

# **ASSEMBLY BILL 685 & Cal/OSHA**

## **What Employers Need to Know**

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December 9, 2020

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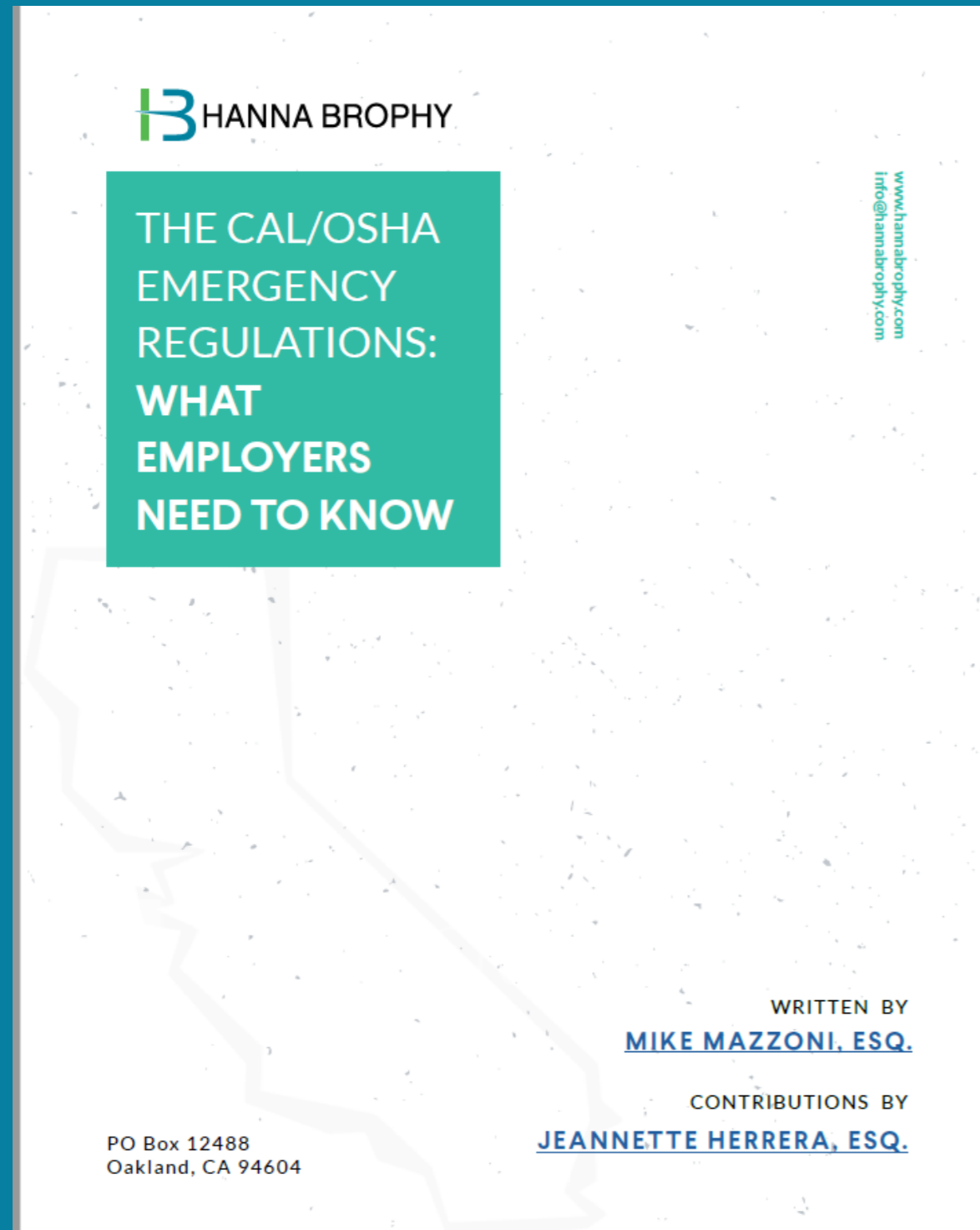
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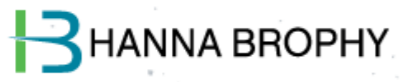


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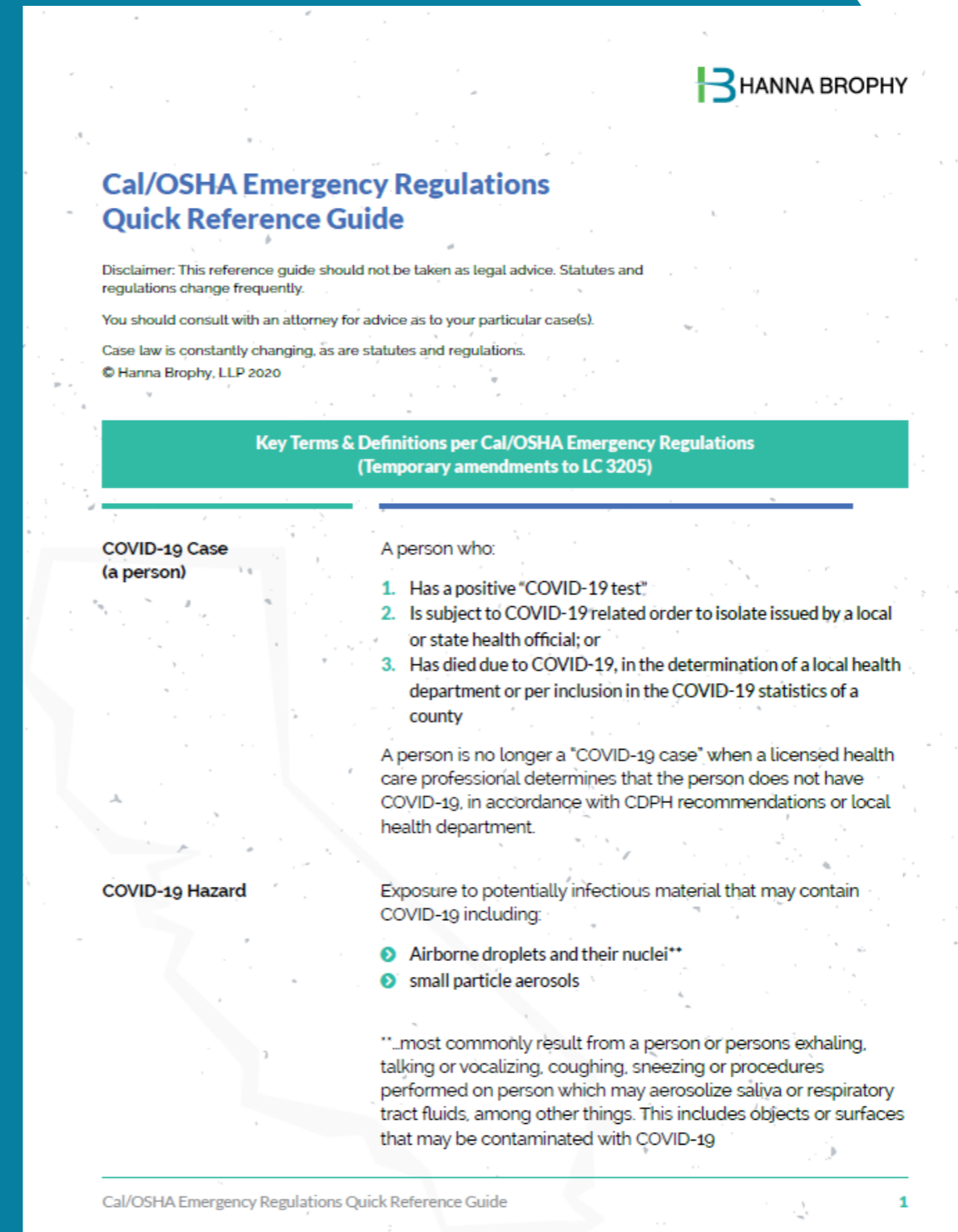
**THE CAL/OSHA EMERGENCY REGULATIONS: WHAT EMPLOYERS NEED TO KNOW**

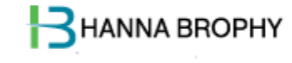
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## Cal/OSHA Emergency Regulations Quick Reference Guide

Disclaimer: This reference guide should not be taken as legal advice. Statutes and regulations change frequently.

You should consult with an attorney for advice as to your particular case(s).

Case law is constantly changing, as are statutes and regulations.

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### Key Terms & Definitions per Cal/OSHA Emergency Regulations (Temporary amendments to LC 3205)

**COVID-19 Case (a person)**

A person who:

1. Has a positive "COVID-19 test"
2. Is subject to COVID-19 related order to isolate issued by a local or state health official; or
3. Has died due to COVID-19, in the determination of a local health department or per inclusion in the COVID-19 statistics of a county

A person is no longer a "COVID-19 case" when a licensed health care professional determines that the person does not have COVID-19, in accordance with CDPH recommendations or local health department.

**COVID-19 Hazard**

Exposure to potentially infectious material that may contain COVID-19 including:

- Airborne droplets and their nuclei\*\*
- small particle aerosols

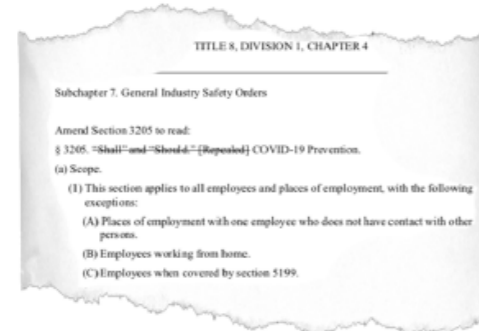
\*\*...most commonly result from a person or persons exhaling, talking or vocalizing, coughing, sneezing or procedures performed on person which may aerosolize saliva or respiratory tract fluids, among other things. This includes objects or surfaces that may be contaminated with COVID-19

Cal/OSHA Emergency Regulations Quick Reference Guide **1**



## Employers Ponder Compliance With New COVID Rules

Cal/OSHA's Division of Occupational Safety and Health has published the first of what it says will be an evolving set of "frequently asked questions" about the temporary emergency standard on COVID-19. It was approved by the Office of Administrative Law earlier this week.



The Division also says it intends to hold a stakeholder committee meeting this month, with the exact date to be determined. An advisory committee will follow it, DOSH adds. Stakeholders will have plenty of questions and comments on the controversial regulation. It will expire on October 2nd. Emergency standards typically last for six months, but this one is extended an extra four months due to Governor Gavin Newsom's COVID executive orders extending various deadlines. The ETS also could be extended twice.

"Our members had fared well when visited by DOSH under the IIPP standard for COVID compliance."  
— Lupe Sandoval

DOSH Chief Doug Parker calls the regulation "strong but achievable standards to protect workers" that also clarify what employers must do to prevent workplace exposures and stop outbreaks. But employer representatives have questions that the FAQ isn't likely to answer ([click here](#) to see the document).

"Our members ... will have many concerns as to how to comply with this onerous, complex and confusing regulation," says Guadalupe "Lupe" Sandoval, founder and executive di-

rector of the California Farm Labor Contractor Association. In addition to guidance, Sandoval urges DOSH to provide sample programs, such as the Injury and Illness Prevention Program and heat illness prevention models the Division has developed.

"I think it's going to be challenging for a lot of people to try to figure out how to do this."  
— Bryan Little

"I think it's going to be challenging for a lot of people to try to figure out how to do this," says Bryan Little, director of COVID Rules continued on page 12866

## Two COVID Updates

### Guidelines

The Center for Disease Control lowered its guidelines – from 14 days to 10 – for how long an exposed person must quarantine to ensure they are not sick with the virus. The quarantine decreases to 7 days with no symptoms and a negative test.

The new emergency standard for coronavirus is in conflict with the new CDC scientific results in that it requires 14 paid days off work.

### Vaccines

Moderna has applied for emergency use authorization. If granted distribution can begin during December, older Americans and first responders will be among the first to get the vaccine.

## IN THIS ISSUE

<b>NEWS</b>	00-12863 to 00-12868
• Parker Part of Biden Transition	
• Settlements in Fatality Cases	
• Latest Fatality Investigations	
• Job Postings	
<b>Decisions</b>	40-8345 to 40-8346
• John Locher Harvesting, Inc.	
• MWL Solutions, Inc.	

It is 7,187 days since our last lost-time accident.

## Model COVID-19 Prevention Program (CPP)

With some exceptions, all employers and places of employment are required to establish and implement an effective written COVID-19 Prevention Program (CPP) pursuant to an Emergency Temporary Standard in place for COVID-19 (California Code of Regulations (CCR), Title 8, section 3205(c)). Cal/OSHA has developed this model program to assist employers with creating their own unique CPP tailored to their workplace.

Employers are not required to use this program. Employers may create their own program or use another CCP template. Employers can also create a written CCP by incorporating elements of this program into their existing Injury and Illness Prevention Program (IIPP), if desired. Cal/OHA encourages employers to engage with employees in the design, implementation and evolution of their COVID-19 Prevention Program.

Using this model alone does not ensure compliance with the emergency temporary standard. To use this model program effectively, the person(s) responsible for implementing the CPP should carefully review:

- All of the elements that may be required in the following CCR, Title 8 sections:
  - 3205, COVID-19 Prevention
  - 3205.1, Multiple COVID-19 Infection and COVID-19 Outbreaks
  - 3205.2, Major COVID-19 Outbreaks
  - 3205.3, Prevention in Employer-Provided Housing
  - 3205.4, COVID-19 Prevention in Employer-Provided Transportation to and from Work
  - The four **Additional Considerations** provided at the end of this program to see if they are applicable to your workplace.
- The additional guidance materials available at [www.dir.ca.gov/dosh/coronavirus/](http://www.dir.ca.gov/dosh/coronavirus/)



November 2020

## DISCLAIMER



**Facts and law change frequently. Please consult your attorney for the most recent laws affecting your decisions and claims handling strategies.**

# DISCUSSION ROADMAP

## COVID-19 in California

- 3 major legal developments
- Pandemic Progression
- Industry Statistics

## Cal/OSHA & Assembly Bill 685

- OSHA - Structure, Authority & Citations – Serious Violations
- Orders Prohibiting Use / Worksite Shutdowns
- AB 685 –
  - What it is
  - What it does: Cal/OSHA Expanded Authority
  - QI's, Potential Exposure & Outbreaks

## Hypo - Employer Notification & Reporting

- SB 1159
- AB 685
- Cal/OSHA Emergency Regulations

# COVID-19 In California



# 3 MAJOR LEGAL DEVELOPMENTS RE: COVID-19 IN CALIFORNIA YOU NEED TO KNOW

## SB 1159

- CA workers' compensation presumption (of industrial injury)
- Effective 9/17/20, retroactive and applies to dates of injury 3/19/20 – 12/31/2022
- 3 sections based on date of injury, type of employee, “outbreaks” (4/4%/closure)

## AB 685

- Effective 1/01/21
- Enhanced Reporting for Employers in CA to DPH and OSHA
- Additional Notification requirements to those at worksite
- Defines “Potential Exposure,” “Qualifying Individual” & “Outbreaks” (3 w/in 14 days)
- Orders Prohibiting Use / Worksite Shutdowns

## Cal/OSHA Emergency Regulations

- Effective as of 11/30/2020
- Temporarily increase authority of Cal/OSHA to monitor and shut down worksites due to COVID-19 safety concerns

**December 1, 2020**

*Numbers as of November 30, 2020*

**COVID-19 Cases**

**1,225,189** (+12,221)

**Fatalities**

**19,211** (+70)

**Ages of Confirmed Cases**

**136,904**

0-17

**729,630**

18-49

**230,204**

50-64

**127,432**

65+

**1,019**

Unknown/Missing

**Gender of Confirmed Cases**

**620,979**

Female

**594,629**

Male

**9,581**

Unknown/Missing

**Hospitalizations**

**Confirmed COVID-19**

**8,240**

Hospitalized

**1,890**

in ICU

**Suspected COVID-19**

**809**

Hospitalized

**110**

in ICU

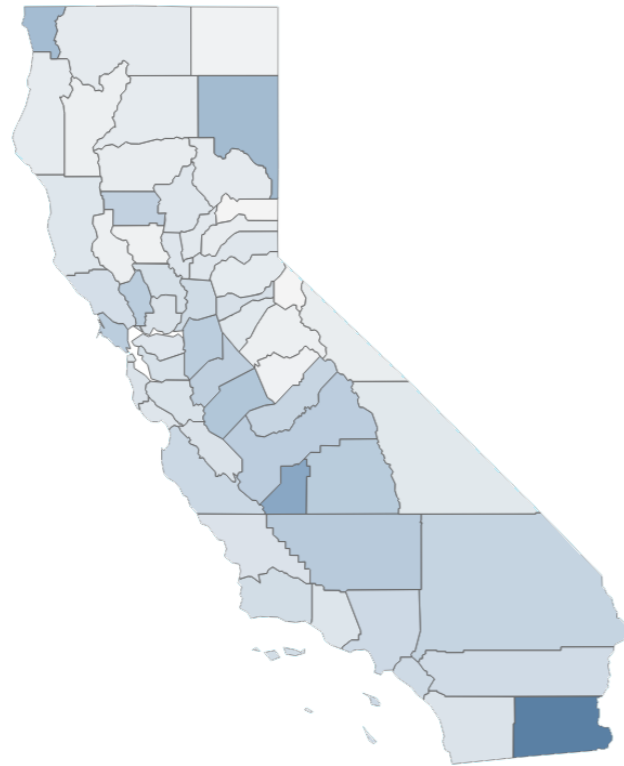
Your actions save lives.  
[covid19.ca.gov](https://www.cdph.ca.gov/covid19)



**Statewide Summary** Claims with injuries thru Oct: **53,264** Deaths reported thru 11/16/20: **302** Claims reported thru 11/16/20: **53,943**

## COVID Claims Per 10K Employees Insured and Self-Insured <sup>[1][2]</sup>

Click on a county to filter exhibits



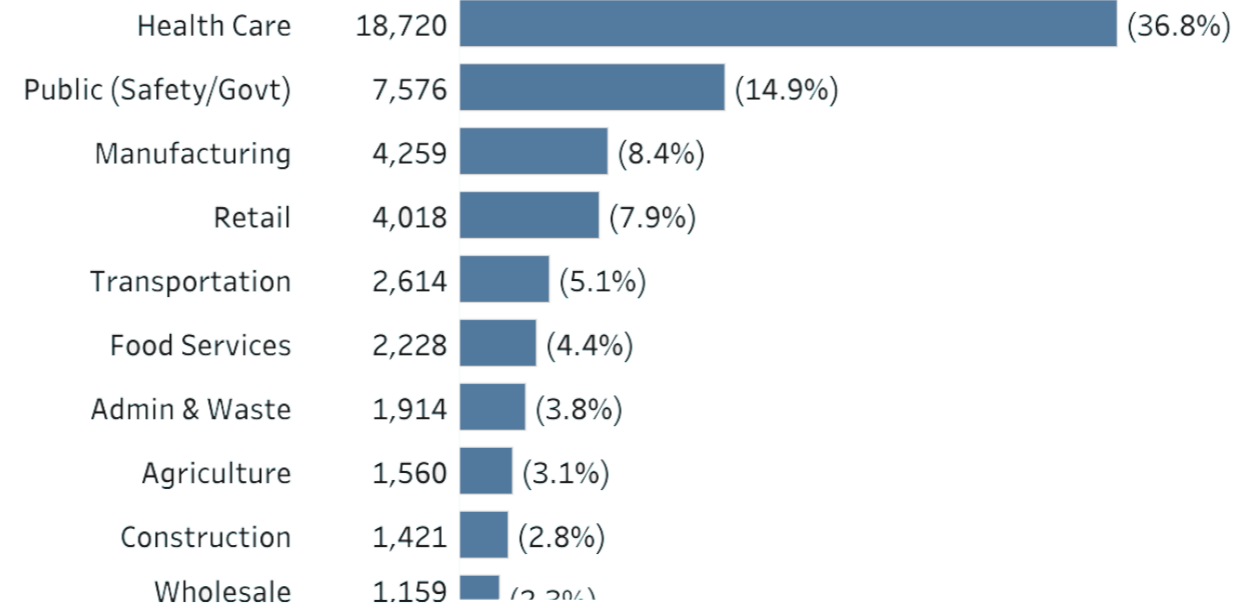
COVID Claims per 10,000 Employees  
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© Mapbox © OSM

Note: The Insured/Self-Insured Filter does not apply to this exhibit.

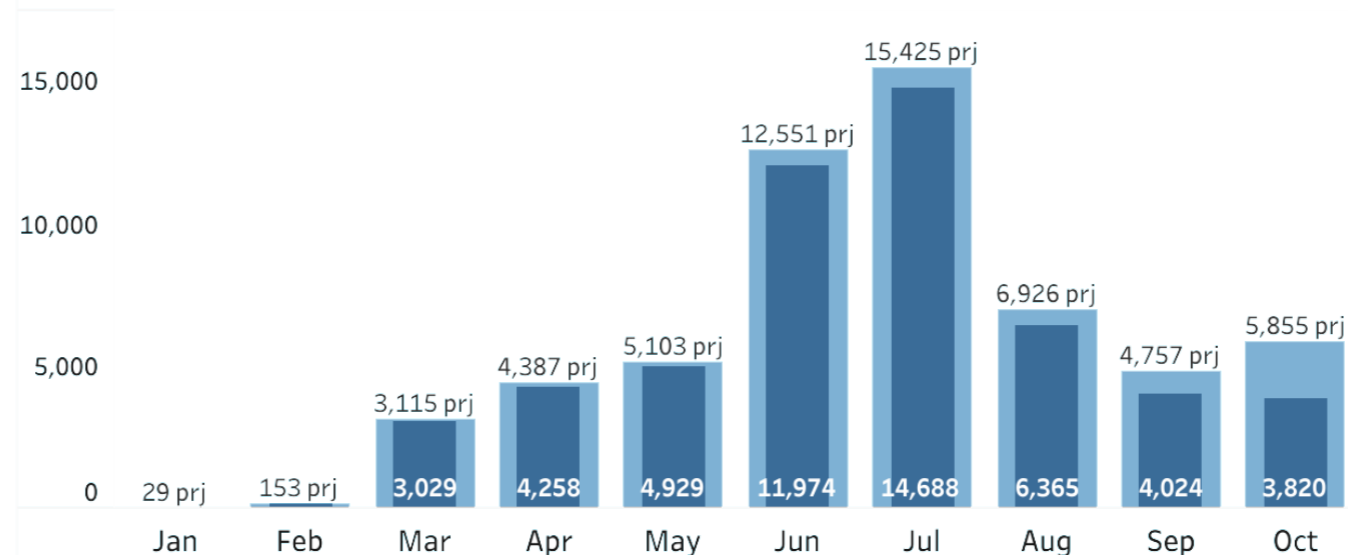
## COVID Claims by Industry <sup>[1][3]</sup>

Counts & Proportions Exclude Unknown Values



## COVID Claims by Month of Injury <sup>[1]</sup>

Reported January - October claims: **53,264** <sup>[1]</sup>  
Projected Ultimate January - October claims: **58,301** <sup>[4]</sup> <sup>[5]</sup>



## Denial Rate By Industry Sector

HEALTHCARE	23%
Public (Safety/Government)	26%
Retail	30%
Manufacturing	36%
Food Services	27%
Admin & Waste	27%
Transportation	55%
Agriculture	27%
Wholesale	29%
Construction	41%
Finance	29%
Other Services	35%
Education	35%
Professional & Tech	50%
Accommodation	41%
Real Estate	46%
Arts & Rec	51%
Utilities	29%
Information	55%
Mining	45%

# COVID-19 In California

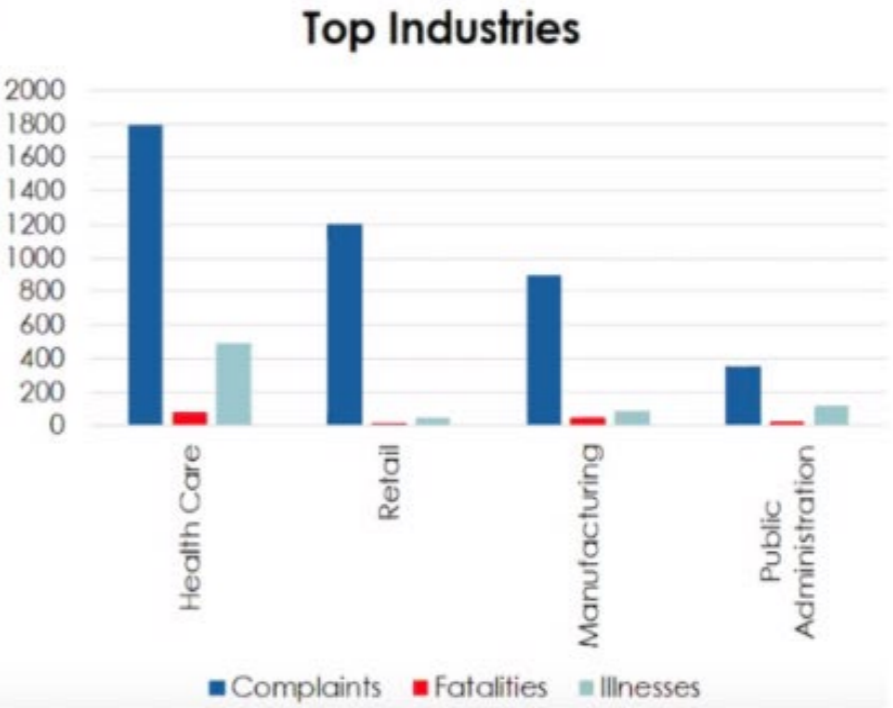
## Top three industries related to COVID-19:

- Complaints
 

Industry	Complaints
Health Care and Social Assistance	1790
Retail Trade	1202
Manufacturing	894
- Fatalities
 

Industry	Fatalities
Health Care and Social Assistance	79
Manufacturing	48
Public Administration	25
- Illnesses
 

Industry	Illnesses
Health Care and Social Assistance	492
Public Administration	118
Manufacturing	89

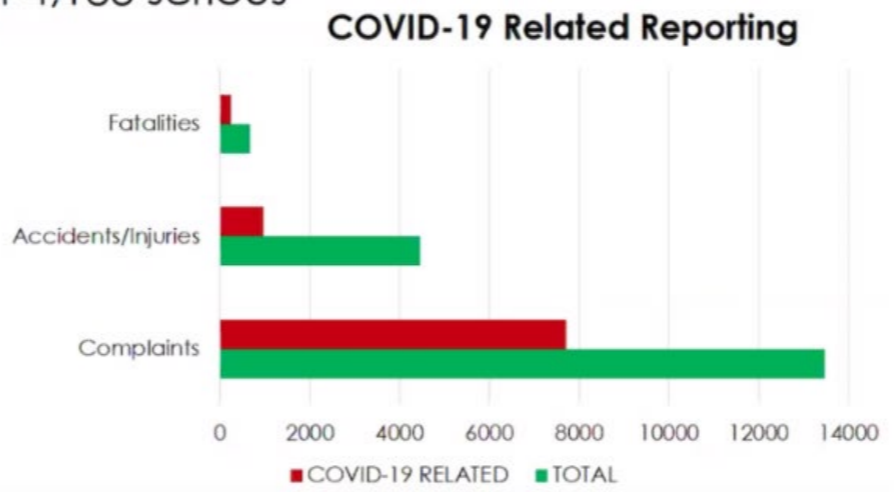


Leading industries for COVID complaints, fatalities and illnesses.

## COVID-19 Complaints, Fatalities, and Illnesses February – October, 2020

- 7,791 complaints received (of 13,025 total)
- 258 fatalities reported (of 640 total reported)\*
- 999 serious illnesses reported (of 4,183 serious injuries and illnesses reported)\*

\*Reported, not necessarily work-related



# Cal/OSHA

- Overview and Jurisdiction
- Safety & Health Inspections
- Penalties
- COVID-19 claims
  - Reporting
  - Citations
- Orders Prohibiting Use / Worksite Shutdowns
- Emergency Regulations



# Cal/OSHA: Overview and Jurisdiction

The California Occupational Safety and Health Act of 1973 established entities within the Department of Industrial Relations to Implement the Act.

Cal/OSHA has jurisdiction over every place of employment in California to enforce Cal/OSHA regulations. It is responsible for worker safety and health protection.

## Three Divisions

- Division of Occupational Safety and Health (DOSH) – Enforces worker safety and health standards
- Occupational Safety and Health Appeals Board (Appeals Board) – Hears appeals regarding Cal/OSHA enforcement actions
- Occupational Safety and Health Standard Board (Standard Board) – Adopts, amends and repeals standards

# Cal/OSHA: Safety & Health Inspections

## Basis for Inspections:

- Imminent Hazard, Fatality or catastrophic injury, Investigation of serious injury or exposure, Formal complaints, and Scheduled inspection, usually of business in industries with higher-than-average potential risk.

## What to Expect during an Inspection:

- Permission to enter, inspection warrant
- Opening Conference, Tour of Facility, Interview Witnesses, Closing Conference

## What to Expect after an Inspection:

- 1BY – Notice of Intent to Classify as Serious
  - Employer option to respond to Notice within 15 days. (Should employer's respond?)
- Citations Issued of alleged violations, Notification of Penalty and Abatement
- Employer Appeal – Appeal Violation, Penalty
- Hearing
- Stipulation & Agreement, Trial

## Cal/OSHA: Penalties

### Title 8, Cal. Code Reg. § 336

- Regulatory violation: \$500 - \$13,277
  - Failure to Report Serious Injury, Illness, Death – minimum penalty of \$5,000
- General violation: \$13,227 maximum per violation
- Serious violation: \$18,000 - \$25,000 maximum per violation
  - Accident related: \$25,000 maximum
- Abatement Credit
  - Proposed Penalty Reduced up to 50%, subject to minimum
- Repeat violation: \$132, 765 maximum per violation
- Willful violation: \$9,483 - \$132, 765 maximum per violation



# Recording and Reporting COVID-19 Claims

## Recordable COVID cases (Log 300)

Record Work-related COVID fatality or illness if it meets one of the following criteria:

- Death
- Days away from work
- Restricted work or transfer to another job
- Medical treatment beyond first aid
- Loss of consciousness

## Reporting COVID cases (Title 8, Cal. Code Reg. 342(a))

All employers required to immediately report within 8 hours any serious illness, injury or death of an employee occurring in the place of employment or in connection with any employment.

- Serious Illness/Injury – Requires inpatient hospitalization other than for medical observation or diagnostic testing.

# Cal/OSHA: Authority Under AB 685

## Workplace Shut Down Orders

Expands the power of California's Division of Occupational Safety and Health (DOSH) to enforce employer compliance and take action to protect employees, including shutting down worksites deemed to be an "imminent hazard" due to COVID risks.

- Creates a clear responsibility to employers to notify employees when there has been a potential COVID exposure at work.
- Becomes law effective from 1/01/2021 – 1/01/2023
- Codified in Labor Code § 6409.6
- The applies to public *and* private employers

# Cal/OSHA: Authority Under AB 685

## Workplace Shut Down Orders

- Provides Cal/OSHA can prohibit operations when, in the opinion of Cal/OSHA, a worksite or operation “exposes workers to the risk of infection of COVID so as to constitute an **imminent hazard**”
- Amendment does not identify any specific level or type of exposure
- Determination and standard left to the discretion of Cal/OSHA
- Cal/OSHA can prohibit operations when, in the opinion of Cal/OSHA, a worksite or operation “exposes workers to the risk of infection” of COVID so as to constitute an imminent hazard.
- Modifies process for when Cal/OSHA intends to issue a serious citation, no prior notice (1BY notices not required), so Cal/OSHA can issue citations for serious violations related to COVID without giving employers 15-day notice, and chance to respond, before issuing serious violation.

# Cal/OSHA Citations: Recent Activity

# Cal/OSHA: Inspection & Citations

- **Over 11,000 in-person compliance assistance visits**
- **Over 1,200 COVID inspections since 2/2020**
- **816 serious COVID illnesses and 215 fatalities**
- **Citations issued to have a significant deterrent effect, including highest monetary penalties issued in any state.**
  - 25% COVID inspections in healthcare
  - 20% in agriculture
  - 12% in retail
  - 10% manufacturing (including food processing)

<https://www.cal-osh.com/article/parker-ab-685-provides-adequate-enforcement-tools/>

# Ca/OSHA: Common COVID-19 Citations:

## Title 8, CCR § 3203: IIPP

- Failure to establish or update workplace safety plans/IIPP
- Failed to follow requirements for providing necessary PPE
- Failure to install Plexiglas barriers
- Failure to ensure physical distancing
- Failure to implement procedures to screen employees exhibiting COVID-19 symptoms
- Failure to provide adequate health and safety training
- Failure to documentation safety and health training
- Failure to effectively investigation COVID illnesses

Title 8, CCR § 342 – Failure to immediately report serious COVID illnesses

Title 8, CCR § 3402 – Failure to ensure prompt access of records to DOSH reps

Title 8, CCR § 14300.5 – Failure to make work-relatedness determination

\*Title 8, CCR § 5199 – ATD Standard (numerous and various)

**Guidance re: protecting workers from COVID-19: July 16,2020**

<https://www.dir.ca.gov/DIRNews/2020/2020-63.html>



# Cal/OSHA: COVID-19 Citations: Who is getting cited?

## Hospitals/Nursing Facilities

- Inadequate respiratory protection fit-testing
  - Failure to update workplace safety plans
  - Failure to establish and implement an ATD plan (provide N95 masks)
  - Failure to ensure healthcare workers wore respiratory protection
  - Failure to provide effective training
  - Failure to address worker-to-worker exposure
  - Failed to follow requirements for providing necessary PPE
- 
- Gateway Care & Rehabilitation Center [Hayward] - **\$21,935.00**: cited for not implementing or maintaining effective procedures to reduce risk of COVID-19 through medical evaluations or respiratory fit testing, and did not provide adequate training on its aerosol transmissible disease procedures. [8 CCR 5199].
  - CHA Health Systems Inc. [Hollywood] - **\$57,120.00**: cited for not having all requirements in their exposure control plan, or implement work practice controls, and did not provide effective training to workers or PPE when working near patients who had or were suspected of having COVID-19. [8 CCR 5199, et seq].

# Ca/OSHA: COVID-19 Citations

## Who is getting cited?

### Police Department

- Failure to implement required screening and referral procedures for person exhibiting COVID-19 symptoms
- Failure to report serious COVID-19 illnesses
  
- Santa Rosa Police Department [Santa Rosa] - **\$32,000.00**: cited for not immediately reporting a COVID-19 related fatality and not implementing a screening and referral procedure for persons exhibiting symptoms of COVID-19 and for not implementing procedures for COVID-19 exposure incidents. [8 CCR 342, 5199]



# Ca/OSHA: COVID-19 Citations

## Who is getting cited?

### Grocery Stores & Retailers

- Failure to report worker death
- Failure to ensure limited number of customers in store, preventing workers from physical distancing
- Failure to install Plexiglas barriers between employees and customers (in certain departments)
  
- Food 4 Less [Los Angeles] - **\$15,000**: cited for failing to limit the number of customers in the store to allow for physical distancing, failing to effectively investigate multiple COVID-19 illnesses of employees, and failing to properly train and instruct employees on how virus is spread, measures to avoid infection and signs/symptoms of infection. [8 CCR 3203(a)]
- Vie de France Bakery [Vernon] - \$21,575.00: cited for not immediately reporting a serious illness to Cal/OSHA timely, and for not providing effective training on hazards of COVID-19 [8 CCR 342, 3203, 3204, 14300.7]
- Ralphs Grocery Company [Studio City, Sherman Oaks, West Hollywood, Culver City] – range of penalties from **\$13,500 up to \$23,700**: cited for not reporting COVID-19 related fatality, recording employee absence due to illness, failing to limit the number of customers in the store, or implement other controls to maintain physical distancing, or training on virus hazards and cleaning protocols [8 CCR 3203, 342, etc].

# Ca/OSHA: COVID-19 Citations

## Who is getting cited?

### General Business/Other

- Failure to ensure physical distancing
- Failing to install Plexiglas or other barriers between workers
- Failure to implement procedures to screen employees exhibiting COVID-19 symptoms at the business
- Failure to Mitigate potential exposure by providing adequate health and safety training

Pitman Family Farms [Sanger] - **\$18,000**: cited for not establishing or implementing physical distance protocols nor providing or requiring their workers to wear cloth face coverings [8 CCR section 3203(a)]

# Ca/OSHA Citations: Other Citations & Guidance

## **CAL-OSHA Cites Frozen Food Manufacturer, Staffing Firm for Failing to Protect Hundreds of Workers from COVID-19**

- Overhill Farms, Inc. and its temporary employment agency Jobsource North America were assessed over \$200,000 in proposed penalties for failures to provide protections to hundreds of employees; failed to implement barriers, or any work place measures to prevent transmission of COVID-19. Close to 500 employees were exposed to the virus. No measures to investigate were in place, nor did they report a COVID fatality to Cal-OSHA, among other issues

## **Cal/OSHA Issues Citations to Multiple Employers for COVID-19 Violations**

- These include DL Poultry, Inc., of Monterey Park and Olson Meat Company of Orland for failures to ensure workers were physically distanced 6 feet apart in the processing areas, nor did they install Plexiglass in between work spaces; Sutter East Bay Berkeley was cited after an employee became ill with COVID-19, and after investigation, found that they failed to comply with Aerosol Transmissible Disease Standard [ATD]; also, multiple farm labor contractors were cited for failing to provide enough shade areas to minimize employee contact and to maintain physical distancing guidelines.

## **Cal/OSHA Urges Employers to Follow the State's Guidance on Protecting Workers from COVID-19**

- “Protecting employees from workplace hazards is not only required by law, it is also the right thing to do and an essential part of stopping the spread of the virus,” said Cal/OSHA Chief Doug Parker. “We’ve designed guidance documents for more than 30 industries so employers have a roadmap.”

<https://www.dir.ca.gov/DIRNews/2020/2020-78.html>

<https://www.dir.ca.gov/DIRNews/2020/2020-76.html>

<https://www.dir.ca.gov/DIRNews/2020/2020-63.html>

# Cal/OSHA Emergency Regulations

**Board Approved: 11/19/2020**  
**OAL Approved: 11/30/2020**

**EFFECTIVE NOW!**

# Cal/OSHA Emergency Regulations

Expand regulations that force employers to do more to protect employees from COVID-19 at work.

The **temporary** emergency regulations adopted by the Board impose **new obligations** on all California employers that are **not** covered under 8 CCR section 5199 [Aerosol Transmissible Disease standard, or ATD standard, such as hospitals, skilled nursing, etc.], and the other exceptions listed in the emergency regulations [i.e. places of employment with one employee and no public contact, employees working from home].

# Cal/OSHA Emergency Regulations

**The Cal/OSHA emergency regulations can be broken down into four major areas:**

- [a] Implementation of a COVID-19 prevention plan by all employers
- [b] COVID-19 reporting requirements
- [c] COVID-19 testing obligations of employers during an “outbreak”
- [d] COVID-19 prevention in employer-provided housing and employer- provided transport.

# Cal/OSHA Emergency Regulations

Obligation to implement and maintain a written “COVID-19 Prevention Program” Including:

- (1) A system for communicating about COVID-19 with employees;
- (2) A method of identifying and correcting COVID-19 hazards
- (3) A system for investigating cases in the workplace;
- (4) Employee training on COVID-19;
- (5) Implementation of physical distancing and face coverings;
- (6) Utilization of engineering and administrative controls;
- (7) Recordkeeping protocols;
- (8) Excluding COVID-19 cases from the workplace; and
- (9) Return to work criteria.

Employers should immediately develop the above plan and make sure any existing plan is consistent with the new standards.

# Cal/OSHA Emergency Regulations

## Different than AB685

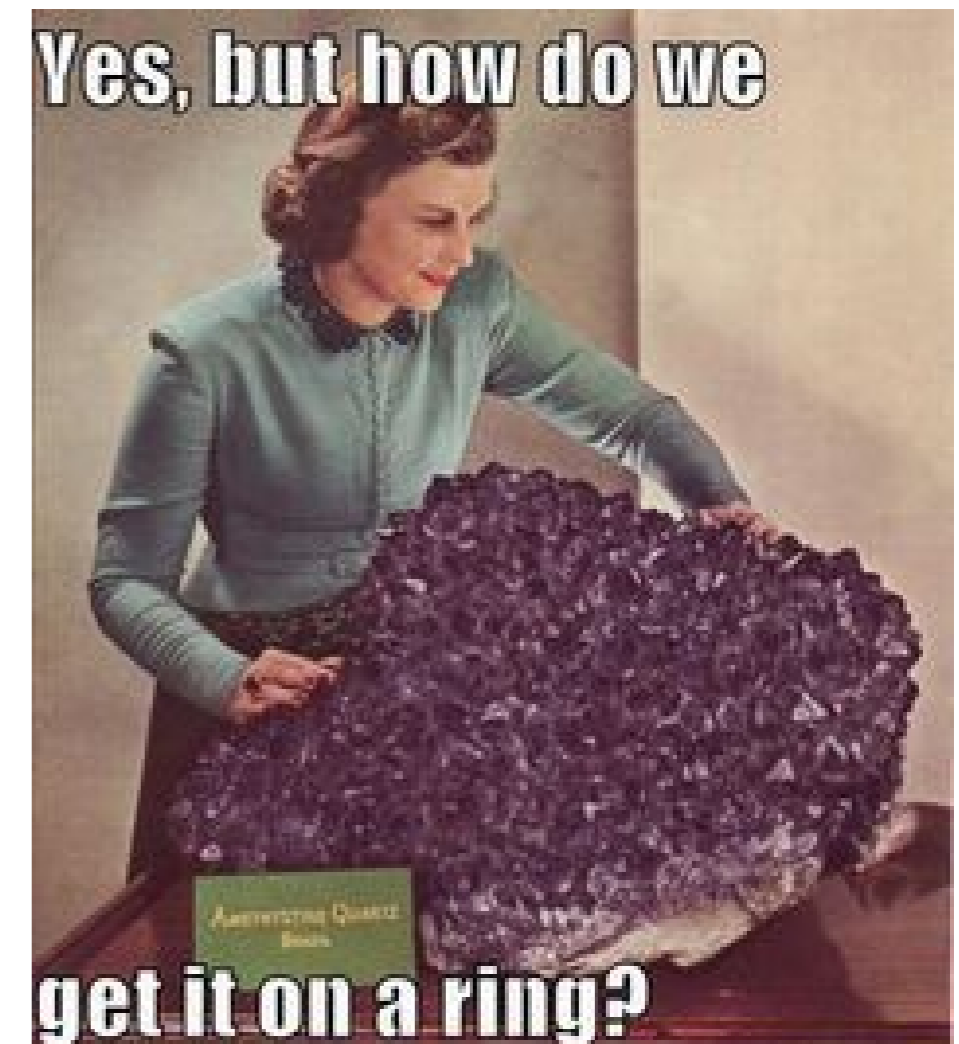
- Notice does not have to be written
- More expansive list of who needs to be notified.
- Obligation to provide free testing to exposed employees following outbreak.



# Cal/OSHA Emergency Regulations

## Other gems...

- More detailed notification requirements where the employer must work with local health departments and other agencies such as the Division of Cal/OSHA, in making sure they are notified as well, in the case of an outbreak.
- Heightened testing where worksite experiences 20+ cases within 30-day period.
- Increased duties owed where employers provide housing / transportation to their employees.



# Assembly Bill 685

Effective 1/01/2021 – 12/31/2022

Potential Exposure and Outbreaks

Expands Cal/OSHA Authority & 1BY Changes

# Assembly Bill 685

*Comprised of eight sections, but we'll focus on 3 of them*

1. Employer Reporting Lacks Clarity

2: Cal/OSHA & imminent hazard (new)

3: Cal/OSHA & imminent hazard (original)

4: Reporting & Outbreak

5. 1BY (new)

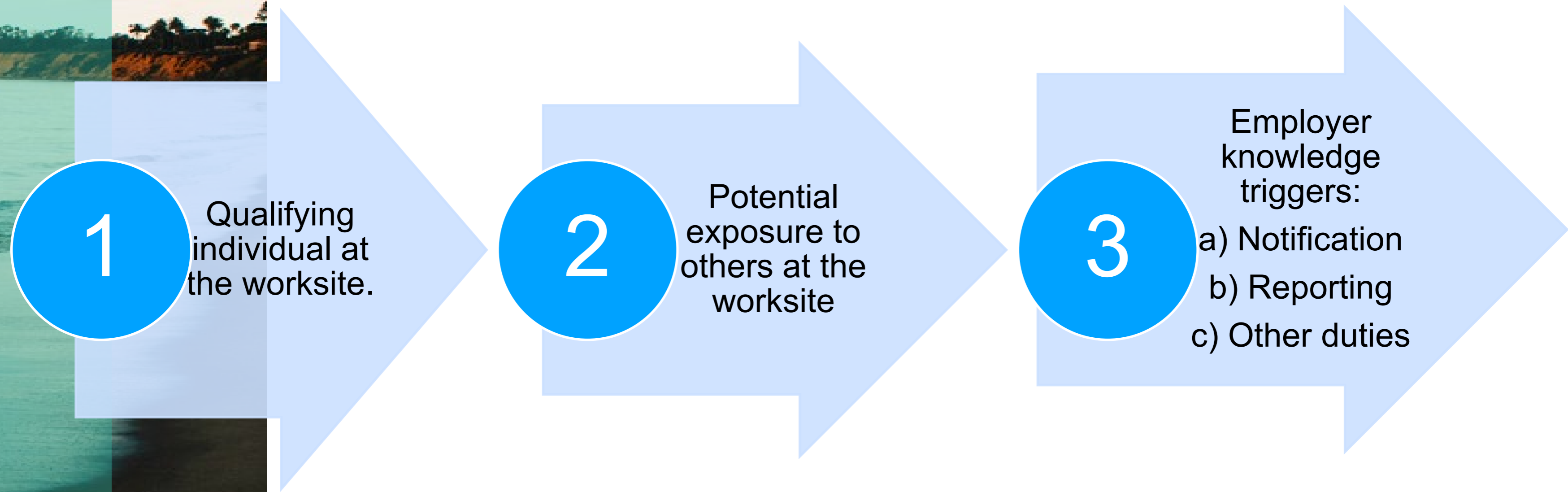
6. 1BY (original)

7. No reimbursement

8. Privacy outweighs public disclosure

# AB 685 – Key Concepts

## Employer Reporting – Broadly



# AB 685 – Key Concepts for Employer Reporting

## Defining “Qualifying Individual”

“Someone is a Qualifying Individual if they:

- Tested positive for COVID;
- Given a positive COVID diagnosis (by licensed health care provider);
- Have been Ordered to Isolate (by a public health official); or
- Died due to COVID.



# AB 685 – Key Concepts for Employer Reporting

## Defining “Potential Exposure”

“An employer is considered to have notice of potential exposure when:

- A public health official or licensed medical provider advises that an employee was exposed to a qualifying individual at the worksite; or
- An employee (or emergency contact) notifies the employer the employee is a *qualifying individual*; or
- The testing protocol of the employer reveals the employee is a *qualifying individual*; or
- A subcontracted employer notifies the employer that a *qualifying individual* was on the worksite of the employer receiving notification.

# AB 685 – Key Concepts for Employer Reporting

## Defining “Worksite” (Where exposure occurred)



### Worksite defined as:

- Building, store, facility, agricultural field, or other location where a worker worked during the infectious period.
- It does not apply to buildings floors or other locations of the employer that a qualified individual did not enter.
- In a multi-worksite environment, the employer need only notify employees who were at the same worksite as the qualified individual.



## Section 1

*“...Current law lacks clarity as to an employer’s reporting requirements, including to their own workforce....[I]t is imperative that positive COVID-19 tests or diagnoses be reported immediately in the occupational setting, to members of the public, and to relevant state agencies.”*





## Section 2 & 3

- *Temporarily amend Labor Code § 6325*
- *Expands Cal/OSHA's enforcement authority*

# AB 685 – Section 3 (Original) Labor Code § 6325 - 12/31/2020; and then after 1/01/2023

## Subsection (a) – Unchanged

- Provides when DOSH determines a place of employment (i.e., incl. machine, devise, apparatus, or equipment) is *dangerous to constitute an imminent hazard to employees*, DOSH has authority to:
  - 1) prohibit entry *and*
  - 2) Require conspicuous notice reflecting prohibition of entry.

## Subsection (a) DOSH's authority limited:

- Prohibited Entry must be limited to immediate, dangerous area

# AB 685 – Section 2 (New)

## Labor Code § 6325

### Applies: 1/01/2021 – 12/31/2022

If Cal/OSHA determines there is a risk of COVID infection to constitute an imminent hazard in a work area (i.e. place of employment, operation, process), it can issue an Order Prohibiting Use:

- Prohibited/limit entry
- Must be limited to immediate area of imminent hazard
- Post conspicuous notice of prohibited/limited entry

**Exception** – Cannot materially interrupt the performance of:

- Critical governing functions relating to public health and safety function
- Electrical Power
- Water

\*Determination of “imminent hazard” standard left to discretion of Cal/OSHA. (LC6325 and LC 6325.5)



## Section 4

- *Creates Labor Code § 6409.6*
- *Employer Reporting Requirements*

# AB 685 – Employer Reporting Notice: “Who” Gets Notice?

## Subsection (a)

If an employer receives Notice of a Potential Exposure, the Employer must (within 1 working day, provide Written *Notice* to 2 groups:

- All Employees (or employee’s representatives, if any)
- All Employers of subcontracted employees

...who were ***on the premise at the same worksite as the Qualifying Individual*** within the infectious period.

# AB 685 – Employer Notification to Those Potentially Exposed: “How” Should Notice Be Delivered?

## Method of Notice:

- In a manner the employer “normally” uses to communicate employment-related information.
- May include personal service, email, text message.
- In English *and* the language understood by the majority of the employees.



# AB 685 – Employer Reporting “What” Information is Required?

## Notice shall include:

- Information regarding COVID-19 related benefits to which the employee may be entitled to (e.g.: federal, state, local, WC).
- Options for exposed employees including COVID-19 related leave, company sick leave, state-mandated leave, supplemental sick leave, or negotiated leave provisions.
- Disinfection and safety plan, if any, consistent with CDC guidelines.
- Information contained on Cal/OSHA Form 300.\*

## Notice should not include:

- The name, or any identifying information related to, the qualifying Individual (or the employee exposed to the Qualifying Individual, if applicable).\*

# Employer Reporting (AB 685)

## *Example*

Joy works in a one-floor office building during regular work-hours with nine (9) other employees. The employer's IIPP requires, among other things, social distancing and masks. However, Joy takes breaks at the same table with one other employee in the employee break room. Joy does not social distance or wear a mask while eating with her colleague.

On 12/29/2020, Joy's husband tests positive for COVID. Although Joy was immediately tested and results were negative, her doctor diagnosed her with COVID on 1/01/2021 and instructs her to isolate.

Joy's brother-in-law contacts Joy's employer to inform him Joy was diagnosed with COVID and ordered to isolate.

**QUESTION: What are the Employer's obligations?**





# Employer Reporting (AB685)

## *Example - Answer*

Joy is a *qualifying individual* because she was both diagnosed with COVID by her doctor (presuming he is a licensed health care provider) and ordered to isolate. The employer has notice of a potential exposure because Joy's brother-in-law informed her employer of the positive diagnosis and order to isolate.

Not only does the employer have to provide written notice to the one (1) employee Joy takes breaks with, but the employer must provide notice to the other eight (8) employees because they were on the premise at the same worksite/floor as Joy.

Exposure occurred within the infectious period because Joy works with all nine (9) other employees on a regular basis. The employer is required to provide these nine (9) other employees with written notice – which can be by way of US postal service, email or text, of all potential COVID benefits and the employer's disinfectant and safety plan.

# AB 685 - Employer Reporting

## What is an “Outbreak”?

Outbreak (AB685) – CDPH currently defines as “three or more laboratory-confirmed cases of COVID-19 within a two-week period among employees who live in different households.”

**This is DIFFERENT THAN UNDER SB 1159**

Outbreak (SB 1159 – WC Claims Administrator’s responsibility): **if one of the following occurs** at a specific place of employment **within a 14-day period:**

(i) If the employer has 100 employees or fewer at a specific place of employment, and 4 employees test positive

**OR**

(ii) If the employer has more than 100 employees at a specific place of employment, 4 percent of the number of employees who reported to that specific place of employment test positive for COVID-19

**OR**

(iii) 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 & Health, or a school superintendent due to a risk of infection with COVID-19

# AB 685 - Employer Reporting

## What to do if there is an “Outbreak”?

When employer is notified of an COVID-19 Outbreak, *as defined by the State Department of Public Health*, Employer must within 48 hours:



- **Notify** the local public health agency in the jurisdiction of the worksite
- **Provide Specified Information:** names, number, occupation, identify worksite(s) of employees who meet definition of a “potential exposure” and a “qualifying individual”
- **Report** the business address and NAICS code of the worksite where the qualifying individuals work
- Employer is required to continue to provide notice to the local health department of any subsequent laboratory-confirmed cases at the worksite.

# AB 685 - Employer Reporting

## Anti-retaliation Clause

- Employer shall not retaliate against a worker for disclosing a positive COVID test, diagnosis or order to isolate.
- Employees, if feel this section violated, can file complaint with Division of Labor Standards Enforcement and complaint *shall* be investigated.

## Information Public

- CDPH required to make information obtained pursuant to this section available on its website.
  - Must allow the public to track 1) number and frequency of COVID outbreaks and 2) number of COVID cases and outbreaks by industry reported by a workplace.
  - [Confusion by AA's if definition of Outbreak different under AB 685 and SB 1159?]

No personal identifiable information can be provided.

# AB 685 - Employer Reporting Exclusions

## Exclusions:

- Does not apply to health facility per H&S Code Section 1250
  - Note: this is a different definition of “health facility” in SB 1159.
- Does not apply to Employees who, as part of their duties, conduct COVID testing/screening.
- Does not apply to employees who provide direct patient care of treatment to individuals known to test positive for COVID, (or person under investigation for COVID, or in isolation, unless the qualifying individual is an employee at the same worksite)

# AB 685 - Employer Reporting Additional Notes

## Other Employer Requirements

- Maintain records of written notification for a period of 3 years.

## DOSH Authority

- DOSH shall enforce [the Notice Requirement] by issuing **citations** alleging violations. Employer can appeal consistent with section 6319.





## Section 5 & 6

- *Temporarily amends Labor Code § 6432*
- *Notice of Intent to Classify as Serious (IBY) Change*

# AB 685 - Section 6 (Original law) – 1BY Labor Code § 6432 – 12/31/2020; after 1/01/2023

**Rebuttable presumption of serious violation** exists if there is a *realistic possibility of death or serious physical harm from actual hazard created by violation.*

- Actual hazard – serious exposure exceeding permissible limits, or unsafe/unhealthful workplace practices
- Existence of violation alone not sufficient to establish serious
- Before issuing Serious Citation, Cal/OSHA should consider training, procedures, supervision, employer provided information



# AB 685 - Section 6 (Original law) – Serious Violations

## What is a Serious Violation?

Citations are classified as serious when Cal/OSHA demonstrates there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.

## What is a 1BY Notice?

Before, 1BY –Alleged Violation Description/Notice of Intent to classify violation of serious would issue to Employers before Cal/OSHA would issue a Serious Violation.

# AB 685 - Section 6 (Original law) – 1BY Labor Code § 6432 – 12/31/2020; after 1/01/2023

## Employer may rebut (challenge) the presumption where:

- Employer ***did not know***, or ***could not have reasonably known***, presence of the violation.
- Employer has **15 days to respond**.

## Employer Considerations in responding to 1BY Notice

- If the Employer does not respond to a 1BY, it is not barred from presenting additional evidence later, with no negative inference.
- Employer may provide different information than what was provided to division, but trier of fact may draw a negative inference.

# AB 685 - Section 5 (New) – 1BY Labor Code § 6432 - 1/01/2021 – 12/31/2022

*“(h) Paragraph (2) of subdivision (b) and subdivision (d) shall not apply to a citation alleging a serious violation relating to the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).”*

## **AB685 Modifies process when Cal/OSHA intends to issue a serious citation:**

- No issuance of the 1BY Notice
- Serious violation citations can issue immediately
- No 15-day period for employer to respond

Issue of employer providing contradictory information to division and trier of fact moot and expressly repealed.

This allows Cal/OSHA to issue citations related to Serious Violations more quickly.





## Section 7

*“No reimbursement is required...that may be incurred by a local agency or school district...”*



## Section 8

*“...Section 4...imposes a limitation on the public’s right to access...The need to protect the privacy of employees from the public disclosure of their personally identifiable information outweighs the interest in public disclosure of that information.”*

# EMPLOYER REPORTING IN THE NEW WORLD

**Let's apply what we've discussed.**



# Maggie's Case

The Springfield Cleaning Company (SCC) considers itself essential and requires all employees to come into the office. SCC mandates a temperature check at the door for anyone entering the worksite, has everyone complete a healthcare questionnaire daily with COVID-19 symptom checkers, keeps a bottle of hand sanitizer on every desk and has closed common areas, providing each employee with a personal coffee maker.

Ned, SCC's risk manager and only human resources executive, is exhausted from all the contact tracing required to comply with SB 1159 and takes a 5-day vacation. During that time, compliance with safety protocols drops and upon returning to work the next week, Ned receives a call from Lisa, a supervisor at the worksite that their main receptionist, Maggie, had just emailed positive COVID test results and was asking about her leave options.

Maggie is isolating at home and has not been hospitalized.



# Maggie's Case

## Additional Facts

After asking a few questions, Ned learns that:

- Maggie's desk is in the main lobby and every single employee passes by her each morning.
- Maggie works from 7 AM- 3P, Mon – Friday, even though the office is open 7 days a week.
- Maggie wore a mask at all times while at her desk.
- 3 employees (Homer, Marge and Bart) were known to regularly stop by and talk to Maggie for 15 minutes or more at least once a day.





# Key Concepts – Maggie's Case

## A few questions:

1. Is SCC on notice of a potential exposure?
  - Yes – Ned and Lisa were specifically advised of an employee onsite who tested positive for COVID.
  - Which employees were potentially exposed within the meaning of AB 685?
    - Exposed workplace includes any work location, working or common area at work used or accessed by a COVID-19 case during the high-risk period including bathrooms, walkways, hallways, aisles, break or eating areas and waiting areas.
    - COVID-19 exposure: being w/in 6 feet of a COVID-19 case for cumulative 15 minutes or greater in any 24 hour period w/in or overlapping the high risk period, regardless of use of face coverings. (Emergency Regs, LC3205(b))
2. Who is the Qualifying Individual in this scenario?
  - Maggie



# Key Concepts – Maggie's Case

## A few questions:

3. Who does SCC need to report to under SB 1159, AB685, and the Emergency Regs?
  - SB 1159 – SCC should report the positive case to their WC claims administrator, even though there is No SB 1159 outbreak at this time so the administrator can track all positive cases. Employer should not provide Maggie's PII, unless she chooses to file for WC benefits.
  - AB 685 – As of 1/1/21, SCC must report the positive case to the Dept. of Public Health.
  - Cal/OSHA Emergency Regs – SCC must notify those (EEs and the ERS of subcontractors) who were at the worksite with Maggie.

\*\* Side note: if Maggie seeks WC benefits, she should be given a claim form and SCC should communicate with their broker/ carrier.



# Key Concepts – Maggie's Case

4. Does SCC have to report Maggie's positive case to Cal/OSHA?
  - Not on these facts. Although COVID-19 may be viewed as a potentially serious illness, in Maggie's case the facts do not support it becoming serious at this time.
5. What should Ned / SCC do to investigate the situation?
  - If not already done, immediately review their IIPP and COVID-19 sanitizing / disinfecting plan, identify and evaluate all COVID-19 hazards.
  - Determine the day and time the COVID-19 case was last present, date of positive test(s) / diagnosis, date the case first had symptoms, who may have had an exposure. This requires evaluation of all activities of the COVID-19 case and all locations at the worksite that may have been visited by the COVID-19 case during the high-risk exposure period (2 days before and up to 10 days after first symptoms).
6. Maggie's brother calls Ned to tell him she's now been hospitalized. Does SCC now have to report Maggie's case to Cal/OSHA?
  - Yes – Serious illnesses clearly include hospitalizations and death where those events have a connection to the employee's work.

# Key Concepts – Maggie's Case

7. Does SCC have to provide testing to all of its employees due to this single positive COVID-19 case?

- No, but it should notify those 3 employees who were more directly exposed and provide testing to them if desired.

8. Homer and Marge test positive a couple days later and inform Ned. Is this an outbreak?

- SB 1159 – no. LC 3212.88 requires 4 / 4% / closure, not present here.
- AB 685 and Cal/OSHA emergency regs – Yes. The CDC defines Outbreak as 3 lab-confirmed cases within 14 days.

9. Ned has determined there was an outbreak per CDC Guidelines (3 positive cases w/in 14 days). Now what?

- SCC must report to the CDPH within 48 hours that there was an outbreak.
- Per the Cal/OSHA emergency regs, SCC must provide COVID testing to all employees at the exposed worksite, except employees who were not present during the period of outbreak. Testing is at no cost to employees and during working hours.

10. Maggie is released from the hospital and her doctor clears her to return to work 10 days later. Should Ned allow her to return to work?

- Per the Cal/OSHA emergency regs, return to work guidance depends on whether the positive employee had symptoms or was asymptomatic.

- A COVID-19 case **with COVID symptoms**, like Maggie, shall not return to work until:

- 1) at least 24 hours have passed since a fever of 100.4 or higher has resolved without fever-reducing medications and
- 2) COVID symptoms have improved AND
- 3) at least 10 days have passed since COVID symptoms first appeared.

- If the COVID-19 positive person was **entirely asymptomatic**, they shall not return to work until a minimum of 10 days have passed since the date of specimen collection of their first positive COVID test.

**\*\*Per Cal/OSHA emergency regs: A negative test shall not be required for an employee to return to work.**

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# QUESTIONS??

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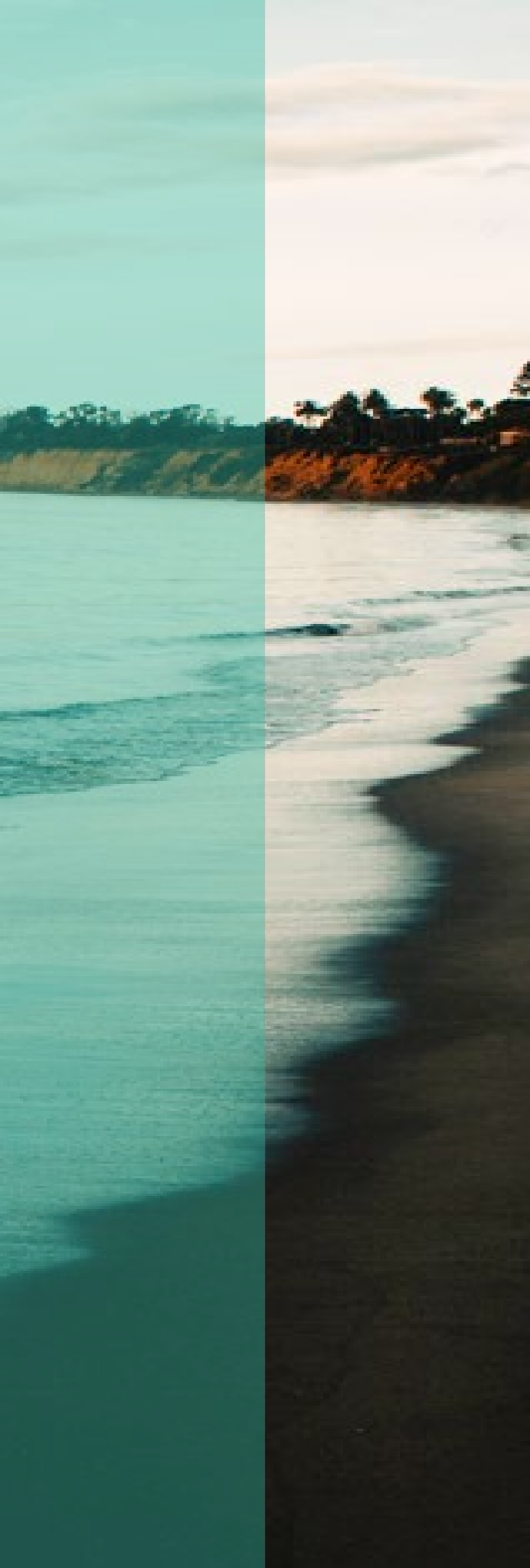
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**Vaccine for Cal-OSHA's New COVID-19  
Safety Regulations: What Employers  
Need to Do to Prepare**

**DATE: 1/12/2021**

**Employment Law and Benefits Update**

**DATE: 1/13/2021**

**Workers' Compensation Webinar Series**

**DATE: 2/24/2021**

# Thank you!



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