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IN–DEPTH DISCUSSION

California SB 1159 Expands Presumption of Workers' Compensation Liability for COVID-19 Illness Claims

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Update: Governor Newsom signed SB 1159 into law on September 17, 2020.

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In May, California Governor Newsom signed Executive Order N-62-20, which created a rebuttable presumption that certain employees who test positive for COVID-19 contracted the virus at work for workers' compensation purposes. With the governor's order expiring on July 5, 2020, there has been widespread speculation as to whether the executive order would be substantively formalized into legislation and, if so, what portions of the executive order would be expanded, extended, or amended. As expected, the California legislature has passed Senate Bill 1159, which creates a new framework for COVID-19-related workers' compensation claims. As emergency legislation, this bill would take effect the day it is signed and chaptered.

How Long is the Presumption Effective?

SB 1159 states that a "disputable presumption" exists for an employee who suffers illness or death resulting from COVID-19 on or after July 6, 2020 through January 1, 2023. Presumably, if an employee suffers an illness or death resulting from COVID-19 after January 1, 2023, the presumption no longer applies and case will be treated under the traditional workers' compensation framework.

How Long Does the Claim Administrator Have to Deny the Claim?

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. However, this presumption is disputable. 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.

The employer and claim administrator must work quickly to gather evidence to dispute the presumption. If the date of injury is before July 6, 2020, the claim administrator has 30 days to deny the claim. If the date of injury is on or after July 6, 2020, the claim administrator *now has 45 days to deny the claim*, or the injury is presumed compensable. The presumption of compensability is rebuttable but *only with evidence discovered subsequent to the applicable investigation period.* However, if the employee is an "essential employee" as specified in Labor Code Section 3212.87, then the 30-day denial period applies regardless of the date of injury. Such "essential employees" include but are not limited to certain firefighters, peace officers, frontline healthcare providers and healthcare facility workers.

Which Employees are Covered?

The presumption created by SB 1159 applies to all employees who: (1) test positive during an outbreak (defined below) at the employee's specific place of employment, and (2) whose employer has five or more employees. The only injury for which the presumption applies is illness or death resulting from COVID-19. However, the following conditions must exist for the presumption to apply:

- The employee tests positive for COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction.
- The day on which the employee performed labor or services at the employee's place of employment at the employer's direction was on or after July 6, 2020. This must be the last date the employee performed labor or services at the employee's place of employment at the employer's direction before the positive test.
- The employee's positive test occurred during a period of an outbreak at the employee's specific place of employment.

Although not specifically addressed, if the employee tested positive between March 19 and July 5, 2020 (*i.e.*, when the executive order was in effect), then the executive order presumably controls.

What is a "Specific Place of Employment"?

Under SB 1159, a "specific place employment" specifically excludes an employee's home or residence, unless the employee performs home health care services at a home or residence. However, a "specific place of employment" does include a "building, store, facility, or agricultural field where an employee performs work at the employer's direction." Not specifically addressed in this code section are employees who perform work outside of a "building, store, facility, or agricultural field" such as those employees who may visit customers' homes for work. For these employees, one may argue there is no "specific place of employment" and, therefore, no presumption.

What Benefits is the Employee Entitled to?

If the presumption applies, the employee is entitled to "full hospital, surgical, medical treatment, disability indemnity, and death benefits." However, the Department of Industrial Relations has waived entitlement to any death benefits under Labor Code Section 4706.5 in the event the deceased employee did not have any dependents.

SB 1159 treats entitlement to temporary disability benefits similarly to the May 6 executive order. SB 1159 states that if an employee is eligible for paid sick leave benefits "specifically available in response to COVID-19" such as those available under FFCRA, such benefits must be used and exhausted before using any temporary disability benefits. However, if an employee does not have such paid sick benefits available to them, then the employee must be provided temporary disability benefits without the traditional three-day waiting period.

If it is determined that an employee may be eligible for temporary disability benefits related to a COVID-19 illness or injury claim, whether an employee qualifies for temporary disability benefits depends on the date they tested positive or was diagnosed with COVID-19.

If the employee tests positive or is diagnosed with COVID-19 *on or after May 6, 2020*, the employee must be certified for temporary disability by a licensed physician within the first 15 days after the initial diagnosis, and then must be recertified every 15 days thereafter for the first 45 days following diagnosis.

If the employee tested positive or was diagnosed with COVID-19 *before May 6, 2020*, the employee must have obtained a certification no later than May 21, 2020 documenting the period for which the employee was temporarily disabled and unable to work, and must have been recertified for temporary disability every 15 days thereafter for the first 45 days following diagnosis.

Reporting Requirements

SB 1159 creates new reporting requirements for an employer. Beginning when this legislation takes effect, when an employer "knows or reasonably should know that an employee has tested positive for COVID-19" the employer must report to its claims administrator the following information *within three business days*, via e-mail or fax:

- An employee has tested positive. The employer shall not provide any personally identifiable information regarding the employee who tested positive for COVID-19 unless the employee asserts the infection is work-related or has filed a claim form pursuant to Labor Code Section 5401.
- The date the employee tests positive—this is the date the specimen was collected for testing.
- The 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.
- 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.

There are separate reporting requirements for positive tests between July 6, 2020 and up to the date that SB 1159 takes effect. If an employer is aware of an employee who has tested positive during this period, the employer must report the information in the first three bullet points above, via e-mail or fax, to its claims administrator *within 30 business days* of the date this legislation took effect. However, instead of the last bullet point, the employer must report the highest number of employees who reported to work at each of the employee's specific places of employment on any work date between July 6, 2020 and the date SB 1159 takes effect.

The claims administrator will use the above information to determine whether an outbreak has occurred. Following these reporting requirements is crucial as SB 1159 institutes a penalty of $10,000 for an employer that "intentionally submits false or misleading information or fails to submit information."

What is an "Outbreak"?

Under Labor Code Section 3212.88, an outbreak exists if within 14 calendar days one of the following occurs at a specific place of employment:

- If the employer has 100 employees or fewer at a specific place of employment, 4 employees test positive for COVID-19.

- If the employer has more than 100 employees at a specific place of employment, 4% of the number of employees who reported to the specific place of employment test positive for COVID-19.
- 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.

If there has been an outbreak, then the presumption of compensability is applicable. Recall, for the presumption to apply, the employee must test positive *during an outbreak*. Therefore, if there is no outbreak, there is no presumption.

Conclusion

Although much of the California workers' compensation world was expecting that Governor Newsom's executive order would be codified, there is some relief on the part of employers that were fearing the legislation would include an absolute presumption instead of a disputable one. For employers and claim administrators to take full advantage of this disputable presumption, the parties must work quickly and diligently to investigate each positive test and obtain evidence in all forms. As with the governor's prior executive order, this legislation should provide yet another incentive for employers to follow guidelines and to take all reasonable steps to keep their workforces safe and healthy as the state of California continues the process of re-opening.