Senate Bill 1159:
Overview & Analysis

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DISCUSSION ROADMAP

COVID-19 in California
- Pandemic Progression
- Interval Legislative Developments

Senate Bill 1159
- Codification of the Executive Order
- Creation of 2 new presumptions

What Comes Next Now
- Immediate Adjustments and Action
- Defense Strategies
Updated Data from October 13, 2020

Cases: 850,025 = +0.4%
Deaths: 16,572 = + 0.1%
Tests: 16,191,341

https://covid19.ca.gov/state-dashboard/
The First CA COVID Presumption - Executive Order N-62-20

- Effective for dates of injury of the period 03/19/2020 – 07/05/2020
- Due to the 14-day period for a positive test from the last day worked, last effective day for a Executive Order Presumption claim was 07/19/2020 (14 days following work on 07/05/2020.)

Then, a “gap” period…

- Following the lapse of the executive order, no further extension by Governor Newsom
- However, an increasingly fast-paced course of legislative negotiation was taking place in Sacramento
Legislative Outcome

*Senate Bill 1159 passed*

- Its passage is the result of a final senate session which extended through midnight and from non-stop negotiations and debate.
- Signed into law on 9/17/20 and effective immediately
- Effective retroactively

*Assembly Bills 196 and 664 failed.*

- Each would have expanded the presumptions and employer obligations.
- Both “died on the floor” nearly concurrent with the passage of SB 1159
Senate Bill 1159 – Five Sections

(1) COVID-19 Claims Impact Study

(2) Codification of the Executive Order

(3) Presumption for Safety Officers & (Certain) Healthcare Workers

(4) Presumption for All Other Workers during “Outbreaks”

(5) Urgency → Immediately Effective
Section 1

COVID-19 Claims Impact Study

“The Commission … shall conduct a study of the impacts claims of COVID-19 have had on the workers’ compensation system, including overall impacts on indemnity benefits, medical benefits, and death benefits…”
Section 2

Codification of the Executive Order

Creates Labor Code § 3212.86 to closely mimic the prior executive order presumption and its applicable time periods
Section 2: Codification of the Exec. Order

- Applies to dates of injury through 07/05/2020
- 30 day investigation/decision period
- Positive COVID-19 test required
- Rebuttable presumption
- Temporary disability rules identical to the executive order

Changes
- Defines “date of injury” → the last day worked prior to the positive COVID test.
- MPN enforceability for medical treatment and temporary disability certifications
Section 3

Safety Officers & Specified Healthcare Workers

Rebuttable Presumption for first responders and healthcare workers in direct contact with COVID-19 patients and for custodial workers in contact with COVID-19 patient, who work at a health facility and for some EMT/Paramedics and home health workers.
Section 4

All Other Employees

Labor Code § 3212.88, a rebuttable presumption for COVID-19 injuries for all other employees if the date of injury is during an “outbreak” at their place of employment.
Section 4: Primary Features

Rebuttable Presumption with a 45-day decision/investigation period

Temporary Disability
- No waiting period;
- Exhaustion of “paid sick leave benefits specifically available in response to COVID-19” prior to payment of TD

Post-Termination Claims
- Presumption extends up to 14 days following termination, starting with the last day actually worked (not 14 days following the end of the employment relationship)

Employers with 4 or fewer employees excluded from the presumption (5+ required to trigger the presumption).

Date of Injury: Last day worked at place of employment prior to positive COVID test (CT or specific??)
Section 4: Triggering the Presumption

Who Does it Apply to?

• Any employee other than a first responder or healthcare worker covered by the Section 3’s presumption

How is the Presumption Triggered?

• Date of injury on/after 07/06/2020;

• Employee tests positive (must be a “polymerase chain reaction” PCR test or other FDA approved test) for COVID-19 within 14 days after performing labor/services at their place of employment under the employer’s direction;

• The date of the positive test occurred “during a period of an outbreak at the employee’s specific place of employment”
Who Determines if there is an “Outbreak”
You do. (If you’re a claims administrator)

“The claims administrator shall use information reported … to determine if an outbreak has occurred for the purposes of administering a claim pursuant to this section.”
Assessing “Outbreaks”
Criteria → Size (of ER) Matters

An “outbreak” exists if one of the following occurs at a specific place of employment within a 14-day period:

(i) If the employer has 100 employees or fewer at a specific place of employment, and 4 employees test positive

OR

(ii) If the employer has more than 100 employees at a specific place of employment 4 percent of the number of employees who reported to that specific place of employment test positive for COVID-19

OR

(iii) 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 & Health, or a school superintendent due to a risk of infection with COVID-19
Assessing Outbreaks: Defining “Specific Place of Employment”

“A specific place of employment’ means the building, store, facility, or agricultural field where an employee performs work at the employer’s direction.”

“A specific place of employment does not include the employee’s home or residence, unless the employee provides home health care services to another individual at the employee’s home or residence.”

What if the employee works at multiple locations?

• “In the case of an employee who performs work at the employer’s direction in multiple places of employment within 14 days of the employee’s positive test, the employee’s positive test shall be counted for the purpose of determining an outbreak at each of those places of employment.”

• If an outbreak exists at any of those places of employment, that location is also considered the employee’s specific place of employment.”
Ongoing Duty to Assess “Outbreaks”

“The claims administrator shall continuously evaluate each claim to determine whether the requisite number of positive tests have occurred during the surrounding 14-day period.”

Newly reported COVID claims (verified by a positive test within 14 days of the last day worked) can trigger the presumption for previously filed claims.

For Example:

- Employer with 100 employees and 1 business location.
- 3 verified COVID infections on Day 1. None would be covered by the presumption at that point.
- 1 more verified COVID infection on Day 10.
- That makes 4 cases within a 14 day period. *All 4 cases would get the presumption.*
Ongoing Duty to Assess “Outbreaks”

Math that even a lawyer can do.....

14 days before DOI and 14 days after DOI.
What About Claims During Non-Outbreak Periods?

Non-applicability of the COVID presumption ≠ No COVID Claim!

COVID claims filed outside of a 14-day “outbreak” period would not benefit from the rebuttable presumption of industrial causation due to an outbreak.

BUT the employee may still pursue a workers’ comp claim.

If not presumptive, the burden lies with the employee to establish industrial causation of their COVID infection by a preponderance of the evidence.
Employer Reporting:

How does the claims administrator obtain information to assess outbreak periods?

Employers are required to provide it (and face penalties if they don’t)

“When the employer knows or reasonably should know that an employee has tested positive for COVID-19, the employer shall report to their claims administrator in writing via electronic mail or facsimile within 3 business days all of the following:

1. An employee has tested positive

   (important: employer shall not provide any personally identifiable information regarding the employee unless the employee is asserting the infection is work related or has filed a claim)

2. The date the employee tests positive (date specimen was collected for testing)

3. Specific address(es) of the employee’s specific place of employment during the 14-day period preceding the positive test.

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 of employment the employee worked at each location.
Employer Reporting: Consequences of Non-Compliance

What if an employer doesn’t report?

“An employer … who intentionally submits false or misleading information or fails to submit information when reporting … is subject to a civil penalty in the amount of up to $10,000 to be assessed by the Labor Commissioner.”

Citation & Appeal Process:

• Labor Commissioner issues citation to employer
• Employer must either pay the citation or contest it within 15 days.
• If contested, a hearing will be set within 30 days.
• Decision issued within 15 days after hearing.
• Employer may further contest the hearing decision by filing a writ of mandate in Superior Court.
• However, if the writ is unsuccessful, employer is liable for costs and attorneys fees incurred by the Labor Commissioner associated with the appeal to superior court.
Employer Reporting: Getting “Current”

What about the “gap” period from 07/06/2020 – 9/17/2020?

• 30 day “safe harbor” period for employers to provide all of the information to their administrators spanning the past 2 months:
  ▪ # of employees who tested positive
  ▪ Date of the positive test for each employee
  ▪ Address(es) of employment for each positive employee for the 14-days preceding the positive test

• Employers must also provide information regarding the highest number of employees who reported to work at each of the employer’s specific places of employment “on any given work day between July 6, 2020 and the effective date of this section.”
Section 5

Immediate Effect

“This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety … and shall go into immediate effect.”
The Impact of SB 1159: Initial Thoughts

SB 1159 Establishes 3 Distinct Presumptions

- Codification of the Executive Order (N-62-20, 5/06/20)
- Safety Officer and Healthcare Workers
- All Other Employees (Outbreak required)

ANALYSIS:
1. Identify the date of injury
2. Identify the type of work / job duties
3. Determine which presumption might apply, then run through requirements of each.
4. Conduct thorough investigation and AOE/COE analysis to see if you can rebut the presumption
5. Consider if additional denial should issue.
Assessing the Impact of SB 1159: Initial Thoughts

In many ways, the most significant change mandated by SB 1159 is the need for both employers and claims administrators to implement an operational infrastructure to gather and synthesize data to assess “outbreak periods.”

As always, the new law is also difficult to apply for certain industries and employers.

Let’s scratch our heads together, shall we?

• Construction contractors: Do general contractors need to keep track of and report COVID information for all workers on their job sites, which will often include a large variety of subcontractors? Do those subcontractors count towards the employee numbers at each specific place of work for calculating outbreaks?

• What about gig economy workers later reclassified (remember AB5)?

• Large Complex Locations: Are airplane maintenance mechanics working in distant publically inaccessible hangars working at the same “specific place of employment” as ticket agents in the public terminal?

• What about vendors performing work onsite? Might want to review those contracts to ensure liability flows in the right direction. Would it make sense to have vendors and subcontractors contract to provide you with information to allow full compliance with these requirements, even for their workers who might be working on your property?
The Impact of SB 1159: Employer Responsibilities

Establish a reporting structure with the capability to provide claims administrators with all necessary information:

- Positive employee COVID tests; dates of the test; locations worked by the employee and personnel numbers at each location

Recognize that Employer “knowledge” for purposes of the LC 5401 rule to provide a claim form is different than “knowledge” required of a COVID-19 positive test that triggers the Employer’s duty to report to the TPA.

- Even if you have an employee that admits to having caught COVID non-industrially, there is still an obligation to transmit that information to the claims administrator (regardless of whether that employee is claiming an industrial injury) if they worked at their place of employment with the 14 days preceding the positive test

- The “outbreak” determination is the number of employee cases, not the number of employee claims.
The Impact of SB 1159: Claims Admin. Responsibilities

Operational tools need to be established now for effectively using the employer-provided data to track and report outbreaks. Coordinate internally and develop a “phone tree.” Consolidate account management and communicate with the employer.
The Impact of SB 1159: Claims Admin. Responsibilities

PRO TIPS:

Remember that the “outbreak” determination is specific to each specific place of employment. It needs to be assessed not by each overall employer, but at each place of employment operated by that employer.

• Contact tracing options

The “outbreak” assessment needs to be continually updated and applied prospectively and retrospectively; positive COVID tests can trigger the presumption for claims preceding and following 14 days.

• Consider designating a single person or a unified team.

Not all employer reported data will involve workers’ compensation claimants seeking benefits. Administrators need to ensure that data for non-claimant COVID positive employees can be integrated with potential and actualized claims, while preserving employee privacy.
The Impact of SB 1159: Attorney Responsibilities

Develop the Record with Facts Relevant to Effectively Defend Cases

- These are all *rebuttable* presumptions

- SB 1159 expressly references that “evidence relevant to controverting the presumption may include, but is not limited to, evidence of measures in place to reduce potential transmission of COVID-19 … and evidence of an employee’s nonoccupational risks of COVID-19 infection

- No provision in SB 1159 impacts the right to apportionment.

- With COVID cases in particular, the key is knowing the right type of evidence to be elicited from employers and claimants

  Familiarity with your client’s workplace operations is more important and useful than ever.
Additional New Legislation

AB 685 – Requires employers who knew of or should have reasonably known of employee COVID exposure to report within 24 hours. A violation is a misdemeanor. Requires employers to notify employees and representatives at worksite where exposure occurs. (Unclear on HIPPA tension.)

AB 2537 – Requires PPE to hospital workers providing direct patient care.

AB 2043 – Signed by Governor. Educate farmworkers on hazards of COVID.

DON'T FORGET TO REPORT HOSPITALIZATIONS AND DEATHS TO OSHA!! BETTER SAFE THAN SORRY.
**AB 2043**

**Immediate Effect**

Required the education of farmworkers on the hazards of COVID-19.
The Impact AB 2043

Labor Code Section 6725

• Cal/OSHA will work with employers and employee groups to distribute information to agricultural employees about COVID-19.

• The information shall include contact information for employees to report workplace safety violations to Cal/OSHA.

• This section does not give any individual authorization to access a worksite they would not normally have access to.
The Impact AB 2043

Cal/OSHA will report on its website:

- The number of investigations in each county.
- A summary of each investigation.
- The outcome and/or Cal/OSHA response to each investigation.
- Statistical information above the investigations.

This section remains in effect until the State of Emergency has ended or is terminated by the Governor and Legislature.
The Impact AB 2043


- (C) COVID-19 Industry Guidance: Food Packing and Processing, issued by the division, the State Department of Public Health, and the Department of Food and Agriculture. http://covid19.ca.gov/pdf/guidance-food-packing.pdf

- (D) COVID-19 Industry Guidance: Agriculture and Livestock, issued by the division, the State Department of Public Health, and the Department of Food and Agriculture. https://files.covid19.ca.gov/pdf/guidance-agriculture--en.pdf

- (E) Any other guidance or guidelines made available on the division’s internet website pertaining to novel coronavirus (COVID-19) infection prevention for agricultural employees.
AN IMPORTANT NOTE FOR EMPLOYERS → AB 685

AB 685 was also passed and creates a clear responsibility for employers to notify employees when there has been a potential COVID-19 exposure at work.

• Applies to public and private employers.
• Who receive notice of a potential exposure to COVID.
• Must provide notice to ALL employees AND employers of subcontractors...that they may have been exposed.
• OSHA “Serious Violation” if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.

DON’T FORGET TO REPORT HOSPITALIZATIONS AND DEATHS TO OSHA!! BETTER SAFE THAN SORRY.
Cal/OSHA Issues Citations to Grocery Stores for COVID-19 Violations

Los Angeles—Cal/OSHA has cited five grocery stores in Southern California for failing to protect their employees from COVID-19. The retailers listed below were cited for various health and safety violations including some classified as serious, with proposed penalties ranging from $13,500 to $25,560. “Grocery retail workers are on the front lines and face a higher risk of exposure to COVID-19,” said Cal/OSHA Chief Doug Parker. “Employers in this industry must investigate possible causes of employee illness and put in place the necessary measures to protect their staff.”

The stores cited for COVID-19 and other safety and health violations include:

Did not provide physical distance between employees and customers

CITED FOR failing to protect workers from exposure to COVID-19 because:

- Did not update their workplace safety plans to properly address hazards related to the virus.
- By allowing too many customers in the store, which prevented workers from maintaining at least 6 feet of physical distance.
- Did not install physical barriers between employees and customers. Plexiglas or other required barriers were not installed at registers 1-8 at the West Hollywood location.
- Both the Culver City and West Hollywood locations failed to provide effective training for their employees, including instruction on how the virus is spread, measures to avoid infection, signs and symptoms of infection, and how to safely use cleaners and disinfectants.
- Culver City and Sherman Oaks grocery stores failed to report a worker’s fatal COVID-19 illness at each location. Cal/OSHA learned of the fatality seven days after the worker’s death in Culver City, and six days after the fatality in Sherman Oaks.

<table>
<thead>
<tr>
<th>Industry</th>
<th>Worksite Location</th>
<th>Inspection Type</th>
<th>Proposed Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grocery</td>
<td>Culver City</td>
<td>Accident-initiated</td>
<td>$25,560</td>
</tr>
<tr>
<td>Grocery</td>
<td>West Hollywood</td>
<td>Complaint-initiated</td>
<td>$25,120</td>
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<tr>
<td>Grocery</td>
<td>Sherman Oaks</td>
<td>Referral-initiated</td>
<td>$23,700</td>
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<tr>
<td>Grocery</td>
<td>Studio City</td>
<td>Complaint-initiated</td>
<td>$13,500</td>
</tr>
<tr>
<td>Grocery</td>
<td>Los Angeles</td>
<td>Complaint-initiated</td>
<td>$16,500</td>
</tr>
</tbody>
</table>
Don’t Forget Cal/OSHA

Guidance re: protecting workers from COVID-19: July 16, 2020
https://www.dir.ca.gov/DIRNews/2020/2020-63.html

Existing regulations require employers to implement effective measures to protect employees from worksite hazards, including recognized health hazards such as COVID-19. Employers must take steps to:

- Modify work or the worksite to allow people to be at least six feet apart or install effective barriers where that is not feasible.
- Provide workers enough time and supplies to disinfect common surfaces.
- Encourage workers to wash their hands frequently in accordance with CDC guidelines, and provide enough time and supplies so they can do it properly.
- Provide employees with cloth face coverings or allow them to use their own and reimburse them for the cost.
- Screen workers for COVID-19 symptoms before they start work.
- Have workers stay home if they feel ill and inform them about sick leave benefits.

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Los Angeles 90013-1854 320 W. 4th Street, 9th Floor
Marina del Rey, CA 90292-6902 4720 Lincoln Blvd, 2nd
Oxnard, CA 93030-7912 1901 N. Rice Ave., Ste. 200
Santa Barbara, CA 93101-7538 130 East Ortega Street

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Oxnard, CA 93030-7912 1901 N. Rice Ave., Ste. 200
Santa Barbara, CA 93101-7538 130 East Ortega Street

Riverside 92501-3337 3737 Main Street, Ste 300
Pomona 91768-2653 732 Corporate Center Drive
San Bernardino 92401-1411 464 W. Fourth Street, Ste 239

Bakersfield 93301-1929 1800 30th Street, Ste 100
Fresno 93721-2219 2550 Mariposa Mall, Ste 4078
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