



Senate Bill 1159: New
Presumptions of Injury
for COVID-19

Assembly Bill 685: New
Notice Requirements for
Employers

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INTRODUCTION

- SIGNIFICANCE OF LEGISLATION
- INTERACTIVE DISCUSSION
- DISCLAIMER

In a World of Change One Thing Remains the Same

Provide the DWC-1 Claim Form

- Whether “presumed” or “possible” or “potential” or actual – you need to provide the DWC-1 and the opportunity for the employee to seek benefits
- Standard: Within one working day of receiving notice or knowledge of **potential** injury or illness
- *Honeywell v. WCAB (Wagner)* – deliberate/intentional refusal to provide claim form, false statements to employee to prevent or delay a claim form
- What constitutes knowledge of COVID-19 injury/industrial exposure? Labor Code § 5400, 5402

Recent Trends in California COVID-19 Cases

Tracking the coronavirus in California

By Los Angeles Times Staff
Updated Oct. 25, 3:39 p.m. Pacific

904,820

confirmed cases

+1,000 today

+4,276 yesterday

17,347

deaths

+4 today

+28 yesterday

Coronavirus (COVID-19) statistics

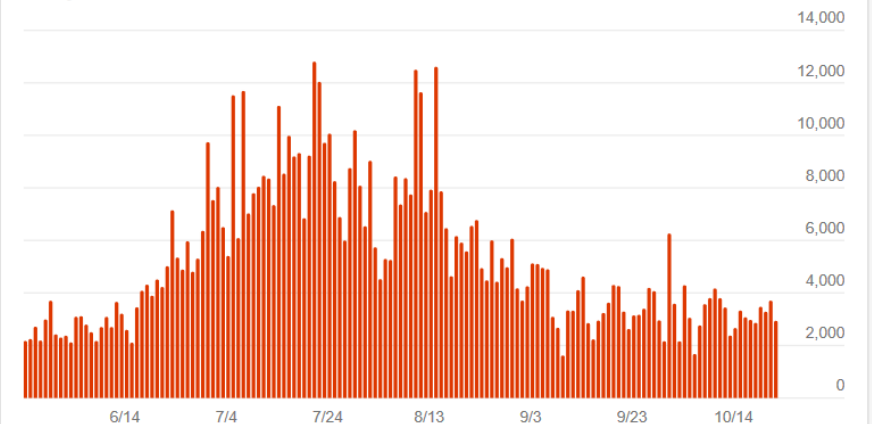
Global

United States ▾

California ▾

Select to view: ● Confirmed ● Deaths

Daily new cases



Senate Bill 1159 - Now the Law

Approved by Governor on 09/17/2020 and made effective **immediately**
and **self-repealing after 01/01/2023**

Labor Code §3212.86	Any worker diagnosed with COVID-19 within 14 days of work between 03/19/20-07/05/20 (30 days investigation period)
Labor Code §3212.87	Peace Officers, Firefighters, and certain Healthcare workers diagnosed with COVID-19 within 14 days of work on or after 07/06/20 (30 days investigation period)
Labor Code §3212.88	Any other worker diagnosed with COVID-19 within 14 days of work on or after 07/06/20 during an “outbreak” at their employer’s place of employment (45 days investigation period)
If employee doesn’t meet any of the above	Revert to 3202.5/5402 (90 day investigation period)

LC § 3212.86 - Work Through 07/05/20

- Applies to all pending matters for any employee who 1) worked at their employer's location from 03/19/20-07/05/20 and 2) was first diagnosed with COVID-19 within 14 days of the last date of work at the employer's location during this time period
- Diagnosis can be made by a MD, DO, or NP acting under the review or supervision of a physician or surgeon
- Diagnosis must be confirmed by laboratory testing within 30 days of diagnosis
- No specificity on type of laboratory testing required
- Shortened Investigation Period - Claim must be denied within 30 days of filing of a claim form or it will be presumed compensable
- Rebutting Presumption – likely must show no opportunity for occupational exposure (difficult)
- NOT a basis to rescind, alter, amend, or reopen any final award of workers' compensation benefits

LC 3212.87 Peace Officers, Firefighters, and Healthcare Workers

- **Diagnosis must be made within 14 days of the last date of work at the employer's place of employment at the employer's direction**
- **Diagnosis must be made by Polymerase Chain Reaction (PCR) test (typically nasopharyngeal swab) or other USFDA approved test with similar or higher sensitivity**
- **Serologic (blood/antibody) testing is insufficient**
- **Date of injury is the last date worked prior to the positive test**
- **Presumption extends for up to 14 days following termination from the last day worked**

LC 3212.87, cont.

- Shortened Investigation Period – Denial must issue 30 days from the date a claim form is filed or injury is presumed compensable
- Healthcare Workers include: a) any person who provides direct patient care or custodial employees in contact with COVID-19 patients at a health facility, b) nurses and EMTs, and c) providers of in-home supportive services (if the services are performed outside their own home/residence)
- Healthcare Workers can also include any other employees of a health facility
- For these “other” health facility employees, the presumption can be rebutted if the employer shows they did not have contact with a health facility patient in the last 14 days who tested positive for COVID-19

Who Are Employees Of A Health Facility

- **Health Facility - a facility, place, or building that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness... to which the persons are admitted for a 24-hour stay or longer (Health & Safety Code 1250)**
 - Includes employees working in buildings part of a general acute care hospital
- **Excludes clinics/outpatient facilities (Health & Safety Code 1200)**
 - Exception? – Single consolidated license issued to a general acute care hospital (H&S 1250.8)

LC 3212.88 - All Other Employees

- EXCLUDES employees described in LC 3212.87
- Employer must have 5 or more employees
- Diagnosis must be made within 14 days of the last date of work at the employer's place of employment at the employer's direction AND during an "outbreak"
- Diagnosis must be made by PCR test (or similar USFDA approved test to detect viral RNA)
- Date of injury is the last date worked prior to the positive test
- Presumption extends for up to 14 days following termination from the last day worked
- Shortened Investigation Period – Denial must issue 45 days from the date a claim form is filed or injury is presumed compensable

Claims That Do Not Meet Presumption Requirements

Non peace officer, firefighter, or health workers where there is no “outbreak” or less than 5 employees

- Liability determined by preponderance of evidence
- Regular 90 day investigation period to accept or deny
- Outlier exposure (lack of additional cases at place of employment)
- Non-occupational exposure risks

What Is An Outbreak?

The “4 and 4 Rule”

5 to 100 Employees at Location

- Four or more employees at a specific place of employment test positive for COVID-19 within 14 calendar days

More Than 100 Employees at Location

- 4% or more of the employees at a specific place of employment who reported to work test positive for COVID-19 within 14 calendar days

OR

A specific place of employment that is ordered to close by a public health department or school superintendent due to risk of COVID-19 infection

Determining Whether There Is An Outbreak

- **This is not a one time calculation!!!!**
- The claims administrator must continually evaluate EACH CLAIM within the surrounding 14 day period (both before and after date of injury) to determine if the outbreak threshold is met

Who Determines If There Is An Outbreak

- Determined by the claims administrator based on information provided by the employer
- The employer **MUST** report to their claims administrator (by e-mail or fax) within three business days of when they know or reasonably should have known an employee tested positive for COVID-19
 - **IMPORTANT DISTINCTION** – This employer reporting is required when they learn/should have learned of a positive employee test, NOT when there is a claim form filed
- Unintended consequences – claims administrators may be subject to deposition if AA disagrees with denial of injury/presumption for no outbreak; subpoenas for employee information used to determine existence of outbreak (privacy issues?)

Feasibility Concerns

- **Outbreaks determined by “Specific Place of Employment”**
 - **Multiple Sites/Buildings? Segregated Areas within Same Building?**
- **The Reality of Tracking/Disclosing Information**
 - **Significant Administrative Burden**
 - **Accuracy and Timeliness of Information**
 - **False Positives / False Negatives**

Benefits Provided For Presumed COVID-19 Cases

- Full hospital, surgical, medical treatment, disability indemnity, and death benefits
- No specific language overriding UR requirements for medical treatment
- Emergency treatment rules likely apply for hospitalization/respirator use
- DIR waives right to any death benefits for cases with no surviving dependents

Labor Code 248.1 Nuances

- Employer to offer CPSL to qualified employee upon written or oral request
- Employee can determine how many hours of CPSL to use
- What happens if employee elects to not use any/all CPSL – is TD/4850 due and payable?
 - Argue NO, LC 3212.87/3212.88 require any available COVID specific sick leave be used and exhausted first

Attempting to Rebut Presumption

- Non-denied claims – can be rebutted by evidence discovered after the initial investigation period
- Same “reasonable diligence” standard for initial investigation? *State Comp Ins. Fund v. WCAB (Welcher)*

Peace Officer/Firefighter/Healthcare Workers

- Evidence of no opportunity for occupational exposure (difficult)

“Other” Workers at Outbreak Locations

- Evidence of measures in place to reduce transmission (use of PPE/masks, hygiene requirements, enforcement of social distancing)
- Evidence of potential non-industrial exposure (investigation, interviews, social media searches)

Exposure Risks

- Multiple potential affected body parts – lungs, heart, stroke, neurological, internal, psych (catastrophic injury – *Wilson*)
- Substantial exposure for medical costs – hospitalizations, intubation/respirator, extensive medical care (“long-haul” cases)
- Death cases (17,345 deaths in CA through 10/25/20)

Multiple Employers and Apportionment

- Date of Injury is defined as the last day worked at a specific location prior to the positive test
- Possible to have multiple dates of injury for one case (reimbursement vs. contribution claims)
- Currently no proposed corollary revision/amendment to LC §4663(e) to exclude apportionment for these three new Labor Code Sections
- However, existing exclusion of apportionment for certain compensable consequence body parts (ie. heart trouble, pneumonia) would still apply

Employer Reporting Requirements under SB1159

Labor Code 3212.88 (i) for “current” claims (positive tests from 9-17-20 and after):

Employer knows or reasonably should know, shall report in 3 business days:

- (1) An employee has tested positive, anonymous unless asserts work related or filed a claim;
- (2) The date of the positive test (date specimen collected)
- (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 at each specific place of employment.

Labor Code 3212.88 (k)(2) for “retroactive” reporting (7-6-20 to 9-17-20)

Employer must report positive tests within 30 business days.

- (1) An employee has tested positive, anonymous unless asserts work related or filed a claim;
- (2) The date of the positive test (date specimen collected)
- (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 each of the employee’s specific places of employment on any given work day between July 6, 2020, and the effective date of this section.

Employer Reporting Requirements under SB1159

Employers should note that the duty to report arises when they reasonably should know of a positive test, and regardless of whether the claim is alleged as industrial.

The employer's duty to report to the claims administrator for any retroactive claims is within 30 business days of 9-17-20, or by 10-29-20.

Also be aware that AB685 becomes effective as of 1-1-2021 and imposes additional reporting requirements on the employer regarding notice requirements for each positive test (unrelated and in addition to the WC reporting requirements)

AB 685

- Signed into law on 9/17/20 by Governor (Labor Code section 6409.6)
- In effect from 1/1/21 – 1/1/23
- Requires employer who receives “notice of potential exposure” to Covid-19 to take the following actions within ONE BUSINESS DAY:
 - Provide written notice to all employees and employers of subcontracted employees, who were on the premises at the same “worksite” as the “qualifying individual” (person who tested positive, received isolation order or died of Covid-19) within the “infectious period”
 - Provide written notice to the Union, if any, of the employees
 - Provide all employees who may have been exposed and their Union, if any, with information regarding Covid-19 related benefits that employees may be entitled to receive, including workers compensation benefits, Covid-19 related leave, company sick leave, paid sick leave, supplemental sick leave, as well as the company’s anti-retaliation/anti discrimination policies
 - Notify all employees, the employers of subcontracted employees, and the Union, if any, on the company’s Covid-19 disinfection protocols/safety plan that the company plans to implement to prevent further exposures per CDC guidelines
- **The notice should be in a manner that does not reveal the identity of the “qualifying individual”**

AB 685

- **“Qualifying individual”**
 - Defined as a person who:
 - Has a laboratory-confirmed positive case or diagnosis from a licensed healthcare provider
 - Received an isolation order from a public health official, OR
 - Died due to Covid-19
 - *** An individual may receive a local isolation order based on potential exposure and not a confirmed case. Hence, inclusion of such individuals increases frequency of notice requirements for employers
- **“Worksite”**
 - Defined as the building, store, facility, agriculture field, or other location where a worker worked during the infectious period. Does not apply to buildings, floors, or other locations of the employer that a qualified individual did not enter.
- **“Infectious period”**
 - The time period a Covid-19 positive person is infectious as defined by the State Department of Health. The CA Department of Public Health (CDPH) states that for symptomatic cases, the infectious period is up to 10 days after onset.
- **“Notice of Potential Exposure”**
 - Includes any of the following: Notice to the employer or representative from
 - (a) A public health official/ licensed medical provider that an employee was exposed to the qualifying individual at the worksite
 - (b) Employee/ employee’s emergency contact that the employee is a qualifying individual
 - (c) Employer’s testing protocol that an employee is a qualifying individual, or
 - (d) Notice from subcontracted employer that a qualifying individual was on the worksite

AB 685

- **Employers must also notify local public health department within 48 hours of the notice of a Covid-19 “outbreak” (as defined by the CA Dept. of Public Health)**
 - The CDPH currently defines an “outbreak” as three (3) or more laboratory-confirmed cases of Covid-19 among workers who live in different households within a two-week period
 - *** Note this is different than “outbreak” as defined in SB1159 – the “4 and 4” rule (4% of employees test positive)
- **Expansion of Cal/OSHA Authority**
 - Cal/OSHA normally has authority to prohibit entry to all or part of a workplace w/in imminent hazard, or to order that an employer stop an operation or process that creates such a hazard
 - AB 685 expands this power by allowing Cal/OSHA to prohibit entry to a workplace or part of a workplace, or prohibit an operation or process where there is a finding that the workplace, operation, or process exposes employees to a risk of Covid-19 infection
- **Serious Violations Citations**
 - Prior to AB 685, Cal/OSHA notified employers of an alleged violation 15 days prior to issuing a citation for a serious violation of occupational health and safety statutes or regulations. This enabled employers to provide additional info/evidence that they took mitigating factors to rebut the potential citation.
 - AB 685 eliminates the latter requirement and Cal/OSHA can now issue citations for serious violations related to Covid-19 immediately, though the employer may still appeal the citation.

Other Considerations

- Potential Psyche Claims
- S/W Claims
- Civil Claims
- Stipulations
- Body Parts
- Compromise and Release

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Thank you !



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