



WELCOME!

WORKERS' COMPENSATION WEBINAR SERIES

A PANDEMIC OF PRESUMPTIONS: SB 1159 AND AB 685



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A PANDEMIC OF PRESUMPTIONS: SB 1159 AND AB 685

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LABOR CODE § 3212.86

This section codifies the Executive Order from the Governor that issued in May of 2020.

LABOR CODE § 3212.86

- Did the work occur outside of the workers' home at the employer's direction?
- Did the day the work performed for the employer occur on or after 3/19/2020 and on or before 7/5/2020?

LABOR CODE § 3212.86

- Did the worker receive a positive test for COVID that was taken within 14 days of working for the employer outside the home at the employer's direction?
- If yes, the COVID is presumed industrial.

LABOR CODE § 3212.86

- What if the worker did not receive a positive test for COVID?
 - If the worker did not receive a positive test, did they receive a diagnosis from a medical doctor holding a physician or surgeon license issued by the California Medical Board or a P.A./N.P. under physician review and supervision?
 - Was the diagnosis confirmed with a positive viral test (PCR) or antibody test within 30 days?

LABOR CODE § 3212.86

- If the aforementioned questions are responded in the affirmative, COVID is presumed industrial, subject to rebuttal by other evidence.
- 30 days to accept or deny the claim after filing of a claim form or it will be presumed compensable.
- DOI now defined as the last date employee performed labor or services at the employer's place of employment.

LABOR CODE § 3212.87

This new code section applies to specified first responders, firefighters, peace officers, health facility workers or home healthcare workers. (Labor Code 3212.87(a)(1-11)).

LABOR CODE § 3212.87

- *In general, first responders* are police officers, active firefighters, fire and rescue service coordinators, safety dispatchers (per AB1945 which adds Government Code § 8562) and custodial employees.
 - Did the worker receive a positive test for COVID that was taken within 14 days of working for the employer at employer's place of employment at direction of employer? If yes, COVID presumed industrial – 30 days to accept or deny the claim.
 - These presumptions are rebuttable, but the employer now must show why the injury is not AOE/COE.

LABOR CODE § 3212.87

- *In general, healthcare facility workers* such as nurses, doctors, clerks, food service workers and the like.
 - Healthcare Facility defined by Health and Safety Code 1250 essentially as a facility operated for the treatment of physical or mental illness to which patients can be admitted for 24 hours or more.
 - Those providing direct patient care and custodial workers in contact with COVID Patients specifically receive a presumption.
 - For other health facility workers the presumption applies, but the employee can be disqualified from the presumption if the employer can establish that the employee had no contact with any patients who tested positive with COVID in the past 14 days.
 - Employees described in this section who do not qualify for the presumption must prove their claims in the ordinary manner.

LABOR CODE § 3212.87

- Did the healthcare facility worker receive a positive test for COVID that was taken within 14 days of working for the employer?
- If the aforementioned questions are responded in the affirmative, COVID is presumed industrial.
- DOI is the last date the employee performed labor at the employer's direction prior to the positive test. The test must be viral test approved by FDA (such as Polymerase Chain Reaction) and not serologic antibody test.
- 30 days to accept or deny the claim.

LABOR CODE § 3212.87

- *In general, home healthcare worker* is anyone who provides home healthcare outside of the worker's residence.
 - Did the home healthcare worker receive a positive test for COVID that was taken within 14 days of working for the employer?
- If the aforementioned question is affirmative, COVID is presumed industrial - 30 days to accept or deny.

LABOR CODE § 3212.88

This provision is to be considered if the prior sections are not applicable and the employer has 5 or more employees. The section generally applies to employees who test positive for COVID-19 during an outbreak at the employee's specific place of employment.

LABOR CODE § 3212.88

- Did the work occur outside of the workers' home at the employer's direction?
- Specific place of employment is defined as the building, store, facility, or field where the employee performs work at the employer's direction.
- Can include employee's home if home health care services are provided to another individual at the employee's residence.
- Did the day the work performed for the employer occur on or after 7/6/2020 and before 1/1/2023?
- Did the worker receive a positive test for COVID that was taken within 14 days of working for the employer? Test must be viral testing, and not antibody testing.
- DOI is the last date the employee performed work at specific place of employment on or after 7/6/2020 prior to a positive test.

LABOR CODE § 3212.88

- Was there an “outbreak” at the employee’s specific workplace?
- Outbreak is determined by:
 - If an employer has 100 or less employees and 4 or more employees receive a positive test within 14 days of each other.

LABOR CODE § 3212.88

- Was there an “outbreak” at the employee’s specific workplace?
- Outbreak is also determined by:
 - If an employer has more than 100 employees and 4% or more receive a positive test within 14 days of each other.
- Third route to outbreak is when the specific place of employment is ordered closed by a local health department, OSHA, a school superintendent, or the State Department of Public Health due to risk of COVID-19 infection.

LABOR CODE § 3212.88

- If either of the aforementioned outbreak definitions are affirmative, COVID is presumed industrial.
 - Who determines if there was an outbreak?
 - The Claims Administrator based on the data reported and gathered.
- **45 days to accept or deny.**

REPORTING REQUIREMENTS

The purpose of the employer reporting requirements is to determine whether an employee qualifies for the presumption accounted for in the bill. Failure to report can result in civil penalties up to \$ 10,000.00 assessed by the Labor Commissioner. Employer must pay penalty assessment within 45 days after Notice or file a Writ of Mandate. A citation can issue for intentionally false or misleading reporting.

REPORTING REQUIREMENTS

POSITIVE TEST ON OR BEFORE 9/17/2020

The employer must report to the claims administrator within 30 business days:

For each separate location employee worked 14 days prior to the test date, the employer must provide to the claims administrator the address and the highest number of employees who reported to the work location on any given day between July 6th and September 17th. The claims administrator is to determine if an outbreak occurred.

REPORTING REQUIREMENTS POSITIVE TEST BEFORE 9/17/2020

Reporting is done by:

- Report must be sent via fax or email.
- Include the test date of when the specimen was collected.
- Omit personally identifiable information unless the employee is filing a claim.

REPORTING REQUIREMENTS POSITIVE TEST ON OR AFTER 9/17/2020

**The employer must report to the claims administrator within
3 business days:**

For each separate location employee worked 14 days prior to the test date, the employer must provide to the claims administrator the address and the highest number of employees who reported to the work location on any given day the 45 day period preceding the employee's last day at the location. The claims administrator is to determine if an outbreak occurred.

REPORTING REQUIREMENTS POSITIVE TEST ON OR AFTER 9/17/2020

Reporting is done by:

- Report must be sent via fax or email.
- Include the test date of when the specimen was collected.
- Omit personally identifiable information unless the employee is filing a claim.

REPORTING REQUIREMENTS

CURRENT INQUIRIES

- Negative COVID tests do not need to be reported.
- Positive COVID tests, regardless of whether or not it is work related are to be reported.
- If any employer knows or reasonably should know of a positive COVID test, it is to be reported.

REPORTING REQUIREMENTS

CURRENT INQUIRIES

- If the claim is deemed compensable and benefits provided, reporting is required.
- If a worker chooses not to file a claim for a positive COVID test, it is to be reported.

REBUTTING THE PRESUMPTION

During the investigative period, of either 30 or 45 days, depending upon which statute applies, defendant can develop evidence to rebut the presumption. Such evidence can take into consideration:

REBUTTING THE PRESUMPTION

- Demonstrating that measures were in place to reduce potential transmission of COVID.
- Demonstrating the employee's non-occupational risks of COVID.
- Utilize our Top 12 COVID Claim Investigative Questions at www.mulfil.com/case-briefs

COMPENSABLE CLAIM

Should the claim be deemed compensable, generally the same benefits are owed as in a regular Workers' Compensation case. Differences are as follows:

COMPENSABLE CLAIM TEMPORARY DISABILITY

- If the employer is providing COVID leave pay, temporary disability or 4850 benefits do not commence until such leave benefits are exhausted.
 - If COVID leave is not provided and the claim does not fall under Labor Code § 3212.86, benefits are owed. There is no waiting period under any of these sections.

COMPENSABLE CLAIM TEMPORARY DISABILITY

- If the claim falls under Labor Code § 3212.86 determine the following:
 - If the worker missed work due to COVID prior to 5/6/2020, the worker must have obtained a certification no later than 5/21/2020, documenting the period of TD and has to recertify the TD every 15 days during the first 45 days following diagnosis.

COMPENSABLE CLAIM TEMPORARY DISABILITY

- If the claim falls under Labor Code § 3212.86 determine the following:
 - If the worker did not miss work, any ongoing claims of TTD entitlement must have a medical doctor certify that the worker is TTD every 15 days within the first 45 days of the diagnosis.

COMPENSABLE CLAIM DEATH BENEFITS

There is no presumption of industrial death, even if the COVID is industrial. The standard is whether the employment was a contributing cause of the death, and if so, it is compensable.

COMPENSABLE CLAIM DEATH BENEFITS

- If no dependents, there is no recovery of the \$250,000 death benefit by the Death Without Dependents Unit.
- If there are dependents, benefits are owed as they otherwise would be for an industrial injury resulting in death.

ANCILLARY ISSUES

- **Compensable consequence** - can be established with substantial medical evidence finding the COVID caused the alleged compensable consequences.
- **Apportionment provisions** - Labor Code §§ 4663 and 4664 still apply.

AB 685 REPORTING REQUIREMENTS

EFFECTIVE 1/1/2021 AND SUNSETTING ON 1/1/2023

LABOR CODE SECTIONS 6325, 6409.6, AND 6432

AB 685 (CONT.)

- If an employer has notice that a worker has potentially been exposed to COVID-19, the employer **MUST** notify all other employees, subcontractors, and exclusive representatives (Union) in writing within 1 business day that they have been exposed to COVID-19 as to a particular worksite (other buildings, or locations where the qualifying individual did not work do not require notice).
- Existing law requires an employer to report very occupational injury or illness, but the bill requires reporting to anyone who were on the premises at the same worksite as a qualifying individual.
- The employer must notify all employees, subcontractors, and exclusive representatives of the disinfection and safety plan the employer intends to implement per CDC guidelines.
- Records must be kept for 3 years of all notifications provided.

AB 685 (CONT.)

- A qualifying individual is:
 - A person who has positive COVID-19 test results as defined by the State Department of Public Health
 - A positive COVID-diagnosis from a licensed healthcare provider.
 - An individual subject to an order to isolate/quarantine due to COVID-19 issued by a public health official.
 - An individual who has died due to COVID-19 as determined by the county public health department or who is included in COVID-19 county statistics.

AB 685 (CONT.)

- Notice of a potential exposure includes:
 - Notification to the employer from a public health official or medical provider that an employee was exposed to a qualifying individual at the worksite.
 - Notification to the employer from the employee that the employee is a qualifying individual.
 - Notification through testing protocols that an employee is a qualifying individual.
 - Notification from a subcontractor that a qualifying individual was on the worksite.

AB 685 (CONT.)

- Notification to the employer is to be in writing, and can be provided in the manner normally used by the employer including mailed correspondence, hand delivered correspondence, email, or text message. Notice should be in English and any other majority language for that worksite.
- Notification must advise the employees of all benefits available due to COVID-19 including supplemental sick leave, workers' compensation benefits, and any other benefits available under federal, state, or local law. Employer must also notify the employee as to protections against retaliation and discrimination.
- If an employer is aware of enough cases that the Department of Public Health's definition of an outbreak (different definition than LC 3212.88) is met, it must report to the local public health agency within 48 hours. The employer must report the names, number, occupation, and worksite of qualifying individual employees., as well as the business address of the worksite where the qualifying individuals work.
- CDPH defines an outbreak as "three or more laboratory-confirmed cases of COVID-19 within a two-week period among employees who live in different households."
- Failure to comply may result in a civil penalty. Consistent with Labor Code section 6319.

AB 685 (CONT.)

- The notice requirements do not apply to health facilities, who are exempt from reporting an “outbreak” within 48 hours.
- The notice requirements do not apply to employees whose duties require COVID-19 testing or screening or patient care unless the qualifying individual is also an employee.
- OSHA can shut down a workplace or operation/process within a workplace for serious violations that expose employees to a risk of COVID-19 infection. Employer must be provided with notice by OSHA, who must limit the shutdown to the immediate area of the hazard.
- No 15-day warning period as with standard violation citations – OSHA can immediately issue a citation, subject to its normal appeal procedures.



MULLEN & FILIPPI

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THANK YOU!



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RESOURCES

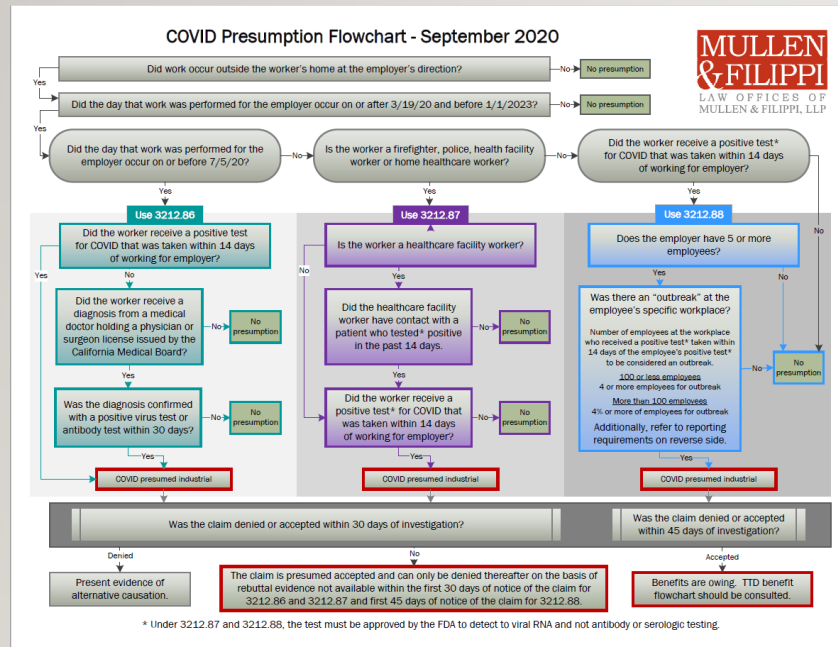
MULLEN & FILIPPI SBI I59 FLOWCHART

MULLEN & FILIPPI SBI I59 INVESTIGATION QUESTIONS

EPIC SBI I59 CHECKLIST

EPIC AB685 CHECKLIST

COVID FLOWCHART



COVID Claim Presumption Flowchart Per 3212.86, 3212.87, 3212.88



This flowchart is not a substitute for legal advice and may not address every factual scenario. If you have a COVID-19 case, we encourage you to contact your favorite M&F attorney to discuss the legal issues applicable to your unique case.

Reporting Requirements for 3212.88 (Employers subject to a civil penalty of up to \$10,000 for failure to report)

Positive Test on or before 9-16-2020

Employer must report to administrator within 30 business days.

For each separate location employee worked in the 14 days prior to the test date, provide the address and the highest number of employees who reported to the work location on any given day between July 6 and September 16. Claims examiner shall use information to determine if an outbreak occurred.

- Report must be sent via fax or email.
- Include the test date of when the specimen was collected.
- Omit personally identifiable information unless the employee is filing a claim.

Positive Test on or after 9-17-2020

Employer must report to administrator within 3 business days.

For each separate location employee worked in the 14 days prior to the test date, provide the address and the highest number of employees who reported to the work location on any given day during the 45-day period preceding the employee's last day at the location. Claims examiner shall use information to determine if an outbreak occurred.

- Report must be sent via fax or email.
- Include the test date of when the specimen was collected.
- Omit personally identifiable information unless the employee is filing a claim.

Apportionment

Is there permanent disability?

Yes

Apportionment to nonindustrial causes of disability such as comorbidities is still available under Labor Code 4663, and Labor Code 4664 still applies if there was any prior award of disability as to the body part or organ affected.

Compensable Consequences

Are there possible compensable consequences?

Yes

Substantial medical evidence must establish the alleged compensable consequences.

Death Benefits

Did the worker die?

Yes

Is the death industrial? While the death will not be presumed industrial even if the COVID is, the contribution standard from the South Coast Framing case will likely apply.

Yes

Did the worker have dependents?

Yes

Death benefits are owing as they otherwise would for an industrial injury resulting in death.

TTD Benefits

Did the worker miss time from work due to COVID or compensable consequences of COVID?

Yes

Did the employer provide leave pay specifically in response to the COVID crisis?

Yes

Worker must exhaust leave benefits set aside for COVID prior to obtaining any TTD or 4850 benefits.

No

Does 3212.86 apply?

No

TTD Benefits owing as usual except no waiting period applies.

Yes

Did the worker miss work due to COVID prior to the date of 5/6/2020?

Yes

The worker must have obtained a certification no later than 5/21/2020 documenting the period of temporarily total disability, and must then recertify TTD every 15 days thereafter for the first 45 days following diagnosis.

No

For ongoing claims of TTD entitlement, worker must have a medical doctor with a physician or surgeon license from the California Medical Board certify that the worker is TTD every 15 days within the first 45 days of the diagnosis.

Evidence relevant to rebutting the presumption includes evidence of measures in place to reduce potential transmission of COVID-19 in the workplace and employee's nonoccupational risks of COVID.

TOP 12 COVID CLAIM INVESTIGATION QUESTIONS



The following is our “Top 12 COVID Claim Investigation Questions” to ask the employer when a new COVID claim is filed. Every case will involve its own follow-up questions, as well as challenges. Feel free to use these questions to get you started with your claim investigation.

1. Do you have any written safety/social distancing policies related to COVID? Do you provide masks and hand sanitizer? Are there protocols to sterilize/wipe down surfaces each day? [\[obtain detail\]](#).
2. On which dates did the applicant work at the office, or at a work site under company direction, in the 2 weeks before the first diagnosis and/or positive test? Did the employee work between the dates of 3/19 and 7/5?
3. Did you talk to the applicant about how he/she feels they may have contracted the virus? If so, how? [\[obtain Details\]](#)
4. Have any other co-workers at the same location been diagnosed or tested positive for COVID-19? When, relative to when applicant was diagnosed/tested positive?
5. Were there any interactions or other contact between those infected co-workers and applicant? [\[obtain details of when, how, and for how long\]](#)
6. Does the employee share equipment, tools, and/or work surfaces with other infected co-workers? Are those surfaces/tools sanitized between uses? Are gloves required/used? [\[obtain details about these protocols used\]](#)
7. Are there common areas where applicant and other co-workers congregate and share equipment, tools, surfaces, etc.? Where, with whom, and how frequently? Are the safety/sanitizing/social distancing and mask protocols (see #1) used in those common areas?
8. Have there been any meetings or congregations involving applicant and co-workers in the 2 weeks prior to diagnosis/testing of applicant? Have any other workers from that meeting/congregation been diagnosed/tested positive? Were the preventative measures in #1 followed in that meeting/congregation (masks, social distancing, etc.)?
9. Was COVID testing done on applicant, and if so, was it conducted outside of the office or part of office testing? When and where exactly was testing done (so that you can easily track down that testing)? Has applicant previously had any COVID testing? When and where? Results?
10. Was the applicant exposed to individuals who are not employees (e.g. clients, vendors, etc.) in the two weeks prior to diagnosis/testing? Was this exposure at an employer location at employer direction? When, where, with whom, and for how long? Obtain details; is the employer aware of any of those non-employees being diagnosed with/tested positive for COVID-19?
11. Are you aware of any personal gatherings or activities in which the employee engaged, outside of the workplace, during the 2 weeks prior to testing positive? Any vacations, social activities, parties, or other gatherings? Has applicant taken public transportation?
12. Is the employer aware of any family members or friends of applicant who have been diagnosed with or tested positive for COVID-19? Who, when, and where?

CA SB 1159

CLAIM REPORTING CHECKLIST

Overview

Governor Gavin Newsom signed SB 1159 on September 17, 2020 as part of his worker protection package. Senate Bill 1159 creates a presumption that an illness or death resulting from COVID-19 has arisen out of and in the course and scope of employment. This presumption will remove burdens of access to Workers' Compensation for those employees who most likely became infected at work (front line workers, health care workers, firefighters, and police officers). An employer may dispute the presumption with evidence such as: (1) measures in place to reduce potential transmission of COVID-19 in the employee's place of employment, (2) the employee's non-occupational risks of COVID-19 infection, (3) statements made by the employee, and (4) any other evidence normally used to dispute a work-related injury.

Specifically, under SB 1159, once an employer knows or reasonably should have known that an employee tested positive for COVID-19, the employer must report to their carrier/TPA within 3-business days. This includes both work-related and non-work related COVID-19 diagnoses.

Employer Reporting Guidelines

Positive COVID-19 cases between 7/6/2020 and 9/17/2020 must be retroactively reported to the carrier/TPA by 10/29/2020!

- ☐ 1. The employer shall not provide any personally identifiable information regarding the employee who tested positive for COVID-19 unless the employee alleges the COVID-19 is work-related.
- ☐ 2. The date that the employee tests positive (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.

Positive COVID-19 cases on or after 9/17/2020 must be reported to the carrier/TPA within three business days.

- ☐ 1. For non-work-related COVID-19 exposures, the Employer must provide the following:
The bill prohibits employers from providing Personal Identifiable Information (PII). The employer may not provide identifying information about the employee unless that employee asserts the infection is work-related.

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CA SB 1159 CLAIM REPORTING CHECKLIST

- 2. Employer must provide the date of the test.
- 3. Employer must provide each location the employee worked for the last 14 business days. If the employee was present or worked in one or more locations, each location must be reported.
- 4. The highest number of employees who reported to work during the 45 days before the last day the infected employee worked for each location.

Special Notes:

- 1. An outbreak (Rebuttable Presumption) is:
 - a. 4 or more employees testing positive for COVID 19 at a "specific place of employment" if there are fewer than 100 employees;
 - b. 4% of the employees test positive for COVID 19 at a "specific place of employment" that has 100 or more employees;
 - c. The place of employment is ordered to be closed by a Department of Health official due to risk of infection from COVID 19
- 2. A "specific place of employment" means the building, store, facility, or agricultural field where an employee performs or works at the employer's direction. If the employee works at multiple locations, then the presumption would apply if an "outbreak" exists at any of those locations. Further, the employee's positive test shall be counted for the purpose of determining the existence of an outbreak at all of those places of employment.

A "specific place of employment" does not include the employee's home or residence unless the employee provides home health care to another individual at the employee's home or residence. It does not apply to buildings or other locations that the employee did not enter.

PENALTY POTENTIAL: Employer or anyone acting on their behalf who fail to comply or intentionally report false or misleading claims data or fails to submit information when reporting will be subject to a civil penalty of up to ten thousand dollars (\$10,000) to be assessed by the Labor Commissioner.

For work-related COVID-19 exposures, please report claims to your carrier or TPA as you would in the normal course of business. Remember to provide the employee with a DWC-1 Employee Claim Form within 24- Hours of notice.

For more information, please contact your EPIC representative.

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AB 685

PROACTIVE STEPS CHECKLIST

Proactive Steps

- ☐ 1. Ensure COVID-19 measures are present in your IIPP as required by Cal/OSHA:
 - ☐ a. Establish infection prevention measures including employee screening, physical distancing, and cleaning/disinfecting procedures
 - ☐ b. Provide employee training
 - ☐ c. Provide adequate washing facilities with a suitable supply of cleansing agents, water, and paper towels
 - ☐ d. Provide appropriate PPE
- ☐ 2. Visit Cal/OSHA's website to review the their Interim Guidelines on Protecting Workers from COVID-19 (<https://www.dir.ca.gov/dosh/coronavirus/General-Industry.html>) as well as Industry Specific Guidance on COVID-19 protocols (<https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html%20>)
- ☐ 3. Regularly review the CDC's website (<https://www.cdc.gov/coronavirus/2019-ncov/index.html>) to keep up to date with new COVID-19 related guidance
- ☐ 4. Develop effective procedures for notifying employees of an outbreak as defined by AB 685
- ☐ 5. Develop effective procedures for notifying employees of their rights and benefits regarding COVID-19
- ☐ 6. Develop effective procedures for documenting and tracking all COVID-19 cases for the purpose of compliance and to defend against claims and Cal/OSHA citations
- ☐ 7. Assign responsibilities for both COVID-19 prevention protocols and notification and tracking of COVID-19 cases

For more information contact Josh Allen at josh.allen@epicbrokers.com

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UPCOMING WEBINARS



Weathering the Post COVID Litigation Storm

Wednesday, October 21, 2020

10:30 am - 11:45 am PST

Employment & Workers' Compensation Legislative Updates -2021!

Wednesday, December 9, 2020

Time: TBA