Understanding New California Law Pertaining to the Presumption and Reporting of COVID-19

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Speakers

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Questions to Explore

• Review of bills, what is in effect today and what is to come?
• What is rebuttable presumption?
• What you need to know about reporting protocols and obligations?
• How has the claims process changed?
• What is the potential impact on Workers’ Compensation system?
California Current COVID-19 Outlook

CWCI California 2020 COVID-19 Worker’s Compensation Claims

Statewide Summary:
- Claims reported thru 10/5/2020: 44,800
- Deaths reported thru 10/5/2020: 241

COVID Claims by Industry
- Health Care: 16,177 (37.8%)
- Public (Safety/Govt): 6,664 (15.6%)
- Retail: 3,398 (7.9%)
- Manufacturing: 3,274 (7.7%)
- Transportation: 2,182 (5.1%)
- Food Services: 1,850 (4.3%)
- Admin & Waste: 1,531 (3.6%)
- Agriculture: 1,216 (2.8%)
- Construction: 1,120 (2.6%)
- Wholesale: 996 (2.3%)
- Finance: 852 (2.0%)
- Other Services: 706 (1.7%)
- Educational: 651 (1.5%)

COVID Claims by Month of Injury
Reported January - September claims: 44,800
Projected Ultimate January - September claims: 51,576

Approved by Governor on 9/17/2020 and made effective immediately, creates **rebuttable presumptions** of COVID-19 workplace injury as codified in three new Labor Code Sections:

<table>
<thead>
<tr>
<th>Labor Code §3212.86</th>
<th>Any worker diagnosed with COVID-19 within 14 days of work between 03/19/20-07/05/20 (30 days investigation period)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Labor Code §3212.87</td>
<td>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)</td>
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<tr>
<td>Labor Code §3212.88</td>
<td>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)</td>
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</tbody>
</table>

**If employee doesn’t meet any of the above**

Revert to 3202.5/5402. (90 days investigation period)
- **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 Care 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)
- **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
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)
Starting **September 17, 2020**, When an employer knows or reasonably should know that an employee has tested positive for COVID-19 they must report to their carrier/administrator within three (3) business days

**Retro Active Reporting** - Employers must report all employees who have tested positive for COVID-19 from July 6, 2020 through September 16, 2020 to their carrier/administrator no later than October 29, 2020.

*The specific address or addresses of the employee’s specific place of employment during the 14-day period preceding the date of 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*

Each carrier/administrator has their own reporting forms and instructions. If not received, please reach out to your carrier/administrator immediately.

Failure to report or intentionally submitting false/misleading information is subject to civil penalty up to $10,000 to be assessed by the Labor Commissioner.
### What is an outbreak? The “4 and 4 Rule”

<table>
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<tr>
<th>5 to 100 Employees at Location</th>
<th>More Than 100 Employees at Location</th>
</tr>
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<tbody>
<tr>
<td><strong>Four</strong> or more employees at a specific place of employment test positive for COVID-19 within 14 calendar days</td>
<td><strong>4%</strong> or more of the employees at a specific place of employment who reported to work test positive for COVID-19 within 14 calendar days</td>
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**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

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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?)
- 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)
In a world of change, one thing remains the same

**DWC-1 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
AB 685

Now Get Ready for 1/1/2021

1. Breakdown of the law
2. Reporting and notification requirements for employers
3. Expansion of Cal/OSHA authority
• **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”
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

Infection 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.

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.

Notice of Potential Exposure

- Includes any of the following: Notice to the employer or representative from
  - A public health official/ licensed medical provider that an employee was exposed to the qualifying individual at the worksite
  - Employee/ employee’s emergency contact that the employee is a qualifying individual
  - Employer’s testing protocol that an employee is a qualifying individual, or
  - Notice from subcontracted employer that a qualifying individual was on the worksite
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.
Q&A
Thank You!