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# **NEW CALIFORNIA COVID-19 EMPLOYMENT LAWS**

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# AB 685

- ▶ AB 685 was signed into law by Governor Newsom on September 17<sup>TH</sup>, 2020. The bill is entitled “COVID-19: imminent hazard to employees; exposure; notification; serious violations.” Generally, the bill expands Cal/OHSA’s ability to declare a workplace an imminent hazard based on risk of COVID-19 exposures, provides notice requirements to employees when employers become aware of an exposure and/or outbreak, and adds certain record keeping requirements, among other things. The bill goes into effect on January 1, 2021 and portions of the bill have a sunset date of January 1, 2023, at which time the COVID-19 imminent hazard provisions would be repealed, but rest of the law would remain.
- ▶ AB 685 expands Cal/OSHA’s ability to deem a workplace an imminent hazard to employees by amending Labor Code section 6325 to grant Cal/OSHA discretion to deem a place of work an imminent hazard to employees when the worksite exposes workers to risk of contracting COVID-19. Cal/OSHA may close areas of the worksite in which it deems to be an imminent hazard to employees. The closure is to be limited to the immediate area(s) in which the hazard exists. Areas outside of the imminent hazard area may remain in operation. Cal/OSHA also requires an employer to post a notice, which Cal/OSHA will provide, in a conspicuous place informing those at the worksite of the designation.

# AB 685

- ▶ There is no clear standard for how to determine if Cal/OSHA will deem a worksite an imminent risk of exposure to COVID-19. The language of the bill simply states: “[w]hen, in the opinion of the division, a place of employment, operation, or process or any part thereof, exposes workers to the risk of infection with severe acute respiratory syndrome coronavirus 2(SARS-CoV-2) so as to constitute an imminent hazard to employees...”
- ▶ This bill expands Cal/OSHA’s ability to issue citations for serious violations related to COVID-19 by suspending the typical 15-day notice requirement. Typically, prior to issuing a citation for a serious violation, Cal/OSHA gives a 15-day notice to an employer of its intent to classify a violation as serious to determine and consider facts. This bill suspends such requirement when Cal/OSHA issues a serious violation citation related to COVID-19.

# AB 685

- ▶ AB 685 also adds reporting requirements for employers when an employer is notified of a potential exposure at the worksite to COVID-19. When an employer is informed of a potential exposure at the workplace, the employer must provide written notice, within one business day of learning the potential exposure, to all employees (and any employee representatives), including any subcontracted employees who were on the premises and at the same worksite where the infected employee worked during the employee's infectious period. The employer must inform those employees of the potential exposure, inform the employees of potential COVID-19 related benefits to which the employee may be entitled (e.g., workers' compensation, Emergency Paid Sick Leave, Emergency Family And Medical Leave).
- ▶ The employer must keep the identity of the potentially infected employee confidential in the notice to potentially exposed employees. The employer must also keep records of the notice(s) provided to employees for three (3) years.
- ▶ The "infectious period" is the 48-hour period prior to the individual developing symptoms. The employer is deemed to have notice of a potential exposure when the employer is informed of an employee's positive test, is informed that an employee is subject to an isolation order from a public health official or is informed that someone visited the worksite who tested positive or is subject to an isolation order.

# AB 685

- ▶ AB 685 also requires an employer to *notify all employees*, the employers of subcontracted employees, and any exclusive representative, of the disinfection and safety plan that the employer plans to implement and complete per the guidelines of the federal Centers for Disease Control and Prevention.
- ▶ When an employer is notified that the number of cases of COVID-19 reported at the worksite meets the definition of an “outbreak,” the employer must, within 48 hours, report to the local public health agency. Currently, the California Department of Public Health defines an “outbreak” at a non-healthcare or non-residential congregate setting workplace as, “at least three COVID-19 cases among workers at the same worksite within a 14-day period.”
- ▶ Healthcare facilities, as defined in section 1250 of the of the Health and Safety Code, are exempted from the outbreak reporting requirements. This includes a facility, a place, or building that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness, physical or mental, including convalescence and rehabilitation and including care during and after pregnancy, as well as other health facilities that admit patients for 24-hour stay, or longer.

# Must You Inform Employees Working Remotely Of A Positive Test?

- ▶ If employees are working remotely, you do not need to inform them of a positive test. AB 685 only requires that an employer inform all employees, the employers of subcontracted employees, who were on the premises at the same worksite as the qualifying individual within the infectious period that may have been exposed to COVID-19 in a manner the employer normally uses to communicate employment-related information. Because a remote employee is not at the premises or same worksite as the qualifying (infected) employee, no notice of a positive test needs to be provided to them.
- ▶ However, the employer is required to notify all employees, and the employers of the subcontracted employees and the exclusive representative, if any, on the disinfection and safety plan that the employer plans to implement and complete per guidelines of the federal Centers for Disease Control and Prevention following notice of a potential exposure.

# What constitutes an “outbreak”?

- ▶ An outbreak is currently defined by the California Department of Public Health in the context of a non-healthcare or non-residential congregate setting as, “at least three COVID-19 cases among workers at the same worksite within a 14-day period.”
  - A COVID-19 case includes someone who: (1) has a positive viral test for COVID-19; (2) is diagnosed with COVID-19; (3) is ordered to isolate for COVID-19 by a public health official; OR (4) dies due to COVID-19, as determined by a public health department.
- ▶ The definition is different than what the California Legislature just passed in SB 1159, which, for purposes of workers’ compensation rules, defines an outbreak when, within 14 days, one of the following occurs:
  1. four employees test positive if the employer has 100 employees or fewer;
  2. four percent of the number of employees who reported to the specific place of employment test positive if the employer has more than 100 employees; or
  3. 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 of COVID-19

Because the California Department of Public Health's guidelines are specifically referenced in AB 685, and are more restrictive than SB 1159, **employers must follow the California Department of Public Health’s guideline of three employees at a single congregate workplace.**



Do employers count employees working remotely toward the outbreak numbers count?

**No.** The California Department of Public Health regulations apply to employees working within a “congregate setting”. A congregate setting workplace is one where the employees gather to perform work or share workspaces. As a result, an employee working remotely and away from any shared workspace or gathering point would not meet the criteria of working in a congregate workplace.



# How does the new law define “worksite”?

- ▶ The bill specifically defines worksite as:

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.

- ▶ This applies to the notice requirements to employees and potential imminent threat designations.
- ▶ Please note that for purposes of determining whether there is an outbreak employers should follow the California Department of Public Health definition of congregate workplace which is a broader definition than the worksite definition under this bill and could include all reported cases at a single location, even if they are in separate buildings or on separate floors.

# SB 1159

## ▶ EMPLOYER REPORTING REQUIREMENTS: LABOR CODE 3212.88

- When an employer, “knows or reasonably should know,” that an employee has tested positive for COVID-19, that employer shall report the incident to their workers’ compensation carrier within 3 business days of knowledge.

# YOU MUST REPORT:

- ▶ When an employee has tested positive for COVID-19. Do not report the employee's name or any identifying information (unless employee asserts it is work-related or a claim form is filed).
- ▶ The date the employee tested positive and the date the specimen was collected (this information is provided by a physician and is documented).
- ▶ The address(es) of specific place(s) of employment during the 14-day period prior to the positive test.
- ▶ The highest number of employees who reported to work at the specific place(s) of employment within the 45-day period prior to the last day the employee worked at each location. (You will need to track the total amount of employees at each location every day).

# SB 1159 CAVEATS

- ▶ For any employee testing positive on or after 7/6/20 through 9/17/20, the employer must report the required information to their claim's administrator by 10/30/20.
- ▶ **CLAIMS ADMINISTRATOR ANALYSIS** determines if an outbreak has occurred for the purpose of administering a claim. (This relates to whether a COVID-19 claim will be presumed compensable).
- ▶ **NOTE:** An employer or any other person acting on behalf of an employer who intentionally submits false or misleading information or fails to submit required information is subject to a penalty of up to \$10,000.

# NOTICE TO EMPLOYEES: LABOR CODE 6409.6

- ▶ If you receive notice of potential exposure to COVID-19, the employer shall take all the following actions within one business day of the notice of potential exposure:
  - ▶ 1. Provide a written notice to all employees, and the employers of subcontracted employees, who were on the premises at the same worksite that they may have been exposed to COVID-19, in a manner the employer normally uses to communicate employment-related information. Written notice may include, but is not limited to, personal service, email, or text message if it can reasonably be anticipated to be received by the employee within one business day of sending and shall be in both English and the language understood by the majority of the employees.
  - ▶ 2. Provide written notice to exclusive representative of employees (union).
  - ▶ 3. Provide information on COVID-19 related benefits.
  - ▶ 4. Notify each of the above of the disinfection and safety plan the employer plans to implement and complete per the CDC guidelines

# CAL-OSHA Recording Requirements

- ▶ Cal- OSHA's guidance contends that employers need to assess COVID-19 cases for work-relatedness and record them on the company's log (i.e., 300, 300A and 301 or equivalent forms) when the COVID-19 case satisfies recording criteria by leading to death, lost time, medical treatment beyond first aid, or loss of consciousness.
- ▶ If in doubt, just record and note in log that company disputes work relatedness.

# CAL-OSHA Reporting Requirements

- ▶ “Under Cal- OSHA’s guidance employers may also need to report the COVID-19 case when work-related and results in the employee’s death or hospitalization.
- ▶ Any work related COVID-19 case that results in a fatality or hospitalization needs to be reported, regardless of how long has passed from the possible exposure event due to differences in Cal-OSHA’s requirements for reporting



# New Cal/OSHA Emergency Temporary Standards

- ▶ Cal/OSHA adopted a series of emergency temporary standards, effective as of November 30, 2020
  - The stated intent of these emergency regulations is to reduce employee exposure to COVID-19.
  - The regulations contain the first formal rules issued by Cal/OSHA with respect to COVID-19 prevention and generally incorporate prior informal guidance issued by the agency.
- ▶ The regulations impose burdensome requirements on employers related to the prevention of and response to COVID-19 cases in the workplace. The new regulations are broken down into five new sections:
  - Section 3205 – General COVID-19 prevention
  - Section 3205.1 – Multiple COVID-19 Infections and COVID-19 Outbreaks
  - Section 3205.2 – Major COVID-19 Outbreaks
  - Section 3205.3 – COVID-19 Prevention in Employer-Provided Housing
  - Section 3205.4 – COVID-19 prevention in Employer-Provided Transportation to and from Work

# General COVID-19 Prevention

- ▶ One core requirement of the COVID-19 regulations is the requirement that employers establish, implement, and maintain a “written COVID-19 Prevention Program” (“CPP”).
  - For years, existing regulations have required California employers to establish and maintain an Injury and Illness Prevention Program (“IIPP”) to account for workplace hazards.
  - The CPP involves a similar concept, except that a CPP, as the name suggests, is specific to the threat of COVID-19.
  - The COVID-19 regulations permit employers to incorporate the CPP into an existing IIPP or maintain it in a separate document.
- ▶ Cal/OSHA has created a model CPP, which employers can use and update for situations and processes specific to their worksite.
- ▶ Employers should make the CPP available to employees and train them on relevant topics included in the CPP.

# Exclusion of COVID-19 Cases from the Workplace

- ▶ The CPP should describe the employer's rules as to the exclusion of COVID-19 cases in the workplace, which should include the following:
  - COVID-19 cases must be excluded from the workplace, until the return-to-work requirements, described below at No. 11, are met;
  - Persons exposed to a COVID-19 case must be excluded from the workplace for 14-days after the last known date of exposure. Per the regulations, employers, with respect to persons exposed to a COVID-19 case during the high-risk exposure period who are "otherwise able and available to work," "shall continue and maintain an employee's earnings, seniority, and all other employee rights and benefits...as if the employee had not been removed from their job."
  - Employers are permitted to require employees to exhaust paid sick leave prior to providing any "exclusion pay" to the employee, and can also "consider benefit payments from public sources in determining how to maintain earnings, rights and benefits" for employees excluded from the workplace under this rule;
  - **Note:** The "exclusion pay" rule, described above, is subject to two exceptions – first, it is inapplicable to situations where the employee is unable to work for reasons other than exclusion by the employer; and second, it is inapplicable where the employer demonstrates COVID-19 exposure did not occur at work;

# Exclusion of COVID-19 Cases from the Workplace continued

- ▶ The exclusion rule is not applicable to employees reassigned to work in a place where they do not have contact with other persons until the return-to-work requirement, below, is met.
  - In other words, if the exposed employee can work in an isolated environment (e.g., at home or in an isolated area at the worksite), no exclusion pay is necessary.
- ▶ When excluding employees from work pursuant to this rule, employers must provide employees notice of benefits available to them, including the benefits of “exclusion pay” and other COVID-19 related benefits, such as:
  - Benefits available under workers’ compensation,
  - FFCRA (if applicable),
  - Standard California paid sick leave,
  - California emergency paid sick leave,
  - Other benefits potentially available to employees.

# Return-to-Work Criteria

- ▶ The CPP should set forth the return-to-work criteria established by law, which includes the following rules:
  - **Return-to-Work Standards:** Notably, the regulations appear to make the following periods of exclusion mandatory notwithstanding such persons receiving a negative COVID-19 test after the date of exposure;
    - **Employees with COVID-19 Exposure** – Employers must exclude such persons from work for 14-days after the last known date of exposure.
    - **COVID-19 Cases with Symptoms** – Such persons shall not return to work until all of the following conditions are met: (1) At least 24-hours have passed since a fever of 100.4 or higher has resolved without the use of fever-reducing medications; (2) COVID-19 symptoms have improved; and (3) at least 10 days have passed since COVID-19 symptoms first appeared;
    - **COVID-19 Cases with No Symptoms** – Such persons shall not return to work until a minimum of 10 days have passed since the employee was tested for COVID-19;
    - **Persons Subject to a Specific Isolation or Quarantine Order from State or Local Health Officials** – Such persons shall not return to work until the isolation period has ended, or the quarantine order has lifted. If no period is specified, such persons shall not return to work until either: (a) 10 days from effective date of the isolation order; or, (b) 14 days from the time the order to quarantine was effective.
- ▶ **No Negative COVID-19 Test is Required:** So long as the periods set forth above are complied with, a negative COVID-19 test is not required for an employee to return to work.

# Multiple COVID-19 Infections and COVID-19 Outbreaks

- ▶ In addition to the requirement of a CPP, businesses experiencing an “outbreak” must take additional steps.
- ▶ These rules are applicable to an employer that:
  - (a) has been identified by an LHD as the location of a COVID-19 outbreak
  - (b) an employer that has three or more COVID-19 cases in an “exposed workplace” within a 14-day period
- ▶ For these purposes, an “exposed workplace” is defined as a “work location, working area, or common area at work used or accessed by a COVID-19 case during the high-risk period, including bathrooms, walkways, hallways, aisles, break or eating areas, and waiting areas.”
- ▶ Beginning January 1, 2021, the term “exposed workplace” will also include a “worksites,” as defined by Labor Code §6409.6, which includes a “building, store, facility, agricultural field, or other location where a worker worked during the infectious period.”
- ▶ An exposed workplace does not include buildings or areas not entered by a COVID-19 case.



# Major COVID-19 Outbreaks

- ▶ Further obligations are imposed on businesses that experience “major COVID-19 outbreaks,” defined as places of employment “when there are 20 or more COVID-19 cases in an exposed workplace within a 30-day period.”
- ▶ The rules continue to apply until there are no new COVID-19 cases detected in a workplace for a 14-day period.



**QUESTION**

**&**

**ANSWER**

**SESSION**



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