



California Legislative Update

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Agenda

- Introduction
- SB1159: California Workers' Compensation Updates
- AB 685: How Employers Will Be Impacted
- SB 973: Pay Data Reporting Requirements
- SB 1383: California Family Rights Act (CFRA)
- AB 1867: California COVID-19 Leave Law
- Other Relevant Bills

SB 1159: California Workers' Compensation Update

Employer's Obligations - Employee COVID-19 Positive Test

- **Report** all positive tests to your Workers' Compensation Claims Administrator, deleting any personal identifiable information, within three business days of knowledge.
- **Provide** a DWC-1 Claim Form within one business day if an employee asserts they contracted COVID-19 on the job and report it to your Claims Administrator.
- **Track** the number of employees reporting to your various worksites daily for your Claims Administrator.
- **Record** how you are protecting employees by following federal, state, and local guidelines regarding personal protective equipment, social distancing, and other applicable measures.
- **Document** facts concerning how an employee may have contracted COVID-19.
- **Notify** all employees located at the same worksite of an infected individual, in writing, of their potential exposure to COVID-19. This notification should include the plans to disinfect and any leave benefits available, including Workers' Compensation.
- **Outbreaks** defined by the California Department of Public Health (CDPH) require the employer to notify their local public health agency within 48 hours of knowledge. The CDPH defines an outbreak as three individuals testing positive within a two-week period.

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The Role of the Workers' Compensation Claims Administrator

- Determine, based on the positive tests reported, if an outbreak has occurred at the employer's worksite that extends an injury presumption to employees testing positive.
- Investigate and analyze the claim to determine if the employee meets the necessary injury qualifiers.
- Apply the burden of proof appropriately for claims presumed work-related due to an outbreak.
- Within 45 days, decide if the employee contracted COVID-19 on the job.
- If the claim is determined to be work-related, provide and pay all benefits due to the injured worker(s).

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Criteria Used by the Claims Administrator to Determine a COVID-19 "Outbreak"

- The Claims Administrator will analyze:
 - The number of positive tests at a specific worksite within a 14-day period; and
 - The highest number of employees on any given day at a specific worksite in the preceding 45-day period.
- An outbreak is declared if:
 - Four or more employees test positive within a 14-day period with a workplace of 100 or fewer employees at the worksite; or
 - Four percent or more employees test positive within a 14-day period with a workplace of 100 or more employees at the worksite.

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The Declaration of an Outbreak Presumption Impacts the Burden of Proof

- When a COVID-19 outbreak is declared at a worksite by the Claims Administrator, it is presumed it occurred as a result of the employment.
- Absent the presumption, the injured worker has the burden to prove they were injured on the job.
- An injury presumption flips this burden, requiring the employer to prove whether or not COVID-19 was contracted on the job.

Disputing a COVID-19 Outbreak Presumption

- The Claims Administrator will have 45 days from the date the employee filed a DWC-1 Claim Form to investigate the claim.
- COVID-19 outbreak presumptions can be disputed by the employer by demonstrating:
 - They did everything required to protect the employee from COVID-19; and
 - The employee was participating in activities outside of work that led to contracting the virus.

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COVID-19 Work-Related Injury Qualifiers

- The employee tested 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.
- The positive test occurred during a period of an outbreak at the employee's place of business.

Benefits Payable

- When it is determined an employee contracted COVID-19 on the job, they are entitled to all benefits traditionally provided as part of an admitted claim. Benefits include:
 - Full Hospital
 - Surgical
 - Medical Treatment
 - Disability Indemnity
 - Death Benefits
- In the event a deceased employee does not have dependents, payment by insurer to the California Department of Death Without Dependents is waived.

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Paid Leave from Work versus Temporary Disability Benefits

- If an employee has paid sick leave benefits specifically available in response to COVID-19, those benefits shall be exhausted before any temporary disability benefits are owed.
- If an employee does not have sick leave benefits, the employee shall be provided temporary disability benefits from the date of disability. There shall not be a waiting period.

The Worksite Defined

- A 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 employer's home or residence.

SB 1159: California Workers' Compensation Update

Peace Officers, Firefighters, and Certain Healthcare Employees Treated Differently

- This section of Senate Bill 1159 created Labor Code Section 3212.87 and is effective from July 6, 2020 through December 31, 2022.
- No outbreak presumption applies to Peace Officers, Firefighters, and certain Healthcare Workers.
- When these employees test positive for COVID-19, it is presumed it occurred on the job.
- The Claims Administrator will have 30 days to investigate the claim from the date the DWC-1 Claim Form is filed.
- The presumption can be disputed by a preponderance of the evidence.

AB 685

- Effective January 1, 2021, employers will have additional responsibilities regarding potential or confirmed COVID-19 exposures.
- It will require employers to provide written notice within one business day of receiving notice of a potential exposure to COVID-19.
- The written notice must include:
 - The disinfection and safety plan the employer plans to implement per guidelines of the CDC;
 - COVID-19-related benefits and options (e.g., Workers' Compensation, paid sick leave, supplemental paid sick leave, and the company's anti-retaliation and anti-discrimination policies); and
 - The employer cannot retaliate against an employee in the event they need to quarantine or isolate themselves.
- These records must be maintained for at least three years.

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:
 - **Notification:** Employers must report prescribed information of an outbreak within 48 hours to the local public health agency in the jurisdiction of the worksite.
- 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.” *
- Employers must continue to give notice to the local health department of any subsequent laboratory-confirmed cases of COVID-19 at the worksite.
- The California Department of Public Health (CDPH) will publish information it received from local health departments on its website. It will be provided 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.
 - The public can track the number and frequency of COVID-19 outbreaks at a particular worksite.

*CDPH Covid-19 Employer Handbook [covid.19.gov](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-19-Employer-Handbook.aspx) July 28, 2020

AB 685: Department of Occupational Safety and Health (DOSH)

- **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.*
- **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.
- DOSH will be the only authority that can allow the operation or process to resume when it is determined safe.

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

**Serious Violation is defined as a "realistic possibility that death or serious physical harm could result from the actual hazard created by the violation."

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

AB 685: How Can Employers Start Preparing?

- Revise and update your Return to Workplace plans.
 - Revisit the Workplace Risk Assessment
 - Revise Written Plan as needed
- Add Return to Workplace plans as an addendum to your Injury & Illness Prevention Program (IIPP).
 - In May 2020, Cal/OSHA released interim guidelines for CA employers to add an addendum to their IIPPs on protecting workers from COVID-19 (<https://www.dir.ca.gov/dosh/coronavirus/General-Industry.html>) . Guidelines include:
 - Providing washing facilities
 - Establishing infection prevention measures
 - Providing employee training to include, but not limited to:
 - General COVID-19 Information (recognizing symptoms, when to seek medical attention, how to prevent spread, and procedures for preventing spread)
 - Proper use of cloth face coverings
 - Cough and sneeze etiquette
 - Proper method for washing hands
 - Avoiding touching eyes, nose, and mouth
 - Avoiding sharing items with coworkers
 - Safe use of cleaners and disinfectants
 - Personal Protective Equipment (PPE)

AB 685: How Can Employers Start Preparing?

- Develop a draft COVID-19 Exposure Notice Letter to employees, employee's representative, and employers of subcontracted employees (**must be sent within one business day of being informed of potential exposure**).
 - Notice shall include:
 - Information regarding COVID-19-related benefits and leave options
 - Disinfection and safety plan
 - May be sent in a manner normally used to communicate employment-related information.
- Develop a Communication Plan to notify the public health department if you have a potential or confirmed COVID-19 exposure (**within 48 hours**).
 - Notice shall include:
 - Names, number, occupation, and worksite of employees who employees who meet the definition of a "potential exposure" and a "qualifying individual"

AB 685: How Can Employers Start Preparing?

- Review and revise your procedures for reporting and responding to Cal/OSHA.
 - Report all COVID-19 exposures that result in one of the following (**within 8 hours of employer's knowledge**):
 - Death
 - Hospitalization
 - Responding to a Cal/OSHA Visit – Who is your employer representative?
 - Responding to a Cal/OSHA Citation
 - Cal/OSHA's Employer Playbook:
<https://files.covid19.ca.gov/pdf/employer-playbook-for-safe-reopening--en.pdf>

SB 973: Annual Report Pay Data

- **Effective Date: January 1, 2021**
- Ensure current Human Resources Information System (HRIS) provider can deliver the data as required. The EEO-1 Form can be used to report the data, *if* it contains all the required data under **SB 973**.
- Private employers with 100 or more employees must report annual pay data to the California Department of Fair Employment and Housing (DFEH) on or before **March 31, 2021** and subsequent years.
- Will require covered employers to report the number of employees by race, ethnicity, and sex by the following the same job categories currently used by the EEO-1 report.
- Employers would count individuals in these groups by looking at a single pay period (of the employers choosing) between October 1 and December 31 of the preceding year.
- Employers obligated to report the number of employees by race, ethnicity, and sex whose annual earnings fall within each of the pay bands used by the US Bureau of Labor Statistics in the Occupational Employment Statistics Survey.
- To complete the pay band statistics, employers will need to use W2 data for each employee regardless of whether the employee worked the full year.
- Report the total number of hours worked by each employee in each pay band.
- If an employer has multiple worksites, they will need to file a report for each location and consolidate it into one report. The consolidated report will need to include the employer's North American Industry Classification System (NAICS) code.

SB 1383: California Family Rights Act (CFRA) Expansion

- **Effective Date: January 1, 2021**
- CFRA currently requires private employers and public agencies with 50 or more employees to provide up to 12 weeks of job protected leave to eligible employees for:
 - Family care leave for a family member's serious health condition;
 - Medical leave for an employee's own serious health condition; and
 - Bonding leave for the birth, adoption, or foster care placement of a child.
- The current California New Parent Leave Act applies to employers with 20-49 employees and provides up to 12 weeks of bonding leave to eligible employees who work at a facility employing 20 workers within a 75-mile radius.
- The new law expands the CFRA to apply to California employers who employ 5 or more employees.
 - Eliminates eligibility requirement of working at location with 50 (or 20) employees within a 75-mile radius.
 - Retains other eligibility requirements of 12 months, 1,250 hours.
 - Repeals the California New Parent Leave Act as of January 1, 2021.

SB 1383: California Family Rights Act (CFRA) Expansion

- Broadens the definition of family member to include grandparents, grandchildren, siblings, and domestic partners.
- Broadens the definition of child to include adult children (even if not dependent) and children of a domestic partner.
- **Deletes** the provision specifying that if both parents work for the same employer, the employer is not required to provide more than 12 weeks total leave to both in connection with the birth, adoption, or foster care placement of a child.
 - Employers are now required to provide 12 weeks to each parent in that situation.
- Eliminates **key employee** exception.
 - Deletes language from the CFRA that authorizes an employer to refuse reinstatement to salaried employees who are among the highest 10% of the employees, and
 - where the refusal is necessary to prevent substantial and grievous economic injury.

SB 1383: CFRA Inconsistencies with FMLA

- With the expanded definition of “family member,” FMLA and CFRA leave may not run concurrently in the following instances:
 - Leave due to pregnancy-related conditions – which is considered a “serious health condition” under FMLA – is generally not considered a “serious health condition” under CFRA unless the employee has already exhausted their separate Pregnancy Disability Leave (PDL) entitlement under California Government Code Section 12945;
 - Leave to care for a serious health condition of a registered domestic partner, adult child who is not incapable of self-care, grandparent, grandchild, or sibling;
 - Leave because of a qualifying exigency related to the covered active duty or call to covered active duty of an employee’s **registered domestic partner** in the United States Armed Forces; and
 - Leave to care for an employee’s parent, child, spouse, or “next of kin” who is a covered servicemember with a serious injury or illness for up to 26 weeks under FMLA.

AB 1867: Supplemental Paid Sick Leave

- **Effective Date: September 19, 2020**
- Codifies existing COVID-19 supplemental paid sick leave for certain food sector workers (including independent contractors) and the requirement that workers in any food facility be permitted to wash their hands every 30 minutes and additionally as needed.
- Mandates COVID-19 Supplemental Paid Sick Leave (SPSL) for employees of private employers that have 500 or more employees nationwide.
- Extends COVID-19 Supplemental Paid Sick Leave to all public or private health care employees and emergency responders who were not provided with such benefits by their employers under the FFCRA.
- Expires December 31, 2020 or at the same time as any extension of the FFCRA (whichever is later).
- Unlike FFCRA, no tax credit reimbursement for payments made.

AB 1867: Supplemental Paid Sick Leave (SPSL)

- Covered employers must provide SPSL to employees who must leave their home or place of residence to attend work and who are unable to do so due to the following reasons related to COVID-19:
 - The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
 - The employee is advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or
 - The employee is prohibited by the hiring entity from working due to health concerns related to the transmission of COVID-19.
- Available for immediate use upon the employee's written or oral request.
 - Leave is not conditioned on medical certification.
- A "quarantine or isolation order" must be specific to the worker's circumstance.

AB 1867: Supplemental Paid Sick Leave (SPSL)

- How much SPSL is required? It depends, but amounts are capped at a maximum of \$511 per day and \$5,110 per employee in the aggregate.
- Workers who worked or were scheduled to work, on average, at least 40 hours per week for the employer in the two weeks preceding the start of the leave and workers considered “full time” by their employers: 80 hours of SPSL
- Part-time workers with a fixed schedule: total number of hours normally scheduled to work over a two-week period
- Part-time workers with a variable schedule:
 - 6-month tenure or longer: 14x the average number of hours worked each day in the preceding 6 months
 - Less than 6 months but more than 14 days: 14x the average number of hours worked each day in the time worked
 - 14 days or less: The total number of hours worked

AB 1867: Supplemental Paid Sick Leave (SPSL)

- SPSL is in addition to state or local mandated paid sick leave.
- Credit for employers who already provided COVID-19 supplemental paid sick leave.
- Pay stub requirement-effective on first full pay period following enactment of the law on September 9, 2020.
- Posting requirement:
 - The Labor Commissioner has created model notices for food sector and non-food sector employers that must be posted by employers in their workplace.
 - If covered employees do not frequent the workplace, employers may “post” by disseminating the new posters through electronic means.
- Labor Commissioner FAQ:
 - <https://www.dir.ca.gov/dlse/FAQ-for-PSL.html>

AB 2257 Independent Contractor: Update Exceptions for AB5

AB 5: Effective Jan 1, 2020

AB 2257: Effective September 4, 2020

- Review your relationship with independent contractors (ICs) and determine whether they would be considered an IC or an employee. ABC Test in Section 2775 requires that unless they meet all of the requirements of the test, they should be considered an employee.
 - A. The hiring entity does not control or direct the worker in performing the work in fact or under the terms of a contract.
 - B. The work performed is outside the “usual course” of the hiring entity’s business.
 - C. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

AB 2257 added 53 new exemptions, for a total of 109 exemptions from AB5.

- Generally, the exceptions fall into the fine arts, certain professional services, writers, photographers, editors, consultants, etc.
 - Business-to-business contracting relationships
 - Relationships between a referral agency and a service provider
 - Professional services
 - Prop 22 is attempting to add an additional exception to the list: Uber, Lyft, DoorDash, Instacart, Postmates
- Specifically, the legislation excluded high hazard industries from being considered independent contractors : janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, or construction services other than minor home repair.
- Authorizes California Attorney General or City Attorney to prosecute companies who do not follow AB 5/AB 2257.
- Following AB5/AB 2257 likely will allow employers to meet the requirements of the new proposed DOL rules on independent contractors FLSA, 29 CFR, Parts 780, 788, and 795.

Other HR & Employment-Related Bills Signed Into Law

- Many other important Bills in the areas of:
 - COVID-19 in the Workplace
 - Independent Contractors and Exceptions
 - Leaves of Absence
 - Wage and Hour
 - Unemployment Insurance-Work Sharing
 - Equal Employment Opportunity
 - Privacy
 - Human Resources
 - Of note: AB 1963 – HR Professionals as Mandatory Reporters, and receivers of child abuse & neglect complaints

Questions?

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