

Alert

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Rebuttable Presumption for COVID-19 Illnesses to Impact Employers Through 2022

On September 17, 2020, Governor Newsom signed SB 1159 into law, expanding access to workers' compensation and making it easier for first responders, health care workers, and other workers who test positive for COVID-19 due to an outbreak at work to recover medical care and wage replacement benefits. The law is a follow up to Newsom's Executive Order N-62-20, which created a rebuttable presumption regarding COVID-19 transmission in the workplace, but which expired on July 5, 2020.

The new law changes the definition of "injury" within the workers' compensation statute and creates a rebuttable presumption that COVID-19 illness arose in the course of employment if contracted under certain conditions. The new definition of injury includes illness or death resulting from COVID-19 for any injuries beginning on July 5, 2020, through January 1, 2023, for employees who contract the virus within 14 days of performing labor or services at the workplace during an outbreak at the workplace. If an employee suffers an "injury" in the workplace related to COVID-19, a rebuttable presumption is created that the illness arose in the course of employment and is therefore compensable under workers' compensation laws.

Covered Employees and Conditions for Presumption

To be protected by the new law, a worker has to be a covered employee. Covered employees include those who: 1) test positive *during an outbreak* at the employee's specific place of employment, and 2) work for an employer who has five or more employees.

If an employee is a covered employee, the presumption that the injury arose in the workplace still only attaches if:

1. the employee tests positive for COVID-19 within 14 days of performing labor or services at the employee's place of employment and at the direction of the employer;
2. the last date the employee worked before the positive test was on or after July 6, 2020; and
3. the test occurred during a period of outbreak at the specific place of employment, defined as "the building, store, facility, or agricultural field where an employee performs work at the employer's direction."

Outbreak

In order for the presumption to apply, there must have been an outbreak in the workplace. Labor Code section 3212.88 has been added to the Labor Code and states that an outbreak occurs when at least one of the following happens at a specific place of employment:

1. If the employer has 100 employees or fewer at a specific place of employment, four employees test positive for COVID-19.
2. If the employer has more than 100 employees at a specific place of employment, 4 percent of the number of employees who reported to the specific place of employment test positive for COVID-19.
3. A specific place of employment is ordered to close by a local public health department, the California Department of Public Health (CPDH), the Division of Occupational Safety and



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Health, or a school superintendent due to a risk of infection with COVID-19.

Note that this definition of outbreak is different than the CDPH definition of outbreak or as outbreak may be defined by local public health ordinances.

Benefits

If an employee is entitled to the presumption, the employee is entitled to “full hospital, surgical, medical treatment, disability indemnity, and death benefits.” However, an employee must use and exhaust all sick leave pay benefits prior to receiving any temporary disability benefits. If the employee does not have sick leave benefits, a qualified employee is entitled to temporary disability benefits immediately and there is no waiting period.

To be qualified for temporary disability benefits, the employee must satisfy one of the following:

1. If the employee has tested positive or is diagnosed with COVID-19 on or after May 6, 2020, the employee shall be certified for temporary disability within the first 15 days after the initial diagnosis, and shall be recertified for temporary disability every 15 days thereafter, for the first 45 days following diagnosis.
2. If the employee has tested positive or was diagnosed with COVID-19 before May 6, 2020, the employee shall 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 shall be recertified for temporary disability every 15 days thereafter, for the first 45 days following diagnosis.

Rebutting the Presumption

Employers still have an opportunity to rebut the presumption that an employee’s injury related to COVID-19 arose within the course and scope of employment. The presumption may be denied and disputed by the employer within 30 days if the injury took place before July 6, 2020, or within 45 days if the injury took place after July 6, 2020, unless the employee is an essential employee, in which case the 30 day denial period exists regardless of the injury date.

Reporting

Employers must also report injury claims within three business days by email or fax to its claims administrator anytime the employer “knows or reasonably should know that an employee has tested positive for COVID-19.” In the written communication to the administrator, the employer must include:

1. that an employee has tested positive. The employer should not provide any personally identifying information unless the employee asserts the infection is work related or has filed a claim form pursuant to Section 5401;
2. the date the employee tested positive (the date the sample was collected);
3. the address of the specific place of employment during all of the preceding 14 days (calendar days); and
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.

These new laws, which are effective immediately, will impact employers across California until their repeal date on January 1, 2023. Employers with additional questions should reach out to counsel for guidance.
