



COVID-19 & SB 1159

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On September 17, 2020, California Governor, Gavin Newsom signed SB 1159 establishing a rebuttable presumption for illness or death caused by COVID-19 and imposing special notice requirements on Employers who have received notice of exposure.

Governor Newsom explained "... law will help California workers stay safe at work and get the support they need if they are exposed to COVID-19".

This bill is effective IMMEDIATELY and absent further action by the Legislation is repealed on 1/1/2023.

Summary of SB 1159

SB 1159 adds three new sections to the Ca Labor Code to deal with COVID-19 exposure. They are:

- 1) **LC §3212.86**, which basically codifies the Executive Order dated 5/6/2020 and applies to DOI 3/19/2020-7/5/2020. This applies to all employees.
- 2) **LC §3212.87**, which applies only to certain employees, including Public Safety/Rescue Personnel, Health Care workers, etc. This is for DOI on or after 7/6/2020
- 3) **LC §3212.88**, which applies to all other employees, if they have been exposed during an outbreak at their specific place of employment. This is for DOI on or after 7/6/2020

LC §3212.86

- 1) Applies to DOI from 3/19/2020-7/5/2020
- 2) Injury includes illness or death if:
 - a. The Employee either tests positive OR is diagnosed with COVID-19 within 14 days after working at the Employer's premises at the direction of the Employer;
 - b. The date of injury is the last date the EE performed labor or services at the ER's place of employment at the ER's direction
 - c. Where this is based on a diagnosis (not testing), the diagnosis **MUST** be made by a licensed physician and surgeon holding an MD or DO, **or state licensed physician assistant or nurse practitioner**, AND that diagnosis is confirmed by testing within 30 days of the date of the diagnosis.
- 3) The place of employment is NOT the employee's home or residence

- 4) If an employee has sick leave benefits, specifically available in response to COVID-19, those benefits SHALL be exhausted before TD or §4850 benefits are due. If there are no such sick leave benefits, the employee shall be provided TD or §4850 benefits from the date of disability. There is no waiting period for TD.
- 5) To qualify under this Order for TD or §4850 benefits, an employee must satisfy either of the following:
 - a. If the employee is diagnosed or tests positive on or after 5/6/2020, the employee shall be certified for TD within 15 days from initial diagnosis and shall be recertified every 15 days thereafter, for the first 45 days following diagnosis: **OR**
 - b. If the employee was diagnosed or tested positive before 5/6/2020, the employee shall have obtained a certification for TD, no later than 5/21/2020, documenting the period for which the employee was TD and then must recertify every 15 days thereafter, for the first 45 days following diagnosis.
- 6) Certification for TD shall be by a physician who holds a physician and surgeon license issued by the California Medical Board. If the employee has a pre-designated physician, per LC §4600(d), is covered by an MPN, HCO, or group health plan, the certifying physician **SHALL** be within that network, organization or plan. Otherwise, the employee may be certified by a physician of their choosing who holds a physician and surgeon license.
- 7) The presumption is rebuttable and may be controverted by other evidence. But unless it is controverted, the WCAB is BOUND to find injury.
- 8) The time limit to deny a COVID-19 case under this law is **30 days**, after the claim form is filed. If not rejected, the illness is presumed compensable, unless rebutted by evidence only discovered after the 30-day period.
- 9) The collection of death benefits, per LC §4706.5, payable to the DIR when there are no dependents, is waived
- 10) This section applies to all pending matters relying on Executive Order N-62-20 and is not a basis to rescind, alter, amend or reopen any final award of WC benefits.

Analysis of LC §3212.86

This applies to DOI from 3/19/2020 – 7/5/2020 ONLY

This Legislation deals with the application of the presumption of injury. COVID-19 cases can still be brought if they don't fall within the presumption.

This section applies to ALL employees.

This applies only to illness or death caused by COVID-19. So if there is no “illness”, there is an argument of no injury.

If there is a pre-designation of physician, an MPN, an HCO or the EE has group health insurance, TD certification SHALL come from a doctor within that network, organization or plan. If not, the EE can be certified by a physician of their choosing. **(The requirement that the TD certification come from a pre-designated doctor, doctor within the MPN, HCO, or group health plan is different than the Exec Order....in the Exec Order this was optional, in LC §3212.86, this is mandatory)**

The workplace cannot be the employee’s home or residence. So this presumption DOES NOT apply to people working solely from home.

The diagnosis can now be made by an MD or DO, **OR** a licensed, Nurse Practitioner or Physician Assistant. **(This is different than the Exec Order)**

The diagnosis can be made by a doctor, Nurse Practitioner or Physician Assistant, but TD MUST be certified by a doctor.

This presumption is rebuttable. If there is no evidence to sufficiently rebut the presumption the Board SHALL find injury.

Denial must be made within **30 days** from the filing of a Claim Form (DWC-1) or it is presumably accepted, unless rebutted by evidence discovered subsequent to the 30-day period. A claim form is filed when it is personally delivered to the employer or received by first class or certified mail. Remember the clock starts ticking from when the claim form is received by the employer, not when it is given to the employee.

All WC benefits are available under this law, including full hospital, surgical, medical treatment, TD, PD and death benefits. However, if there are no dependents, the death benefit is NOT paid to the DIR. Apportionment to prior Awards as well as non-industrial factors is available.

If there is paid sick leave available in response to COVID-19 that is exhausted first before TD or §4850 benefits are due. However, an employee does not need to use their normal sick leave benefits. Once TD or §4850 benefits are due, they are due immediately upon a finding of disability. There is no waiting period.

For TD or §4850 benefits....

If the diagnosis or positive test occurs on or after 5/6/2020, the TD certification must be within the first 15 days after the diagnosis and then every 15 days, for 45 days.

If the diagnosis or positive test was before 5/6/2020, the TD certification must be by 5/21/2020. The TD slip must document the period which for which the employee was unable to work and then recertification every 15 days, for 45 days.

Certification **SHALL** be by MD or DO and **SHALL** be by doctor pre-designated, in MPN, HCO or group health plan, if applicable.

LC §3212.87

- 1) Applies to DOI after 7/6/2020.
- 2) This section applies **ONLY** to Active Firefighters, Peace Officers, Safety Officers, EEs providing direct patient care or custodial EEs in contact with COVID-19 patients working at a health facility, RN, EMT, EE who provides direct patient care for a home health agency, provider of in home supportive services, outside of their own home, and other EEs of health facilities. For this last group, the presumption does **NOT** apply if EE did not have contact with a health facility patient within the last 14 days who tested positive for COVID-19
- 3) Injury includes illness or death if:
 - a. The Employee tests positive within 14 days after working at the Employer's premises at the direction of the Employer; **(MUST BE A POSITIVE TEST)**
 - b. The date of injury is the last date the EE performed labor or services at the ER's place of employment at the ER's direction
- 4) Place of employment does not include EE's residence.
- 5) If an employee has sick leave benefits, specifically available in response to COVID-19, those benefits **SHALL** be exhausted before TD or §4850 benefits are due. If there are no such sick leave benefits, the employee shall be provided TD or §4850 benefits from the date of disability. There is no waiting period for TD.
- 6) The presumption is rebuttable and may be controverted by other evidence. But unless it is controverted, the WCAB is **BOUND** to find injury.
- 7) This presumption is extended for 14 days following termination of employment, starting with the last date actually worked
- 8) The time limit to deny a COVID-19 case under this law is **30 days**, after the claim form is filed. If not rejected, the injury is presumed compensable, and can only be rebutted by evidence discovered after the 30-day period.

- 9) The collection of death benefits, per LC §4706.5, payable to the DIR when there are no dependents, is waived
- 10) This section applies to all pending matters, unless otherwise specified, but shall not be a basis to rescind, alter, amend or reopen any final award of WC benefits.
- 11) For purposes of this law, “test” means PCR (Polymerase Chain Reaction), not an antibody test.

Analysis of LC §3212.87

This applies to DOI after 7/6/2020

This section applies to Firefighters, Peace Officers, First Responders, Health Care Workers and others in the Health Care System.

This Legislation deals with the application of the presumption of injury

This applies only to illness or death caused by COVID-19. So if there is no “illness”, there is an argument of no injury.

This section requires a **POSITIVE TEST**, rather than just a diagnosis.

Presumption is extended for 14 days following termination of employment, starting with the last date actually worked

There is no indication of who must certify for TD

This presumption is rebuttable. If there is no evidence to sufficiently rebut the presumption the Board SHALL find injury.

Denial must be made within **30 days** from the filing of a Claim Form (DWC-1) or it is presumably accepted, unless rebutted by evidence discovered subsequent to the 30-day period. A claim form is filed when it is personally delivered to the employer or received by first class or certified mail. Remember the clock starts ticking from when the claim form is received by the employer, not when it is given to the employee.

All WC benefits are available under this law, including full hospital, surgical, medical treatment, TD, PD and death benefits. However, if there are no dependents, the death benefit is NOT paid to the DIR. Apportionment to prior Awards as well as non-industrial factors is available.

If there is paid sick leave available in response to COVID-19 that is exhausted first before TD or §4850 benefits are due. However, an employee does not need to use their normal sick leave benefits. Once TD or §4850 benefits are due, they are due immediately upon a finding of disability. There is no waiting period.

LC §3212.88

- 1) Applies to DOI after 7/6/2020
- 2) Applies to EEs not within §3212.87 who test positive during an outbreak at the employee's specific place of employment and the ER has 5 or more employees
- 3) Injury includes illness or death if:
 - a. The Employee tests positive within 14 days after working at the Employer's premises at the direction of the Employer, and the test occurred during a period of an outbreak at the EE's specific place of employment (**MUST BE A POSITIVE TEST & MUST BE THE LOCATION WHERE THE EE WORKED**)
 - b. The date of injury is the last date the EE performed labor or services at the ER's place of employment at the ER's direction
- 4) The place of employment is NOT the employee's home or residence, **UNLESS** the employee provides Home Health Care Services to another individual at the employee's home or residence
- 5) If an employee has sick leave benefits, specifically available in response to COVID-19, those benefits **SHALL** be exhausted before TD or §4850 benefits are due. If there are no such sick leave benefits, the employee shall be provided TD or §4850 benefits from the date of disability. There is no waiting period for TD.
- 6) The presumption is rebuttable and may be controverted by other evidence. But unless it is controverted, the WCAB is **BOUND** to find injury. This presumption is extended for 14 days following termination of employment, starting with the last date actually worked in the specified capacity at the EE's place of employment. This section does not affect an employee's rights to compensation for illness or injury in accordance with a preponderance of evidence.
- 7) Evidence relevant to disputing the presumption may include, but is not limited to, evidence of measures in place to reduce potential transmission of COVID-19 in the EE's place of employment and evidence of an EE's nonoccupational risks of COVID-19
- 8) The time limit to deny a COVID-19 case under this law is **45 days**, after the claim form is filed. If not rejected, the injury is presumed compensable, and can only be rebutted by evidence discovered after the 45-day period.
- 9) The collection of death benefits, per LC §4706.5, payable to the DIR when there are no dependents, is waived
- 10) This section applies to all pending matters, unless otherwise specified, but shall not be a basis to rescind, alter, amend or reopen any final award of WC benefits.

- 11) When an ER knows, or should reasonably know that an EE has tested positive for COVID-19, the ER shall report to Claims Administrator, either by email or fax within 3 business days all of the following:
 - c. That an EE has tested positive. No personal information regarding the EE is provided, unless the EE claims the exposure is industrial
 - d. The date of the positive test (the date the specimen was collected)
 - e. The address of the specific place of employment during the 14 days preceding the date of the positive test
 - f. The highest number of EE's who reported to work at the specific place of employment in the 45 days preceding the last day the EE worked at each specific location
- 12) Intentionally failing to submit this information, or submitting false or misleading information subjects the ER to civil penalties up to \$10,000.00
- 13) The claims administrator shall use this information to determine if an outbreak has occurred. To calculate the number of employees at a specific place of employment, the claims administrator shall:
 - a. For DOI after 9/17/2020 utilize the data for the first employee who is part of the outbreak (See 11 above)
 - b. For DOI 7/6/2020 – 9/16/2020, see below
- 14) For DOI between 7/6/2020 -9/16/2020, if an ER is aware that an employee tested positive, they are to notify the Claims administrator by email or fax by 10/17/2020 all of the data required above (Sec 11). In determining the highest number of EE's who reported to work, it shall be on any given day between 7/6/2020-9/16/2020. The claims administrator shall use this information to determine if there was an outbreak between 7/6/2020-9/16/2020.
- 15) An outbreak exists if within 14 calendar days one of the following occurs at a specific place of employment:
 - a. 100 employees or less at a specific place of employment with 4 EE's testing positive
 - b. More than 100 employees at a specific place of employment with 4% of the employees reporting to that specific place of employment testing positive
 - c. A specific place of employment is ordered to close by local public health dept, State Dept of Public Health, OSHA or a school superintendent due to COVID-19 infection risk

A claim is not part of an outbreak if it occurs during a continuous 14 day period where the requisite number of positive tests has not been met
- 16) For purposes of this "test" means PCR (Polymerase Chain Reaction), not an antibody test.
- 17) Specific place of employment does not include EE's residence. It means the building, store, etc, where the EE performs the work and does not include the EE's home, unless the EE provided home health care services to another individual at the EE's home

- 18) If the work is done at multiple locations, at the ER's direction, the positive test shall be counted to determine an outbreak at each of the locations and if any one has an outbreak, that shall be considered the "specific place of employment"

Analysis of LC §3212.88

This applies to DOI after 7/6/2020

This section applies to all EE's who don't fall under First Responders, Peace/Safety Officers and Health Care Workers and only if there has been an "outbreak" at their specific place of employment.

REPORTING REQUIREMENTS.....if an ER knows, or should reasonably know that an EE tested positive for COVID-19 they SHALL report to the Claims Administrator by email or fax, within 3 business days, that an EE has tested positive (No personal information is to be given), the date the specimen was collected, the address of the specific place of employment during the 14 days prior to the date of the positive test (if more than one location, all locations need to be reported) and the highest number of EE's who reported to the specific location in the 45 days prior to the last day the EE worked at each location

If an ER knows that an EE tested positive between 7/6/2020-9/16/2020, they must notify the Claims examiner by 10/17/2020. In reporting the highest number of people who reported to work, the Employer shall report the highest number of EE's who reported to work at each specific places of employment between 7/6/2020-9/16/2020. **This means that a retroactive analysis must be done by all employers if there are EE's they know tested positive. This will be extremely onerous.**

Intentional failure to report or intentional false or misleading reporting carries up to \$10,000. fine

There is an outbreak if within 14 calendar days there are: 4 EE's testing positive (at a specific place of employment with 100 employees or less) OR 4% EE's testing positive (at a specific place of employment with more than 100 EEs) OR a specific place of employment is ordered to shut down due to COVID-19 infection risk. A claim is not part of an outbreak if it occurs during a 14 day continuous period when there were not the requisite number of positive tests. **(This only means the presumption doesn't apply...there can still be an injury and a claim filed)**

To determine the number of EE's at a specific place of employment to determine if there is an outbreak use the highest number of EE's who reported to work at the specific location in the 45 days prior to the LDW by the positive EE for DOI on or after 9/17/2020 and for DOI between 7/6/17-9/16/17, the highest number of people who reported to each specific place of employment of EE from 7/6/17-9/16/17.

The outbreak must be at the specific place of employment, store, warehouse, building, etc.

This Legislation deals with the application of the presumption of injury

This applies only to illness or death caused by COVID-19. So if there is no “illness”, there is an argument of no injury.

This section requires a POSITIVE TEST, rather than just a diagnosis.

There is no indication of who must certify for TD

This presumption is rebuttable. If there is no evidence to sufficiently rebut the presumption the Board SHALL find injury. The presumption can be rebutted, by among other things, evidence of measures in place to reduce potential transmission of COVID-19 in the EE’s place of employment and evidence of an EE’s nonoccupational risks of COVID-19

Denial must be made within **45 days** from the filing of a Claim Form (DWC-1) or it is presumably accepted, unless rebutted by evidence discovered subsequent to the 45-day period. A claim form is filed when it is personally delivered to the employer or received by first class or certified mail. Remember the clock starts tickin from when the claim form is received by the employer, not when it is given to the employee.

All WC benefits are available under this law, including full hospital, surgical, medical treatment, TD, PD and death benefits. However, if there are no dependents, the death benefit is NOT paid to the DIR. Apportionment to prior Awards as well as non-industrial factors is available.

If there is paid sick leave available in response to COVID-19 that is exhausted first before TD or §4850 benefits are due. However, an employee does not need to use their normal sick leave benefits. Once TD or §4850 benefits are due, they are due immediately upon a finding of disability. There is no waiting period.

TAKE AWAYS

For current DOI, after 9/17/2020, we have 45 days to deny unless the EE is a Safety Officer, Peace Officer, First Responders or Health Care Workers

We have 30 days to deny for Safety Officers, Peace Officers, First Responders, Health Care Workers and those who came under the Executive Order, i.e. claims with DOI from 3/19/2020-7/5/2020.

The presumption is rebuttable and it can be rebutted with evidence of measures taken by the ER to lessen the exposure and evidence of non occupational exposure.

Do an investigation using the Questions that I have provided to determine outside potential exposure.

Any cases of COVID-19 that the ER knows of (or should reasonably have known) must be reported to the Claims Administrator within 3 business days. No personal information is given, unless the EE is claiming an industrial injury.

Any ER who is aware of an employee testing positive between 7/6/20-9/16/2020 shall report to claims administrator by 10/17/2020

Reporting is mandatory and extremely onerous. But failure to do so could result in fines up to \$10,000.00

This law is repealed on 1/1/2023, unless the Legislature acts otherwise

**PLEASE DO NOT HESITATE TO CONTACT ME WITH ANY QUESTIONS
LORI WENDEROFF....Lori@wenderofflaw.com. (818) 407-1413 or (310) 880-1154**

	LC §3212.86	LC §3212.87	LC §3212.88
EMPLOYEES	APPLIES TO ALL EMPLOYEES	FIREFIGHTERS, SAFETY OFFICERS, HEALTH CARE WORKERS, ETC	EE'S NOT COVERED BY §3212.87 TESTING POSITIVE DURING OUTBREAK, AND ER HAS MORE THAN 5 EES
DATE OF INJURY	3/19/20-7/5/2020 DOI IS LAST DATE PERFORMED SERVICES FOR ER	7/6/2020 & AFTER DOI IS LAST DATE PERFORMED SERVICES FOR ER.	7/6/2020 & AFTER DOI IS LAST DATE PERFORMED SERVICES FOR ER.
INJURY	POSITIVE TEST OR DIAGNOSIS* WITHIN 14 DAYS AFTER WORKING AT ER PREMISES, FOLLOWED BY POSITIVE TEST WITHIN 30 DAYS *IF BY DX, MUST BE MD, DO, PA OR NP PLACE OF EMP CANNOT BE EE'S HOME	POSITIVE TEST WITHIN 14 DAYS AFTER WORKING AT ER PREMISES PLACE OF EMP CANNOT BE EE'S HOME	POSITIVE TEST WITHIN 14 DAYS AFTER WORKING AT ER PREMISES, DURING A PERIOD OF AN OUTBREAK AT SPECIFIC LOCATION PLACE OF EMP CANNOT BE EE'S HOME, UNLESS EE PROVIDES HOME HEALTH CARE SERVICES AT THE EE'S HOME
TD	IF COVID-19 SICK LEAVE BENEFITS, MUST USE THOSE FIRST. DOI BEFORE 5/6/2020: CERTIFICATION NO LATER THAN 5/21/2020 DOI 5/6/2020 & AFTER: CERTIFIED WITHIN 15 DAYS AND THEN EVERY 15 DAYS FOR THE FIRST 45 DAYS AND SHALL BE BY MD OR DO, PRE DESIGNATED, MPN, HCO, OR GROUP HEALTH, IF APPLICABLE. NO WAITING PERIOD	IF COVID-19 SICK LEAVE BENEFITS, MUST USE THOSE FIRST. THEN TD OR §4850 NO WAITING PERIOD	IF COVID-19 SICK LEAVE BENEFITS, MUST USE THOSE FIRST. THEN TD OR §4850 NO WAITING PERIOD
PRESUMPTION	REBUTTABLE	REBUTTABLE, AND EXTENDED FOLLOWING TERMINATION OF EMPLOYMENT FOR 14 DAYS SINCE LDW. FOR HEALTH CARE WORKERS, OTHER THAN DIRECT PT CARE OR CUSTODIAL, NO PRESUMPTION IF ER CAN ESTABLISH NO CONTACT WITH PT WITHIN LAST 14 DAYS WHO TESTED + FOR COVID-19	REBUTTABLE, AND EXTENDED FOLLOWING TERMINATION OF EMPLOYMENT FOR 14 DAYS SINCE LDW. CAN BE REBUTTED BY SHOWING MEASURES ER USED TO LIMIT EXPOSURE AND NON OCCUPATIONAL RISKS OF COVID TO EE
TIME TO DENY	30 DAYS	30 DAYS	

45 DAYS