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PERSPECTIVE

SB 1159 extends COVID-19 presumption of compensability

By Theodore A. Penny and Yvette Davis

On Thursday, Gov. Gavin Newsom signed Senate Bill 1159 into law, which was passed as the replacement to Newsom's Executive Order N-62-20. The bill extends the presumption of industrial injury to certain employees who fulfill the criteria originally set out in the executive order. However, unlike the executive order, the bill limits the availability of the presumption to certain occupations, sunsets it for workers who are not specified in the bill, creates a new category of workers who may qualify for the presumption based on an outbreak of disease, and imposes new reporting obligations on employers who face significant civil penalties for willful failure to meet those obligations. The limited scope of the presumption and the burdens of the reporting requirements may make the legislation a bitter pill for some.

In the absence of a presumption of compensability, California employees who seek workers' compensation benefits due to illness from COVID-19 must prove that the illness arises out of and occurs in the course of their employment per California Labor Code Section 3600 (all code references are to the California Labor Code). For some illnesses, like seasonal colds or flu, the courts have been hesitant to award workers' compensation benefits. In *Tim Abernathy v. Harris Wolf California Almonds*, 2015 Cal.Wrk.Comp. P.D. LEXIS 547, the Workers' Compensation Appeals Board explained the proximate cause standard for an industrial illness from exposure to a disease: "In regard to industrial causation of a disease, the employee's risk of contracting the disease from the employment must be materially greater than the general public or more common at the place of employment than among the public."

During the COVID-19 pandemic California employees have benefited from a presumption that lost time and needed medical care were due to an industrially caused illness from COVID-19 since Newsom issued Executive Order N-62-20 on May 6. The presumption was made available when an employee, on or after March 19, tested positive for or was diagnosed with COVID-19 within 14 days of working at the employer's workplace at the employer's direction, on the condition that the workplace was not the employee's home. It shortened the time, during which a preliminary decision on compensability could be made, from 90 days from the date the claim form is filed to 30 days. If the claim is not denied within that time limit, the presumption of injury is then rebuttable "only by evidence discovered subsequent to the 30-day period." A qualifying employee was required to use all sick leave benefits "specifically available in response to COVID-19" before receiving temporary total disability benefits in workers' compensation. The executive order was in effect only for dates of injury occurring within 60 days of its issuance.

SB 1159 creates a new Section 3212.87 to extend the presumption of compensable illness to certain firefighters, peace officers, fire and rescue coordinators, health facility workers who provide direct patient care or are custodial workers at the health facility, registered nurses, medical technicians, providers of in-home supportive services, and employees who provide direct patient care for a home health agency and others — as each of these is defined in the code. To qualify for a presumption of compensable industrial illness, an employee in a listed occupation must test positive within 14 days after the employee worked at the employer's direction at the place of employment on or after July 6. Again, for these employees the presumption is disputable, but if liability is not rejected within 30 days, the presumption may be rebutted only with evidence discovered after the first 30 days from the employee's filing of the claim form per Section 5401. SB 1159 defines testing as "a PCR (Polymerase Chain Reaction) test" and does not include antibody testing. Like the executive order, except for a provider of home supportive services, the place of employment excludes the employee's home or residence.

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The new class of employees for whom a presumption is available is defined by Section 3212.88 as including employees who test positive during an "outbreak" at the employee's specific place of employment. An outbreak will apply to any employer with five or more employees. An outbreak exists if within 14 continuous calendar days, one of the following occurs at a specific place of employment: four employees of an employer of 100 or less test positive for COVID-19 by PCR test or 4% of employees of employer with more than 100 employees test positive. An outbreak also is attributed to an employer when a local or state health department, school superintendent or OSHA orders a place of employment to close due to a risk of infection by COVID-19.

To qualify for the presumption of a compensable illness during an outbreak, an employee must test positive after July 6 and within 14 days of having worked at the jobsite with the outbreak at the employer's direction (provided the place of employment is not the employee's residence). When a claim form is filed during an outbreak, the employer has 45 days within which to make a decision on compensability. If a decision is not timely made, the presumption is disputable only by evidence discovered after the 45-day period. Once a presumption arises, evidence to rebut the claim may include, but is not limited to, "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." The presumption applies to all pending matters, but is not a basis to reopen a final award of the Workers' Compensation Appeals Board. *See* Section 3212.88(e)(2) for more detail.

Section 3212.88(i) imposes the obligation for determining if an outbreak has occurred, and for determining if a claim of COVID-19 illness arises during an outbreak with the employer's workers' compensation claims administrator. This subsection requires every employer with five or more employees who knows, or reasonably should know, that an employee has tested positive by PCR to report to their claims administrator via email or fax within three business days all of the following: (1) the fact that an employee has tested positive (the report is to exclude personally identifying information, unless the employee asserts that the illness is work related or makes a claim for workers' compensation benefits); (2) the date the employee tested positive, defined as the date the test specimen was collected; (3) the addresses of the specific place or places of employment where the employee worked during the 14 days preceding the positive test; and, (4) the highest number of employees at each place where the employee worked during the 45 days before stopping work at that location.

Additionally, all employers with 5 or more employees must, within 30 days of the new law becoming effective, submit via email or fax the information listed in the above paragraph for all employees who the employer is aware of tested positive on or after July 6, regardless of the effective date of the statute. However, in this communication the employer must report "the highest number of employees who reported to work at each of the employee's specific places of employment on any given work day between July 6 and the effective date of this section," per Section 3212.88((k)(2).

With the information provided by the employer, the claims administrator is to determine if an outbreak has occurred "for the purpose of applying the presumption under this section." To determine the number of employees at a specific place of employment, the claims administrator is to use the highest number of employees where the infected employee worked in the previous 45 days; or for claims between July 6 and the effective date of this section, the highest number at each place of employment between July 6 and the statute's effective date.

A civil penalty of up to $10,000 may be imposed by the labor commissioner if the commissioner finds that the employer or other person acting on the employer's behalf intentionally submitted false or misleading information to the claim administrator If the employer unsuccessfully contests the labor commissioner's determination, the commissioner shall recover costs and attorney fees arising out of the challenge.

The section is silent about how the information might be exchanged between the workers' compensation claim administrator and the labor commissioner. Note that the employer's obligation to communicate to the workers' compensation administrator is in addition to an employer's other reporting obligations. For example, California's COVID-19 Employer Playbook requires "employers to contact the local health department in any jurisdiction where a COVID-19 employee resides when there is an outbreak in a workplace. An outbreak is defined as three or more laboratory-confirmed cases of COVID-19 within a two-week period among employees who live in different households."

Presumptions of compensable injury have long been available for certain sworn officers, including sheriffs, police and fire, and for certain county employees for a variety of health issues. These presumptions cover claims of hernia, pneumonia, heart trouble, cancer, etc. In all these cases the specified employees enjoy a rebuttable presumption of injury. However, one unique aspect of SB 1159 is that in none of the previous presumptions is the time shortened within which a preliminary decision of compensability must be made.

The absence of a presumption of injury for an employee does not disqualify the employee from workers' compensation benefits. Any employee who becomes ill from COVID-19 and suffers lost time, incurs medical expenses, remains with permanent impairment or who dies from the disease may seek benefits under the workers' compensation act. The primary difference for those who qualify for a presumption and all others is the shifted burden of proof.

Proving that the COVID-19 illness arose out of and occurred in the course of employment will be more difficult in the absence of identifiably ill co-employees and the presence of high levels of community transmission. For an employer who seeks to defend a claim in which the presumption is appropriately asserted, the burden may be unusually expensive and may require genetic analysis of the virus found in the ill claimant for comparison with any co-employee with a history of COVID-19 illness.

An employee who is awarded workers' compensation benefits utilizing the presumption is entitled to all the benefits of workers' compensation as though no presumption is involved. However, unlike the existing presumptions found at Sections 3212 et. seq., SB 1159 for the first time requires employees who have "paid sick leave benefits specifically available in response to COVID-19" to exhaust those benefits before receiving temporary total disability benefits. Further, for the first time the waiting period for receiving temporary disability in the absence of immediate hospitalization is eliminated. ■

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