



Legal & Regulatory Updates: COVID-19 and Beyond

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Speakers

California

- Maria Brunel, CSP
mbrunel@pomsassoc.com
- Eddy Canavan, ARM, AIC
ecanavan@pomsassoc.com
- Paul Penne, JD
ppenne@pomsassoc.com
- Amy Dolson, ARM-P, CEAS, CPSI, ABCP, REHS
adolson@pomsassoc.com

New Mexico

- Larry Vigil, ASP, CSR, CPSI, CIC
lvigil@pomsassoc.com
- Steven G. Meilleur, Ph.D., SPHR
smeilleur@pomsassoc.com

Agenda

- Introduction
- General Overview - CA WC SB1159
- General Overview - CA AB 685
 - How Can I Start Preparing Now?
- Cal/OSHA and COVID-19
- OSHA New Mexico - Rapid Response and COVID Safe Practices
- CDC Updates
- DOL Updates and Beyond
- Questions/Answers & Open Discussion

SB 1159 Summary

Senate Bill 1159 created three distinct and separate labor code sections with differing COVID-19 work-related presumptions, effective dates, corresponding qualifiers, and timeframes to investigate. SB 1159 was effective September 17, 2020.

Section II

- Codified Governor Newsom's May 6, 2020 Executive Order creating a COVID-19 work-related presumption.
- Created California Labor Code Section §3212.86, effective from March 19, 2020 through July 5, 2020 and expiring on July 6, 2020.
- Extends a disputable presumption to employees that tested positive or diagnosed with COVID-19 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.
- The Claims Administrator has 30 days from the date the claim form is filed to decide AOE/COE.
- The presumption is disputable and may be controverted by other evidence.

SB 1159 Summary

Section III

- Created California Labor Code Section §3212.87.
- Effective July 6, 2020 through December 31, 2022.
- Applies to Peace Officers, Firefighters, and workers at healthcare facilities.
- Provides a disputable presumption that can be controverted by other evidence.

Section IV

- Created Labor Code Section §3212.88, effective July 6th through December 31st, 2022.
- Applies to employees not covered by Labor Code Section §3212.87.
- Created a work-related COVID-19 "outbreak" presumption when it is determined by the Claims Administrator that an outbreak has occurred at a specific place of employment.
- The employee must test positive for COVID-19 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.
- Paid sick leave designated for COVID-19 must be used prior to any temporary disability benefits being owed.
- The outbreak presumption is disputable by demonstrating the employer complied with all requirements to keep their employees safe and the employee participated in non-occupational activities that may have exposed them to COVID-19.

AB 685

- Effective January 1, 2021, employers will have additional responsibilities regarding potential or confirmed COVID-19 exposures.
- The intent of Assembly Bill 685 is to reduce the transmission of COVID-19 at the workplace and focuses on the following:
Imminent Hazards to Employees, Exposure, Notification, Serious Violations
- **Imminent Hazard** - Cal/OSHA's Division of Occupational Safety and Health (DOSH) now has the authority to classify exposure to COVID-19 an imminent hazard. This gives DOSH the authority to issue a "stop work" order if "in its opinion" they deem an imminent hazard exists related to COVID-19 in the workplace.*
- DOSH will be the only authority that can allow the operation or process to resume when it is determined safe.

*AB 685 Chapter 84 (1)

AB 685

- **Exposure:** Employers (public or private) will be required to notify all employees and the employers of subcontracted employees within one business day of knowledge of a potential exposure.
 - The name of the infected individual cannot be shared, only the occurrence.
 - This notice will include:
 - The disinfection and safety plan the employer plans to implement per guidelines of the CDC
 - COVID-19-related benefits and options
 - Employees' right to file a Workers' Compensation claim
 - Employer cannot retaliate against an employee in the event they need to quarantine or isolate themselves.

AB 685

- **Notification:** Employers must report prescribed information of an *outbreak* within 48 hours to the local public health agency in the jurisdiction of the worksite.
- Employers must continue to give notice to the local health department of any subsequent laboratory-confirmed cases of COVID-19 at the worksite.
- DOSH will gather data from employers and local health departments to identify any trends with employees and/or industries to make further recommendations when an outbreak occurs.
 - The CDPH 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.”*
 - The employer will have 48 hours to notify their local health department and provide a list of the infected individuals.
 - The State Department of Public Health will make workplace industry information received from local public health departments available on its website in a manner that allows the public to track the number and frequency of COVID-19 outbreaks and the number of cases and outbreaks by industry. AB 685 is imposing a state-mandated local program.

*CDPH Covid-19 Employer Handbook covid.19.gov July 28, 2020

AB 685

- **Serious Violation:** AB 685 “exempts Cal/OSHA from having to issue a 1BY Form prior to citing an employer for a serious violation related to COVID-19. The 1BY Form is a notice of intent to issue a serious violation, which gives an employer 15 days to answer why it should not be so cited.” *
- This exemption would be repealed on January 1, 2023.
- Serious Violation is defined as a “realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.”

• * 1 Cal OSHA Reporter 00-12789 Vol.47 No 36

• ** DIR Chapter 3.2 Cal OSHA Subchapter 1 DIR Article 4 Proposed Penalty Procedure 334 Classifications of Violations and Definitions (c)(1)

How Can I Start Preparing Now?

- Review and revise Return to Workplace plans to reduce workers' risk of exposure to COVID-19.
- Add Return to Workplace plans as an addendum to your Injury & Illness Prevention Programs (IIPP).
- Develop a draft COVID-19 Exposure Notice to Employees letter (must be sent **within one business day** of being informed of potential exposure).
- Develop a Communication Plan to notify the public health department if you have a potential or confirmed COVID-19 exposure (**within 48 hours**).
- Review and revise your procedures for responding to a potential Cal/OSHA visit or citation.

Cal/OSHA and COVID-19

- Cal/OSHA Division of Occupational Health and Safety (DOSH) will be aggressively enforcing the provisions of AB 685.
- Currently DOSH has cited employers for a variety of different issues; while AB 685 may not be in effect, employers are being cited for:
 - Aerosol Transmissible Diseases (ATD)
 - Injury and Illness Prevention Program (IIPP)
 - Respiratory Protection
 - Unsafe worker protection (ex. 6 feet distance COVID-19, lack of PPE)
 - Employee training for COVID-19 transmissibility, identifying signs of COVID-19, how to safely use cleaners and disinfectants, etc.

OSHA New Mexico - Rapid Response and COVID-19 Safe Practices

- New Mexico DOH - Lead Agency
- New Mexico Environment Dept. (State OSHA)
Emergency Amendment to NMAC 11.5.1, Section 16
Employers Must Notify NMED of Positive Case Within
4 Hours
- Prepare for Rapid Response
- Best Practice: Develop Written COVID-19 Safe
Practices
- Document, Document, Document

CDC Updates

- CDC guidance is fluid, and it is important that you regularly check and visit the site for updates and changes in procedures and practices.
<https://www.cdc.gov/>
- Recent updates:
 - Masks <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html>
 - Children and Teens
<https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/children/symptoms.html>

US DOL FFCRA: Revisions to Temporary Rule/Regulations

- On September 16, 2020, the DOL published revisions and clarifications to its Temporary Rule (“Rule”) implementing the provisions of FFCRA. These revisions are in response to the SDNY’s August ruling which vacated certain provisions of the DOL’s initial Temporary Rule. The revised Rule became effective upon publication and:
 1. Affirmed that FFCRA leave may only be taken if the employee has work from which to take leave;
 2. Affirmed that, where intermittent FFCRA leave is permitted, an employee must obtain employer approval;
 3. Revised the definition of “health care provider” to be consistent with the Family and Medical Leave Act (“FMLA”);
 4. Clarified that an employee should provide to their employer information supporting their need for leave as soon as practicable; and
 5. Corrected an inconsistency regarding when an employee may be required to give notice of their intention to take leave under the FFCRA.

US DOL FFCRA: Updated COVID-19 Guidance – School Reopening

- On August 27, 2020, the DOL issued [guidance](#) on the FFCRA and school re-openings.
- Applies to certain public employers and all employers with fewer than 500 employees.
- The guidance outlined three scenarios that employees with school-aged children may encounter this Fall, concerning eligibility for FFCRA paid leave (FMLA+):
 - **Hybrid-Attendance:** If a school is operating on a hybrid-attendance basis, such as alternate day in-person attendance, an employee is eligible to take paid leave under the FFCRA on days when the employee's child is not permitted to attend school in person and must instead engage in remote learning.
 - **Option to Attend In-Person or Virtual:** If a school provides the option to attend in person or participate in a remote learning program and the employee selected the remote learning program, the employee is not eligible for paid leave under the FFCRA.
 - **Remote Learning:** If a school is beginning the school year with a remote learning program and has announced that it will continue to evaluate local circumstances, an employee is eligible to take paid leave under the FFCRA while the child's school is closed to in-person attendance.

The DOL continues to update and provide additional guidance in its [Questions and Answers](#) document.

US DOL EEOC: Updated COVID-19 Guidance – Anti-Discrimination Laws

On September 8, 2020, the EEOC released an [updated technical assistance document](#) addressing COVID-19 and the federal anti-discrimination laws enforced by the agency, including the Americans with Disabilities Act (“ADA”).

- New questions and updates involve three topics:
 - Disability-related inquiries and medical examinations
 - Confidentiality of medical information
 - Reasonable accommodations.
- Of some note, employers may administer COVID-19 testing to detect the presence of the virus on a periodic basis or before employees are permitted to enter the workplace.
 - Employers conducting COVID-19 viral testing should ensure that:
 - Their testing program is consistent with current CDC guidance, and
 - That the tests they are using are considered accurate and reliable.

US DOL Wage & Hour: COVID-19 and the FLSA Q&A Page

- **September 25, 2020 Update:** On September 21, 2020, the U.S. DOL provided new [guidance regarding COVID-19 and the Fair Labor Standards Act](#), about a variety of issues:
 - Exempt employees performing non-exempt work – jeopardize exemption?
 - Requirements re: the use of volunteers in public, private for-profit & NPO entities
 - What is included in the “regular rate of pay” for OT (hazard pay, incentive pay, etc.)
 - Compensable time – cleaning and disinfection, telework intermittent
 - Compensable time – remote workers (exempt vs. non-exempt)
 - Reimbursement of telework expenses and minimum wage requirements
 - Applicability of OSHA to remote workers at home

US Department of Labor and Beyond – New FMLA Forms

- The U.S. Department of Labor (DOL) recently issued new model notices and certification forms (FMLA forms).
- Applies to all employers with 50+ employees and all public entities.
 - These forms are not mandatory. Employers may choose to use their own forms or prior versions of these forms.
 - The DOL says that the forms are clearer and more user-friendly for employers and employees.
 - The new forms feature a number of “check boxes” rather than requiring written responses.
 - Certain topics are now more detailed, including employee eligibility and rights and responsibilities, leave designations, and medical information.
- The new model FMLA forms are available here:
<https://www.dol.gov/agencies/whd/fmla/forms>

US Department of Labor and Beyond - Benefits

- Leverage your benefits offerings to help employees through this pandemic.
- The FFCRA & the CARES Act mandate that group health plans must provide coverage and may not impose any cost sharing requirements (e.g., deductibles, copayments, coinsurance) or prior authorization or other medical management.
- Retirement Plan Withdrawals
 - Normally, early distributions from a qualified retirement plan (e.g., 401(k) plan) are subject to a 10% additional tax on that early distribution.
 - However, the CARES Act provides that the 10% tax penalty will not apply to COVID-19-related distributions.
- For additional information, please contact your Benefits Advisor.

US Department of Labor and Beyond – Worker Classification

- The new rule emphasizes the “**economic reality**” between the worker and the company. It emphasizes that contractors must be in business for themselves, rather than being economically dependent on the company for work.
- Applies to employers who utilize contractors or who are considering utilizing contractors.
- The rule uses a five-factor test for this analysis:
 - DOL identifies two core factors:
 1. The nature and degree of the worker's control over the work.
 2. The worker's opportunity for profit or loss based on initiative or investment.
 - Three other factors that may serve as additional guides in the analysis:
 1. The amount of skill required for the work.
 2. The degree of permanence of the working relationship between the worker and the potential employer.
 3. Whether the work is part of an integrated unit of production.
- ***NOTE: California recently codified its “ABC” test for worker classification.***

Disclaimer

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