



MEMBER ALERT
SB 1159: WORKERS' COMP COVID-19 PRESUMPTION
AB 685: COVID-19 NOTIFICATION AND REPORTING
(September 22, 2020)

On September 17, 2020, Governor Newsom signed into law SB 1159 and AB 685. SB 1159 creates a rebuttable presumption of industrial injury for illness or death resulting from COVID-19 under certain specified conditions. In addition, it creates new reporting and tracking requirements for employers and claims administrators related to any positive COVID-19 tests.

AB 685 requires employers to promptly notify employees and their representatives of potential exposure to COVID-19 in the workplace and to report "outbreaks" as defined to local public health. It also allows CalOSHA to close operations at a work site if it determines there is imminent hazard to employees.

These new laws are extensive and will require a high level of coordination between NBSIA and our Members. In addition to this Alert, we are planning a presentation at the September Board of Directors meeting and developing in-depth training for Member staff. We also have a dedicated internal COVID team finalizing the necessary procedures to support the new reporting and tracking requirements.

Background

SB 1159 and AB 685 are two separate pieces of legislation focused on different aspects of COVID-19 including workers' compensation benefits, worker safety, and tracking and reporting cases and exposures. They were signed together on September 17, and Gov. Newsom promoted them collectively as worker protection bills, saying in his signing message:

"Protecting workers is critical to slowing the spread of this virus... These two laws will help California workers stay safe at work and get the support they need if they are exposed to COVID-19."

SB 1159 was passed as an urgency statute. It therefore took effect immediately upon signing. Most significant for Members, **you must begin immediately complying with the reporting requirements established under Labor Code § 3212.88** (more on that below). It remains in effect until January 1, 2023. AB 685 takes effect January 1, 2021, and some provisions sunset January 1, 2023.

SB 1159 – COVID-19 WORKERS' COMP PRESUMPTION AND REPORTING

There are actually three separate but similar COVID-19 presumptions created under SB 1159:

1. The bill codifies the presumption created by the Gov's Executive Order in May. That presumption applies to any worker who tested positive for COVID-19 within 14 days of going to work at the direction of the employer between March 19 and July 5 (ref. Labor Code §3212.86).
2. Establishes a new presumption that applies only to firefighters, peace officers, and health care workers (ref. Labor Code §3212.87).
3. For all other workers, establishes a presumption of industrial injury for all workers who report to work outside the home at the employer's direction, and test positive within 14 days and during an "outbreak" at the employee's specific place of employment (ref. Labor Code §3212.88). This "outbreak presumption" will be the main focus of this alert.

Qualifications for Outbreak Presumption

This presumption applies to employers with five or more employees. It extends to all employees, including employees following termination of service for a period of 14 days from the date last worked at the specific place of employment. In addition, all of the following circumstances must be met:



- The employee tests positive for COVID-19 within 14 days after a day they worked at a specific place of employment at the employer's direction.
- The day on which the employee performed work at the specific place of employment at the employer's direction was on or after July 6, 2020.
- The employee's positive test occurred during a period of an outbreak at the employee's specific place of employment.

An "outbreak" exists if within 14 calendar days, one of the following occurs at a specific place of employment where the employee worked:

- If the employer has 100 or fewer employees at a specific place of employment, four (4) employees test positive for COVID-19.
- If the employer has more than 100 employees at a specific place of employment, 4% of the 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 (emphasis added).

NBSIA is responsible for determining the existence of an outbreak based on information reported by Members. See below for more information on the reporting and tracking requirements to assess whether an outbreak has occurred.

Benefits

The workers' comp benefits available for COVID-19 illness claims under the presumption are the same as those for other injuries, including hospital, surgical, medical treatment, disability, and death benefits. Medical treatment will be delivered through our existing Medical Provider Network (MPN).

Similar to the Executive Order, employees who receive COVID-19-specific sick leave benefits must exhaust those before receiving workers' comp temporary disability (TD) benefits. If no such sick leave benefits were paid, TD benefits start on the first date of disability with no waiting period.

Rebutting the Presumption

The presumption is rebuttable by evidence controverting the presumption, including but not limited to:

- Evidence of measures in place to reduce potential transmission of COVID-19 in the employee's place(s) of employment.
- Evidence of an employee's nonoccupational risks of COVID-19 infection, including evidence of potential transmission elsewhere (home, other job, etc).

If the claim is not rejected within 45 days, COVID-19 is presumed compensable and the presumption may only be rebutted later by evidence discovered subsequent to the 45-day period.

Tracking and Assessing Outbreaks

To assist in determining whether a specific worksite is experiencing an outbreak, the bill requires Members to report the following information to NBSIA within three business days:

- That an employee tested positive for COVID-19, whether or not the employee is filing a claim. Note: No name or other personally identifiable information is to be provided unless the employee asserts the COVID-19 is work-related or files a claim.



- The date the employee tested positive, which is the date a specimen was collected for testing. Note: Test means a PCR (Polymerase Chain Reaction) or similar test approved for use to detect the presence of the virus. It does not include antibody testing.
- The specific address or addresses of each place the employee worked during the 14 days preceding the positive test.
- The highest number of employees who reported to work at each specific place of employment in the 45-day period preceding the last day that the employee who tested positive worked at the same location.

The three-day reporting requirement is effective for positive tests dated on or after September 17, the bill effective date. For earlier tests, there is a one-time safe harbor reporting period (see below). Under the new law, failing to submit this information or intentionally submitting false or misleading information could result in a **civil penalty of up to \$10,000**.

Safe Harbor Reporting Period

The bill provides a one-time window for Members to report positive tests that they are aware of that occurred on/after July 6 and before September 17, 2020. Members must report all such cases within 30 business days of September 17. NBSIA will provide Members with more information and a procedure for this reporting shortly.

Determining Application of the Presumption

NBSIA will use the reported information to determine if an outbreak has occurred. This requires continuous evaluation of positive tests during the surrounding 14-day periods when claims are made, so it is critical that Members timely report all positive tests of which they are aware and include all of the required information.

Recommendations

There are many nuances to this legislation and questions remain to be answered. It is likely the state will develop regulations with more specific guidance. In the meantime, NBSIA staff will manage any questions or issues that arise. We have designated an internal COVID team to manage cases and support our Members, and we will be reaching out to our contacts to provide more information.

For now, we strongly recommend that Members take the following steps:

- Assign a point person to receive positive tests reports for your District/COE and to work with NBSIA, preferably someone in Human Resources due to the confidential nature. Please notify [Kami Liñan](#) or [Felecia Lawson](#) at NBSIA of that person's contact information.
- Notify all District/COE administrators, managers, and supervisors to immediately report to your point person when they have knowledge of any employee who has tested positive for COVID-19 on or after July 6, 2020.

AB 685 – COVID-19 IMMINENT HAZARD AND WORKER NOTIFICATION

AB 685 has several components related to work site safety and notification to workers and others when there is a positive test at a job site. It requires reporting of an "outbreak" but this term does not mean the same thing as it does in SB 1159.

Here are the main provisions of AB 685:

- Gives the Division of Occupational Safety and Health (CalOSHA) authority to close any work site if it believes the risk of exposure to COVID-19 constitutes an "imminent hazard."



- Creates a rebuttable presumption of “serious violation” in situations where CalOSHA finds a possibility of death or serious physical harm from COVID-19-related hazard.
- Requires employers to notify workers and their representatives about potential exposure and any COVID-19 benefits that are available under state and federal law.
- Requires employers that experience an outbreak (as defined) to report to local public health agencies the names, occupations, and work sites of anyone who tests positive or is medically diagnosed with COVID-19.

Imminent Hazard

AB 685 allows CalOSHA to close a place of employment if, in its opinion, there is risk of COVID-19 infection that rises to the level of imminent hazard to employees. The criteria for determining imminent hazard are not defined in the bill and may be included in follow-up regulations.

If CalOSHA does close a site, it is required to provide a notice to the employer, to be conspicuously posted at the place of employment. Any closure of business must be limited to the immediate area in which the imminent hazard exists, and closure cannot materially interrupt the performance of critical governmental functions essential to ensuring public health and safety.

Serious Violation

AB 685 also creates a rebuttable presumption that a “serious violation” exists in a place of employment if CalOSHA demonstrates that there is a realistic possibility of death or serious physical harm resulting from the actual hazard created by the violation. Before issuing a citation alleging that a violation is serious, CalOSHA must make a reasonable attempt to consider pertinent facts. The criteria for determining serious violation and rebuttal by the employer are outlined in detail in the new statute.

Worker Notification

If an employer receives notice of a potential exposure to COVID-19, it is required to notify the following people within one business day of the notice:

- All employees who were at the same worksite as the infected person within the infectious period;
- The exclusive representative of those employees; and
- The employers of any subcontracted employees who were at the same worksite as the infected person within the infectious period.

Notice must be in writing in a manner normally used to communicate employment-related information, and in both English and any other language understood by the majority of employees. The notification must include:

- Information regarding COVID-19-related benefits and options.
- Information on the disinfection and safety plan that the employer plans to implement and complete per the guidelines of the federal Centers for Disease Control.

The employer is required to maintain records of notifications for at least 3 years. The bill includes a **civil penalty for violation of the notification requirements**.

Outbreak Reporting

The public health reporting requirements in AB 685 are triggered when a workplace experiences what the California Department of Public Health (CDPH) considers a COVID-19 outbreak. It is important to note that the term “outbreak” under AB 685 does not mean the same thing as it does in SB 1159.



The CDPH currently defines an outbreak as:

“three or more laboratory-confirmed cases of COVID-19 within a two-week period among employees who live in different households.” (Ref. CDPH’s [“COVID-19 Employer Playbook – Supporting a Safer Environment for Workers and Customers”](#))

Where employers are notified of a number of cases that meet the CDPH definition of an outbreak, the employer must notify the applicable local public health agency within 48 hours of the names, number, occupation, and worksite address of any “qualifying individual,” as defined. Further, the employer must continue to give notice to the local health department of any subsequent laboratory-confirmed cases of COVID-19 at the worksite.

CDPH is required to make workplace statistics received from local health departments under this provision – other than personally identifiable employee information – available on its website, such that members of the public can track the number of cases and outbreaks by industry.

Conclusion

This alert is by no means an exhaustive discussion of the many elements in these bills. Both are complicated and should be reviewed in detail by Members and their counsel.

As mentioned, NBSIA has designated staff to manage the SB 1159-related claims, reporting, and outbreak tracking/assessment functions. This information may also serve to help Members with their notification and reporting obligations under AB 685. We will work closely with Members to ensure that procedures and communication are well-defined and understood.

We are also working with our legal partners on training related to both bills and will advise Members as soon as this is scheduled. Until then, please feel free to contact [Janet](#) or [Kami](#) with any questions or concerns.

