRP) and the California Workers' Compensation Experience Rating Plan—1995 (ERP) which exclude COVID-19 claims from a contractor's experience modification rate (EMR).

As SB 1159 contained an urgency clause, contractors must prepare to comply with the provisions of SB 1159 immediately.

To assist with compliance, below is an overview of SB 1159:

Rebuttable Presumption:

The bill establishes three rebuttable presumption labor codes for employees contracting COVID-19, in which only two presumptions apply to the construction industry:

New Labor Code Section 3212.86: Retroactively Codifies Governor Newsom's May 6, 2020 Executive Order: only for dates of injury from 3/19/2020–7/5/2020, with three minor clarifications/changes to the original Executive Order:

- The Date of Injury (DOI) is to be considered the LAST date on which the employee performed services at the place of employment.
- A diagnosis that is provided within 14 days of the DOI must be done by a licensed physician or surgeon holding an MD or DO degree, or a state licensed Physician's Assistant or Nurse Practitioner acting under review/supervision.
- The diagnosis must be confirmed by a COVID-19 test (PCR test), or a serologic test (aka, an antibody test), within 30 days of the date of the diagnosis.

New Labor Code Section LC 3212.88: Effective from 7/6/2020–1/1/2023, COVID-19 claims will be rebuttably presumed compensable only during a period that's being defined as an "outbreak."

"Outbreak" is defined if within a 14-calendar day period, one of the following occurs:

- An employer has 100 or fewer employees at a specific place of employment and at least four (4) employees who reported to the site test positive for COVID-19;
- An employer has more than 100 employees at a specific place of employment and at least 4% of the number of employees who reported to the site, test positive for COVID-19.

COVID-19 is rebuttably presumed compensable for workers during an outbreak if:

- An employee tests positive for COVID-19 within 14 days after a day that employee performed labor or services at the employee's site, and the positive test occurred during an outbreak as previously defined;
- The "Test" is a PCR (Polymerase Chain Reaction) test approved for use to detect the presence of viral RNA. (Note: approved testing does not include "serologic testing," aka, antibody testing);

Presumption applies for 14 days after last date worked, even if employee has been terminated. And, if a claim is not rejected within 45 days after the date the claim form is filed, the COVID-19 claim is presumed compensable.

If the definition of an "outbreak" is not met and there are still employees who test positive for COVID-19, the presumption and rules outlined above do not apply. In this scenario, the standard rules around establishing compensability will apply, meaning the employer and claim administrator have 90 days in which to conduct their investigation from the date the DWC-1 claim form is filed.

In addition, the bill specifically allows employers to refute the presumption by pointing to measures they took to reduce the potential transmission of the disease or pointing to a worker's non-occupational risks of COVID-19 infection.

The COVID-19 rebuttable presumption established under SB 1159 sunsets on January 1, 2023.

Reporting and Filing Claims:
On or after September 17, 2020, employers need to keep records of a possible COVID19 outbreak, regardless of whether an employee who tests positive for COVID-19 files a claim or not. When the employer knows or reasonably should know that an employee tested positive for COVID-19, they must report all the following data to their claim administrator within three business days (in writing via electronic mail or fax):

- An employee has tested positive. For purposes of this reporting, 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 claim form pursuant to California Labor Code Section 5401.

- The date that the employee tests positive, which is the date the specimen was collected for testing.
- 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.
- 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.

Penalties for Failure to Report Employees with COVID-19:
Where an employer fails to submit timely or intentionally submits false or misleading information, they shall be subject to a $10,000 civil penalty.

Advice – Contractors Need to be Diligent on Record-Keeping:
It's recommended that employers maintain daily records that are able to show which employees worked at specific locations on given days. Employers will also need to keep a log of the number of employees that reported to work at the affected employee's place of employment and the specific number of employees that test positive for COVID-19. Any time an employee believes the infection is work-related and requests to file a workers' compensation claim, a DWC-1 claim form should be provided to the employee and the claim should be reported to the carrier regardless of whether there is an "outbreak" or potential presumption. The carrier will assess whether the presumption applies or whether the general compensability rules apply.