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COVID-19 IN THE WORKPLACE – WORKERS' COMP STRATEGIES AND EMPLOYER BEST PRACTICES

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The WC Law Firm for Employers

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- **WCAB appeals**, procedures and tactics.
- **Complex WC claims** and controversies.
- **Fraud** prevention and prosecution.
- Disability Accommodations and the **Interactive Process.**
- **Excess WC insurance** claims and coverage issues and disputes.
- **132a** and Serious & Willful Misconduct (**S&W**) defenses.
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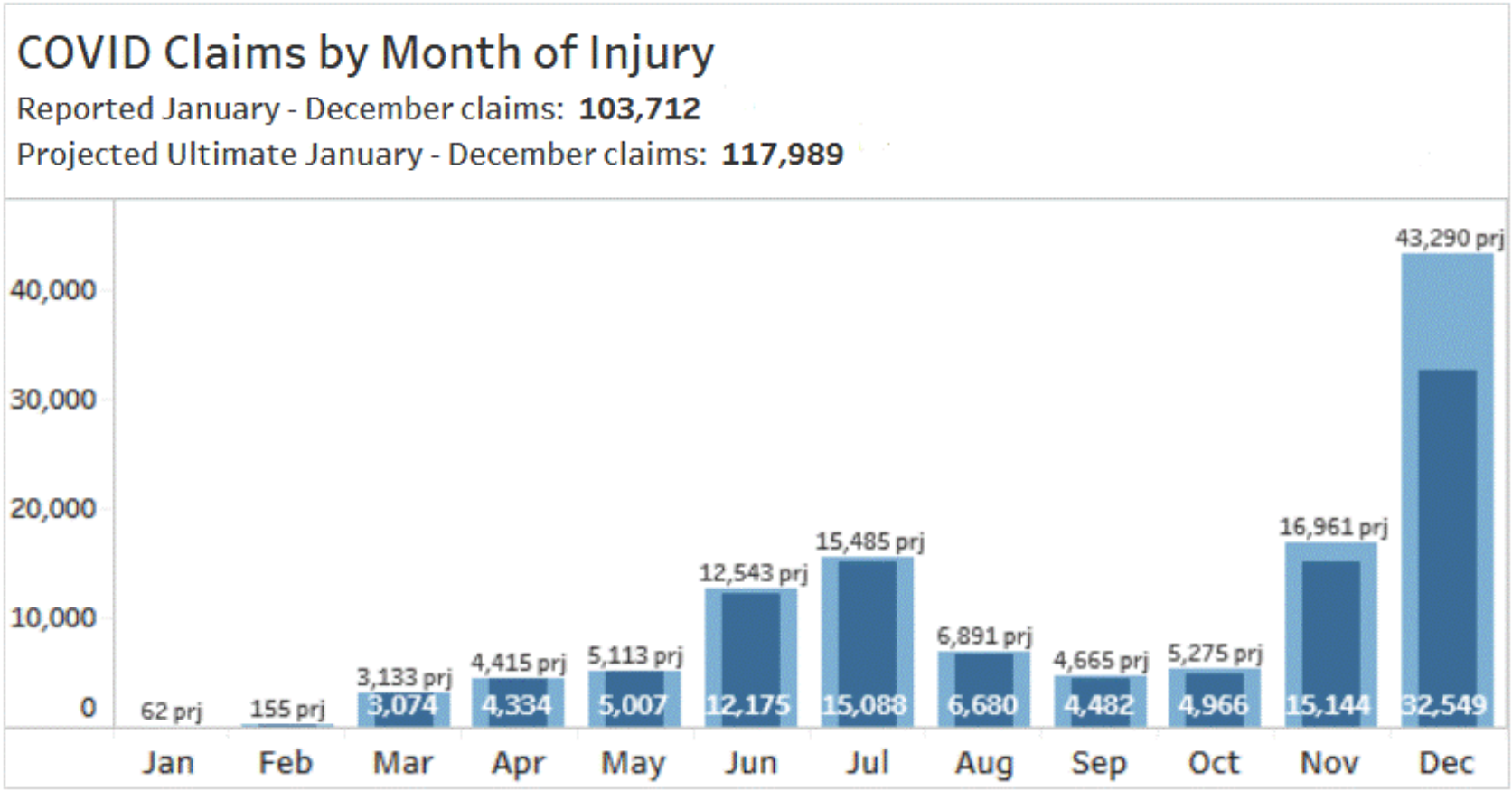
COVID Claims Data

- The 8 states, including California, with rebuttable presumptions for COVID-19 claims tended to have higher COVID-19 claims rates than states without presumptions.
- 51% of all California Workers' Comp claims in December 2020 were for COVID-19, up from 29% in November.
- Denial rates for COVID-19 claims increased from 33.1% in September to a seven-month high of 37.9% in October.

What's Coming in California? Lots of COVID Workers' Comp Claims



COVID Claims Questions

- Can California's "rebuttable" presumption for COVID-19 claims actually be rebutted? How?
- How does the presumption law fit with the notice law and OSHA regulations?
- Will COVID-19 claims continue to spike in 2021?
- Are 30%+ denial rates for COVID-19 claims appropriate? Should it be twice that? Or closer to 100%?

What else is coming: COVID-19 Vaccines for Employees

Can an Employer Mandate COVID-19 Vaccines?

- In May 2020, the Equal Employment Opportunity Commission (EEOC) issued a statement affirming employers' right to mandate a vaccine when it became available.
- In December, the EEOC confirmed that a vaccination requirement on its own would not violate the Americans with Disabilities Act (ADA).

Can an Employer Mandate COVID-19 Vaccines?

- "At-will" employers can set employment conditions around health and safety, generally speaking.
  - Does your MOU or company policy limit that?
- There are limits, however, including religious liberty and anti-disability discrimination rules.

Can an Employer Mandate COVID-19 Vaccines?

- What steps can an employer take if an employee cannot or will not be vaccinated?
  - The employer must engage in the interactive process of an individualized assessment to determine whether an accommodation can be reached.
  - If there is no way to provide a reasonable accommodation without undue hardship that would eliminate or reduce the direct threat, the employer most likely can exclude that employee from the workplace.

What about adverse side-effects to COVID-19 Vaccines?

- Short answer: an adverse/allergic reaction to the COVID-19 vaccination given to employees will likely be compensable under Workers' Comp, if:
  - *Mandated* by the employer and injected anywhere, either at work or at an off-site location, even while off-duty; or
  - *Not mandated but optionally offered at the workplace*, especially in a medical or safety setting where the employer clearly benefits from that inoculation.

Adverse side-effects example

- Example: Saint Agnes Medical Center v. WCAB (Cook) (1998) 63 CCC 220 (writ denied), an injury caused by the adverse side-effects of a flu shot was found compensable, where it was *optionally* offered by the medical center on-site, in part for the benefit of the employer, i.e., to help prevent the spread of the flu virus in the workplace to other employees and to patients.

What about Vaccine paid-leave?

- Short answer: an adverse/allergic reaction to the COVID-19 vaccination while *off-duty, off-site* may still be compensable under Workers' Comp, if:
  - *Employee is paid* regular salary or wage to go get vaccinated, even if that inoculation is *optional*.
  - What if the employee is provided paid-leave, such as an allowance to use sick-leave or special "COVID vaccine leave" by the employer?
    - Answer: Maybe yes, maybe no.
    - The closer you get to "mandatory," "on-site" or "paid," the more likely its covered by Workers' Comp.

Agenda

- COVID-19 claims data √
- COVID-19 vaccinations √
- SB 1159 Presumption laws – overview
- *Can we/should we Deny COVID claims? Even presumptive injury claims?*
- CalOSHA Regulations – *to the rescue!*
- 685 Notice requirements – some clarity
- SB 1159, OSHA Regs & AB 685 Overlap
- Employer Liability and Special Employment Issues
- FAQs

COVID-19 Presumption Laws

Presumption Laws Nationally

- Some 21 states have adopted COVID presumptions through legislative actions, governors' orders or agency rules. The scope of the presumptions varies widely, as do claim denial rates.
- No state has linked Workers' Comp claims to OSHA safety violations, although a few, such as California and Illinois, allow the inverse: *Rebuttal of virus claims if the company or agency followed disease-prevention protocols.*

California's Presumption Law: SB 1159

- **SB 1159**, became law on September 17, 2020.
- It adds three sections to the Labor Code: **3212.86, 3212.87, and 3212.88**.
- Each section enacts a separate presumption law, applying to different classes of employees in different contexts.

Sec. 3212.86 of SB 1159

- Sec. 3212.86 of SB 1159 mostly codifies Executive Order N-62-20 issued by the Governor on May 6, 2020, which created a rebuttable presumption of illness or death resulting from COVID-19 from **March 19, 2020 through July 5, 2020.**

Sec. 3212.87 of SB 1159

- Sec. 3212.87 of SB 1159 creates a presumption of injury applicable to **peace officers, firefighters and certain health care workers, including some home-health workers.**
- Sec. 3212.87 and Sec. 3212.88 pick up where Sec. 3212.86 leaves off, and are limited to injuries occurring **on or after July 6, 2020.**

Sec. 3212.88 of SB 1159

- Sec. 3212.88 covers all California employers who have **5 or more employees.** The presumption applies, if:
  - An employee tests positive **within 14 days of a workday**, and
  - That positive test occurs when there was an **"outbreak"** of COVID-19 at the employee's specific place of employment.

Employer obligations under 3212.88

- Starting Sept. 17, 2020, every time an employer knows or reasonably should know that an employee has tested positive for COVID-19, the employer must report specified information to their Workers' Comp claims administrator.
- If the employer forgets to timely submit this data or makes any clerical error in this reporting, it could result in a **$10,000** penalty against the employer…for each violation.

Employee Tracking

- As part of this process, employers must **accurately track** the number of their employees working at each specific place of employment and timely report positive COVID-19 tests to their claims administrators.

- This is required *whether or not a Workers' Comp claim is made in connection with a specific test.*

Notify claims within 3 days

- Once an employer "knows or reasonably should know" that an employee has tested positive, the employer is required to do the following:
  - Send written notification to its claims administrator within **3 business days of suspecting** that an employee has tested positive.
  - The written notification **"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.

The test date

- After July 5, 2020, diagnosis alone does not trigger the presumption: there must be a positive COVID-19 test within 14 days of work.

- Sec. 3212.88(i)(2), defines the positive test **date** as: "The date…the specimen was collected for testing."

Employer's ongoing reporting

- The employer's written reporting to the claims administrator must include data regarding the:
  - Specific address or addresses of the employee's specific place(s) of employment during the 14-day period preceding the date of the employee's positive test, as well as
  - The highest number of employees who reported to work at each job site(s) in the 45-day period preceding the last day the employee worked there. We interpret this to mean the *total* number of employees.

What is a “specific place of employment”?

- The building, store, facility, or agricultural field where an employee performs work at the employer’s direction. If the employee works at multiple locations, then the presumption would apply if an “outbreak” exists at any one 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.

What is a "specific place of employment"?

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

What happens with this data?

- With this information the claims adjuster is then tasked with the job of determining, on a rolling and continuous basis, whether an "outbreak" has occurred.
- An "outbreak" exists if within 14 calendar days one of the following occurs at a specific place of employment…

Claims Adjuster's review of the data

- The claims administrator must use the information to **determine if an "outbreak" has occurred** for the purpose of applying the presumption. The adjustor must review every positive test and determine if there were 4 or more, or 4% or more, within 14 days.
- If the adjuster concludes that an "outbreak" has occurred, then the presumption would apply. The claims administrator must continually evaluate each claim to determine whether the requisite number of positive tests have occurred during the surrounding 14-day periods.

“Outbreak” defined

- …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.

“Outbreak” defined

- The employer has 100 employees or fewer at a specific place of employment and four (4) employees test positive for COVID-19, or
- The employer has more than 100 employees at a specific place of employment and four (4) percent of the number of employees who reported to the specific place of employment, test positive for COVID-19, or…

Sick leave offset

- Where an employer has paid sick leave benefits specifically available in response to COVID-19, those benefits shall be used and exhausted before any TD or Labor Code section 4850 pay is due and payable.
- Where an employee does not have such sick leave benefits, the employee shall be provided TD or Labor Code section 4850 benefits from the date of disability. In other words, the "3-day waiting period" does not apply.

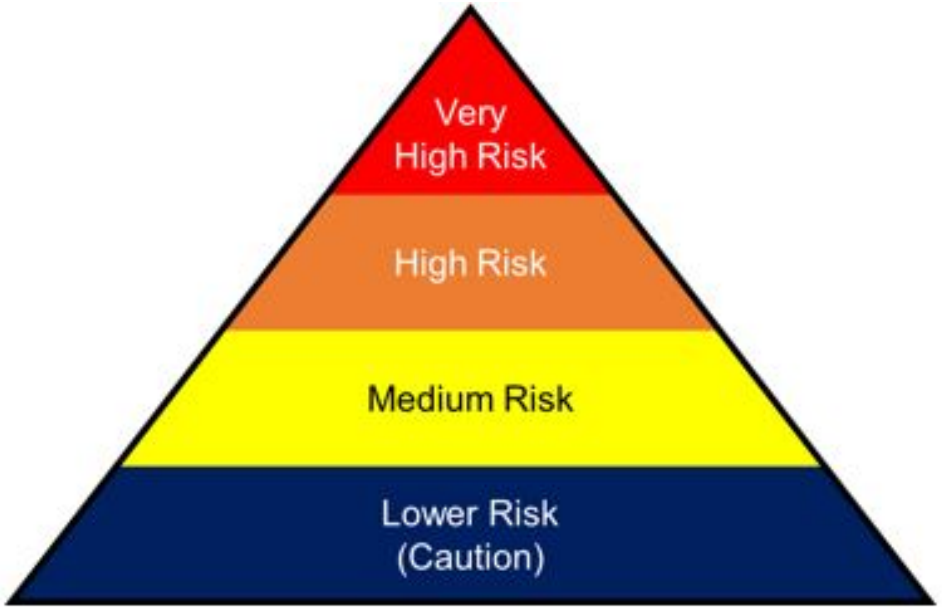
Can one Deny a COVID Claim?

Case Law to Consider

- *LaTourette v. WCAB* (1998) 63 CCC 253 and *Johnson v. IAC* (1958) 23 CCC 54
  - The California Supreme Court has stated that the fact that "an employee contracts a disease while employed or becomes disabled from the natural progression of a nonindustrial disease during employment *will not* establish a causal connection…"
  - Additionally, an ailment "does not become an occupational disease simply because it is contracted on the employer's premises."

In California, most jobs that are "high risk" are covered by a presumption

- The types of jobs that may pose a materially greater risk of contracting COVID-19 (healthcare, public safety, etc.) under by OSHA's COVID-19 Hazard Recognition page, are now covered by a presumption.



Non-presumptive = Lower Risk

- Claimants who are not covered by a presumption in California are likely in Medium to Low Risk jobs.
- That means, absent a presumption, if "an employee contracts" COVID-19 "while employed…during employment," that alone "*will not* establish a causal connection…"
- Absent extraordinary circumstances in a particular workplace, its anyone's guess where and when the employee contracted the disease.

Non-presumptive COVID claims denial

- Absent a presumption, it is the claimant's burden of proof by reasonable medical probability to show that the disease was transmitted to them while working their medium to low risk job, as opposed to any social or off-work occasions.
- In short, if a presumption does not apply, the claim probably can and should be denied, because the risks of contracting COVID-19 are risks of commonalty to the whole population.

What if a presumption applies?

- A legal presumption shifts the burden of proof to the employer, to show that the disease was not transmitted to the employee while working, and was instead more likely contracted in a social or off-work setting.
- In short, if a presumption does apply, the claim probably should be accepted in the employer does nothing to meet that burden of proof.
- However, there is a formula meeting that burden of proof in most cases.

The Presumptions are Rebuttable

- "Outbreak" Presumption: Sec. 3212.88(e)(2) specifically identifies "measures in place to reduce potential transmission of COVID-19" as relevant evidence to rebut the presumption.
- "Healthcare/Public Safety" Presumption: Sec. 3212.87(e) also says the presumption is rebuttable, though it does not mention remedial measures specially.

Presumption claim denial criteria

- If a presumption *does* apply, the presumption can still be rebutted and the claim can still be denied if the employer had **good remedial measures in place** at the time of the alleged exposure, and:
  - There is a known **contemporaneous non-work exposure** (housemate or family member with COVID, known unsafe social interactions or travel, etc.), or
  - There was insufficient "**exposure**" at work to a co-worker/customer known to have COVID, within **6 feet for 15 minutes or more** in a 24 hour period.

“Remedial measures”? “Exposure”?

"Remedial measures" under Cal/OSHA Emergency Regs – (Pg. 1)

- Draft & implement a COVID-19 Prevention Program;
  - This is similar to the Injury and Illness Prevention Program already required by state law.
  - It must include a system for communicating about COVID-19 with employees.
  - CalOSHA's Model COVID-19 Prevention Program:

www.dir.ca.gov/dosh/dosh_publications/CPP.doc

"Remedial measures" under Cal/OSHA Emergency Regs – (Pg. 2)

- Provide employee training on the COVID-19 Prevention Program;
- Identify COVID-19 hazards with employee input and correct them;
- Investigate COVID-19 cases;
- Within 1-business day, notify and provide testing to potentially exposed employees;

"Remedial measures" under Cal/OSHA Emergency Regs – (Pg. 3)

- Require physical distancing and mask wearing;
- Improve ventilation and maximize outdoor air;
- Quarantine infected employees away from workplace and pay them;
- If there is an "outbreak," report it to the local public health department and provide continuous testing to employees;
- Follow specified rules for employer-provided housing and transportation.

Exceptions to Cal/OSHA COVID-19 Emergency Regulations

- Does not apply to employees working from home exclusively;
- Does not apply to businesses covered by California's Aerosol Transmissible Disease (ATD) standards (mostly health care facilities and emergency responders);
- Has recordkeeping and reporting obligations in addition to and overlapping with those under SB 1159 & AB 685.

Cal/OSHA Emergency Regs - *Resources*

DIR's Regulations FAQ page:
https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html

CalOSHA's 1-page summary for Employers:

https://www.dir.ca.gov/dosh/dosh_publications/COVIDOnePageFS.pdf

CalOSHA' Model COVID-19 Prevention Program:

https://www.dir.ca.gov/dosh/dosh_publications/CPP.doc

"Remedial measures" & Workers' Comp

- Did the employer have these measures in place at the time of the alleged injury, and can we prove it?
- There may already be sufficient proof via the recordkeeping and reporting obligations required by the OSHA Regs., in addition to those under SB 1159 & AB 685.

COVID-19 “exposure” defined

- “COVID-19 exposure” means:
  - being within **six feet** of a “COVID-19 case” (i.e., positive-tested person), and
  - for a cumulative total of **15 minutes** or greater in a 24-hour period within or overlapping with the “high-risk exposure period” defined by Labor Code §3205.
  - This definition applies regardless of the use of face coverings.

Is *OSHA* your friend? Yes!

- "Exposure" and "remedial measures" are not defined in SB1159 or AB685.
- Therefore, OSHA's definitions should apply to presumption rebuttals.
- It also helps to show that the employer has <u>not</u> been cited by OSHA inspectors for COVID violations in the relevant "place of employment."

Presumption claim recap

- If a presumption *does* apply, the presumption can still be rebutted and the claim can still be denied if the employer was compliant with the OSHA Regs at the time of the alleged exposure (i.e., "**remedial measures**" were in place), and:
  - There is a known **contemporaneous non-work exposure** (housemate or family member with COVID, known unsafe social interactions or travel, etc.), or
  - There was insufficient "**exposure**" at work to a co-worker/customer known to have COVID, within **6 feet for 15 minutes or more** in a 24 hour period.

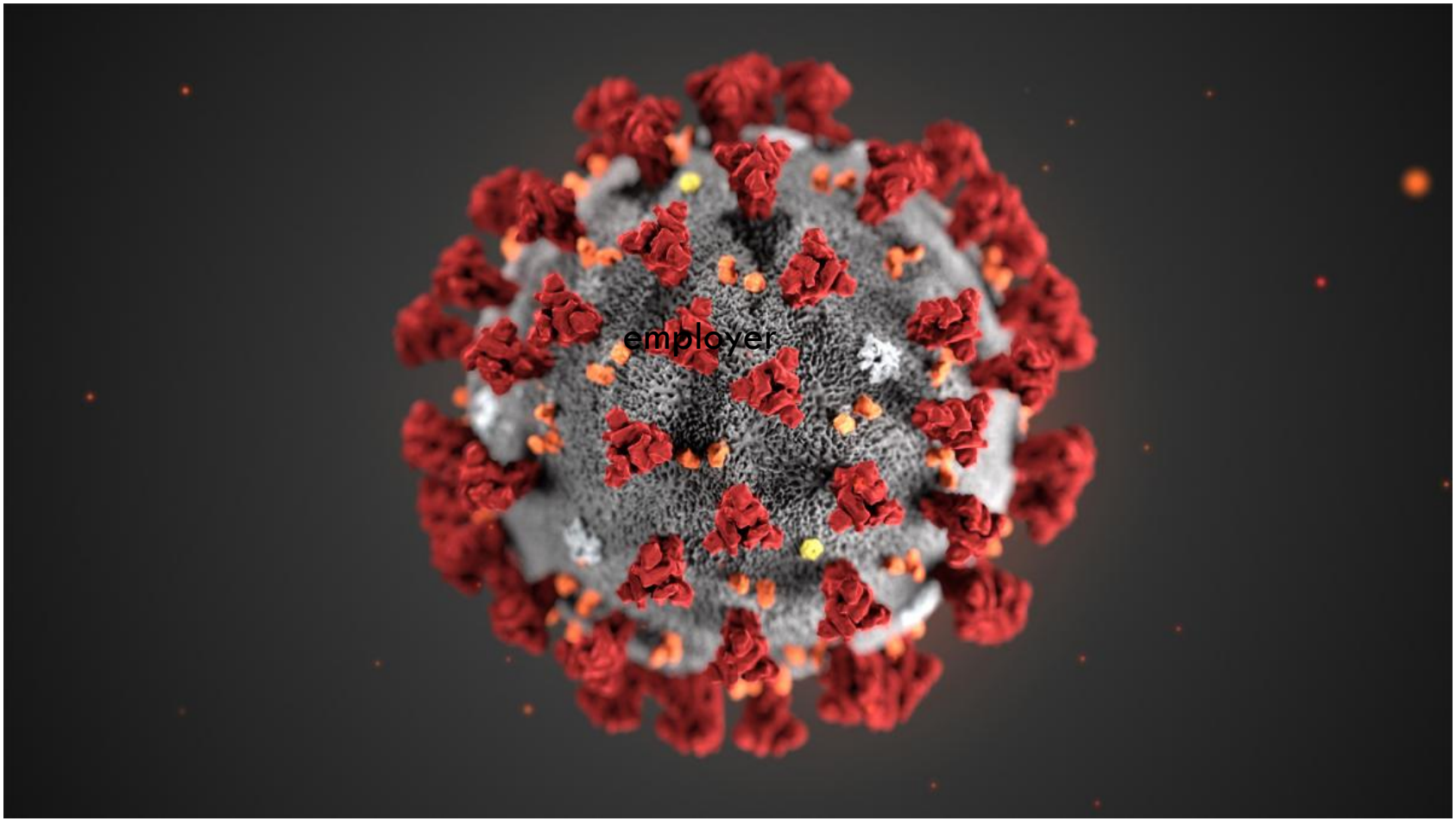
Denials: Limited time to act

- "Outbreak" Presumption claims must be denied within **45 days** of the date of injury, per Sec. 3212.88(f).
- "Healthcare/Public Safety" Presumption must be denied within **30 days** of the date of injury, per Sec. 3212.87(f).
- The usual 90-day time-frame does not apply if there is a presumption.

Agenda check-in

- COVID-19 claims data √
- COVID-19 vaccinations √
- SB 1159 Presumption laws – overview √
- *Can we/should we Deny COVID claims? Even presumptive injury claims?* √
- CalOSHA Regulations – *to the rescue!* √
- AB 685 Notice requirements – some clarity
- SB 1159, OSHA Regs & AB 685 Overlap
- Employer Liability and Special Employment Issues
- FAQs

AB 685: Effective 01/01/2021



Sec. 6409.6 Notice Requirements

- AB 685 enacts many new Statutes. One of the most important is Labor Code Section 6409.6.
- Within one business day of an employer learning any employee, and in some situations the employee of a subcontracted entity, was "**exposed**" to a "**qualifying individual**" at the work location, the employer must provide specific written notices and information to its employees, the subcontractor and to employee representatives (definition not specified).

Is Cal OSHA your friend, again?

- Labor Code Section 6409.6 applies when someone have been "**exposed**" to a "qualifying individual" at the work location.
- *"Exposure" is not defined in AB685*.
- OSHA's definition (within 6 feet, 15+ minutes to a positive person) could possibly limit the scope of those who must be noticed under AB 685, just they help define rebuttal criteria under SB 1159.

Qualifying Individual (QI) Defined

- Any person (employee, subcontractor, student, patient, client, customer, visitor, etc.) who:
  - Has a laboratory-confirmed case of COVID-19;
  - Is diagnosed with COVID-19 by a licensed health care provider;
  - Is under a COVID-19-related order to isolate provided by a public health official; or
  - Has died due to COVID-19 as determined by the county public health department.

What Is Notice To The Employer?

- A public health official or licensed medical provider notifies the employer;
- An employee (or emergency contact) notifies the employer that the employee is a QI;
- The employer's testing protocol (if any) reveals that the employee is a QI; or
- A subcontracted employer notifies the employer that a QI was on the worksite of the employer.

What Information To Provide

- Information regarding COVID-19-related benefits as well as the organization's anti-retaliation and anti-discrimination policies.
- The disinfection and safety plan.
- Employers should not include any identifying information.
- The notice must be written and given in a manner the employer normally uses to communicate employment-related information.
- The notices must be maintained by the employer for a period of three (3) years;
- It is recommended that the information should kept in a confidential manner.

What Is A Worksite?

- "Worksite" means the 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.

CoVid coNfuSioN

Must Employers Become Doctors?

- AB 685 is quite challenging: it requires notice to those employees potentially "exposed" "during the infectious period." What is the "infectious period?"
  - Presently, the California DPH defines the Infectious Period as **14 days**, including, at a minimum, the 48 hours before the individual developed symptoms.
  - For an individual **who tests positive but never develops symptoms**, the infectious period for COVID-19 begins 2 days before the specimen for their first positive COVID-19 test was collected. The infectious period ends **10 days** after the specimen for their first positive COVID-19 test was collected.

Outbreak Overlap with SB1159

- Employers must notify the worksite's local public health department of COVID-19 within 48 hours of learning of the "outbreak."
- "Outbreak" is currently defined by California Department of Public Health to be **three** (3) or more cases in a 14-day period, not four (4) or more (or 4%) as defined by SB 1159.

OSHA Notice requirements

- Employers must provide the public health department the names, numbers, occupations and worksite(s) of all individuals who are Qualifying Individuals, as well as the business address and North American Industry Classification System (NAICS) code of the worksite(s) of the Qualifying Individuals.
- An employer experiencing outbreak must continue to give notice to the local health department of any subsequent laboratory-confirmed cases of COVID-19 at the worksite(s).

Summary of COVID-19 Notice Rules

- Positive Test › Claims Admin. › 3 biz. days;
- Exposure to a Qualifying Individual › Employees, Union › 1 biz. day;
- Illness/Serious health condition or death due to COVID-19 › CalOSHA › 5 days or 8 hours;
- "COVID-19 outbreak" › Local Public Health agency › 48 hours;
- Potential exposure › EE's & others › 1 biz. day

Liability and Co-Employment

3rd party liability

- The presumption laws may also create 3rd party business liability exposure.
- The Notice laws may turn into invitations to plaintiff's lawyers.
- For example: An employee who is covered by a presumption may go home and expose members of the household or community to the illness.
  - This may create liabilities traceable back to the employer, if the underlying illness is presumed to be work-related, especially if any one of those 3rd parties became seriously ill.

Co-employment relationships

- Do independent contractors working onsite create COVID-19 civil liability exposure?
  - Employers are anticipating that as they reopen physical sites, many on-site individuals will actually be contractors who need to be on-site for service of the buildings/staff.
- Co-employment can be used by an "employee" to make a Worker's Comp claim.
  - The employer may be able to invoke the Worker's Comp exclusive remedy rule as a defense to a civil suit brought by employee-plaintiffs.

General-Special Employment

- Whether the contractor will be considered an employee mainly revolves around the right to control and direct the activities of the alleged employee, or the manner and method in which the work is performed.
  - If a contractor were to assert an employment relationship (as "special employer") in filing a WC claim, it may still be payable by the contracting agency's ("general employer") WC coverage, per **LC 3602(d)(1).**
  - Typically, a WC claim by a contractor "special employee" could only proceed against the special employer's WC coverage if the contracting agency did not have a valid policy in place or their coverage went insolvent.

FAQs

FAQs

- An employee of one of our vendors works at one of our locations and tests positive. Do we include that in our SB 1159 headcount claim reporting?
- What about contingent workers or temp workers through an agency?
- Do we include employees on leave/vacation during the 14 days in the headcount?
- Do we need to include a positive test for an employee who solely works from home?

FAQs

- If an employee who is covered by the 3212.87 presumption (safety officer, hospital worker, etc.) tests positive, should they be included in the "outbreak" data required by 3212.88?
- If we have a maintenance services employee who visits multiple locations throughout the day (e.g., performs equipment installation services, repairs at various locations, etc.) do we have to report those locations as well?
- Is there a minimum duration of time that employee needs to spend at a specific location for it to be reportable?
- Does a "specific place of employment" include the facility or location owned and operated by a third-party, where your employee is dispatched to work?

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https://epicbrokers.com/insights/what-employers-need-to-know-about-covid-19-vaccines-part-2

Part 2 in our COVID-19 Vaccine Webinar Series

In this webinar moderated by EPIC Pharmacy Practice Leader Bob Eisendrath, Sree Chaguturu, M.D., Senior Vice President, CVS Health and Chief Medical Officer, CVS Caremark answers medical questions about the vaccine. EPIC Senior Wellness Consultant Craig Schmidt also presents best practices for keeping the workplace safe.

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