LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
WEDNESDAY, DECEMBER 23, 2020

PERSPECTIVE

Workers' compensation presumption for COVID-19: a review

By Arash Homampour

In the early days of the coronavirus pandemic, California took swift action to protect workers and the public. Many employees were faced with the proverbial "lose-lose" choice: return to work and get sick or stay home and potentially lose indispensable income. The public needed first responders, front line health care workers, farmworkers, grocery store workers, warehouse workers and other necessary employees to do their jobs.

It also made sense to ensure that exposed (or potentially exposed) workers were not disincentivized to stay home for fear they would lose that necessary income.

On May 6, Gov. Gavin Newsom signed Executive Order N-62-20, simplifying what otherwise could have been an unnecessarily tricky issue for workers: causation for the COVID-19 virus. The order greatly reduced the need for employees to prove they contracted COVID-19 in the workplace, thereby facilitating prompt medical and economic relief and reducing exposure in the workplace and public.

The governor's executive order established a rebuttable presumption that a COVID-19 diagnosis for an employee not working remotely would be deemed an industrial injury covered by workers' compensation, and it set forth specific criteria for the employee to qualify for the presumption:

A. The employee tested positive for or was diagnosed with COVID19 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;

B. The day referenced in subparagraph (a) on which the employee performed labor or services at the employee's place of employment at the employer's direction was on or after March 19, 2020;

C. The employee's place of employment referenced in subparagraphs (a) and (b) was not the employee's home or residence; and

D. Where subparagraph (a) is satisfied through a diagnosis of COVID-19, the diagnosis was done by a physician who holds a physician and surgeon license issued by the California Medical Board and that diagnosis is confirmed by further testing within 30 days of the date of the diagnosis.

Senate Bill 1159, enacted Sept. 17, codifies the executive order's presumption that an employee's coronavirus diagnosis is an occupational injury subject to workers' compensation benefits. It spells out how COVID-19 diagnoses will be treated before May 6 and for the period from May 6 to July 21, and it significantly expands the executive order's reach and requirements.

The new law became effective immediately and will remain in effect through Jan. 1, 2023. It adds new Sections 3212.86 through 3212.88 to the Labor Code. According to SB 1159, unless an employer can contravene the law's presumptions, any employee who is sick with COVID-19 and meets the designated eligibility criteria is entitled to stay home and receive workers' compensation benefits. The employee must use any paid sick leave before applying for temporary disability.

The immediate benefit of SB 1159 is that it reduces exposure, limits outbreaks and promotes workplace safety by removing workers from the workplace as soon as they are diagnosed, and it has the added benefit of reducing otherwise costly litigation to establish causation.

SB 1159 creates two new presumptions, both set forth in Labor Code Section 3212.87, that extend workers' compensation benefits to first responders, including emergency and rescue workers, as well as frontline health care workers. Firefighters and peace officers, along with doctors, nurses and others who work in medical facilities are now presumed to have contracted the coronavirus in the course of their work. As with all other categories of employees, these presumptions require that certain preconditions are met, and they can be rebutted by the employer.

The presumptions for all categories of workers have been clearly tailored under SB 1159 to reduce potential employer liability for infections beyond their control. New Labor Code Section 3212.88(b) requires that workers other than first responders and frontline healthcare providers must test positive within 14 days of performing services at the worksite, and it mandates that any positive test must have "occurred during a period of an outbreak at the employee's specific place of employment." Absent a demonstrated and verifiable COVID-19 outbreak at the worksite, therefore, the presumption does not apply.

For purposes of identifying an "outbreak," Section 3212.88(m) sets forth these guidelines:

(4) An "outbreak" exists if within 14 days one of the following occurs at a specific place of employment:

(A) four employees test positive if the employer has 100 employees or fewer;

(B) 4% of the number of employees who reported to the specific place of employment test positive if the employer has more than 100 employees; or

(C) 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.

For first responders and frontline health workers covered by Labor Code Section 3212.87, the workers' compensation presumption is limited to those workers whose jobs put them at the greatest risk of exposure. Unless they have been directly interacting with infected individuals or otherwise exposed to a higher risk of infection, these workers do not qualify for the presumption.

Employers may present evidence to controvert the law's presumption, including proof that the employee was not at the worksite on the days in question. They may even attempt to rebut by providing "evidence of measures in place to reduce potential transmission of COVID-19 in the employee's place of employment and evidence of an employee's nonoccupational risks of COVID-19 infection."

New reporting requirements obligate employers that know or reasonably should know that an employee has tested positive for COVID-19 to report certain information to claims administrators. Companies may be subject to civil penalties of up to $10,000 for intentionally submitting false or misleading information, or for failing to report required information.

While some argued that the new law would be costly, administratively burdensome, and unworkable for employers, SB 1159 ultimately made sense. It protects frontline and other essential workers, and it enables a large number of California employees who have contracted COVID-19 to get timely medical care and workers' compensation benefits. Workers who risk their health (and sometimes lives) by coming into the worksite at their employers' request should not face the unnecessary burden of proving how they were exposed in order to access workers' compensation benefits. ■

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