Legislative Update 2020: The Latest on Coronavirus Legislation

By John Kamin & Zane Uribarri
Bradford & Barthel, LLP

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2

John Kamin, Esq.
B&B Woodland Hills
Office: (818) 654-0412
jkamin@bradfordbarthel.com

Zane Uribarri, Esq.
B&B Ontario
Office: (909) 476-0552
zuribarri@bradfordbarthel.com

What we'll cover

- BREAKING: Prop 22 and the ABC Test
- SB 1159: the three presumptions
- AB 1867: mandatory sick leave
- AB 685: virus reporting
- SB 1146: making depos easier

- What to look for in 2021
- Copy service fee proposal
- Med-legal fee proposal
- Brief case law update (time permitting)

BREAKING: Prop 22

- On Nov. 3, CA voters approved Prop 22 with a 58% voting "yes."
- Means that workers for cell phone services apps <u>are not employees</u> for work comp purposes.

Examples:

- Uber
- Lyft
- Postmates
- Grubhub

- In exchange for being ICs, they get:
  - Occ accident insurance with up to $1m in medical
  - Higher wages
  - Group health coverage worth $184-$367/mth

Prop 22: No more ABCs

- Prop 22 was created to dispute AB 5, which was approved by Gov. Newsom in 2019.
- AB 5 clarified that the: CA Supreme Court's ABC Test applies to many types of workers, effectively replacing Borello's right of control test to determine if IC or EE.
- Why is that important? ABC test makes it much easier for a court to determine that a worker is an employee for work comp and labor law purposes.

Prop 22: Know your ABCs

- But wait! Prop 22 only affected workers for the big tech companies who make cell phone apps.
- So if your applicant doesn't work for a big tech company, then AB 5 still controls.
- Examples: hairdressers, stylists, barbers, nail salon workers, truck drivers, should all still be wary of AB 5.

7

So what's the ABC Test?

If a worker <u>does not</u> meet all of the following three conditions, then they are an EE for work comp:

- A: Free from the control and direction of the hiring entity in connection with the performance of the work;
- B: Performs work that is outside the usual course of the hiring entity's business;***
- C: Worker is customarily engaged in an independently established trade, occupation, or business.

<u>(* "B" is the factor that transforms most workers into employees.)</u>**

AB 5 Exemptions and Exceptions

- Depending on the industry, AB 5 created exemptions for various industries. But if no exemption: ABC Test applies.
- Examples:
  - Construction truck drivers got a 2 year grace period to be ICs, whereas regular truckers did not.
  - Barbers, manicurists, cosmetologists: exempt if they set own rates, paid directly by clients, and do own scheduling.
  - Salespeople: exempt if salary based upon actual sales.
  - Commercial fisherman: exempt for everything except unemployment insurance.

AB 5 Exemptions and Exceptions

- These people are independent contractors, and any disputes will be subject to the Borello test (aka the right-of-control test), which is the test we've used in comp for years:
  - Doctors, dentists, lawyers, engineers, accountants, architects, realtors, travel agents, graphic designers, HR administrators, grant writers, marketers, fine artists, investment advisors, brokers/dealers, payment processors, photographers, photojournalists, freelancers, repo men and more.

What's the Borello test again?

Borello determines who had right to control the worker, and considers:

a. whether one performing services is engaged in a distinct occupation or business
b. kind of occupation, whether the work is done with/without supervision
c. skill required by occupation
d. supplying of the tools
e. length of time services provided
f. method of payment – by time, or by job
g. is the work part of the reg business of the principal
h. parties' belief as to employer/employee

The New Law: SB 1159

- Gov. Newsom signed it into law on 9/17.
- Effective immediately on 9/17.
- Contains three rebuttable presumptions.
- Under all three presumptions, last day of work is date of injury.
- Presumptions don't cover people solely working from home.

SB 1159: Presumptions?

Has three parts:

1. The Executive Order for presumption from 3/19/20-7/5/20.
2. A presumption for police, fire, and many health care workers from 7/6/20-1/1/23.
3. A presumption for "everybody else" from 7/6/20-1/1/23.

Labor Codes

The labor code sections in SB 1159 are LC 3212.86, 3212.87, and LC 3212.88.

- LC 3212.86 is the codified executive order for DOI 3/19/20 – 7/5/20
- LC 3212.87 is the first responder presumption for DOI 7/6/20 – 1/1/23
- LC 3212.88 is the "everyone else" for DOI 7/6/20 – 1/1/23

Before we go further…

- Q: What if someone isn't covered by any of these presumptions? What happens to their claim?
- A: They can still establish compensability of their claim by proving beyond a preponderance of the evidence that their work put them at greater risk of catching COVID-19. 90-day decision timeframe upon receipt of DWC-1 form. [Labor Code § 3600 and § 3202.5 or if "outbreak" see § 3812.88]
- Okay, now let's move onto the presumptions.

Executive Order in A Time of Disorder

Executive Order – May 6, 2020 – Now modified by SB 1159

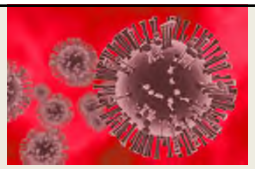
- Applies to all workers from 3/19 to 7/5
- Requires a Positive Test or Diagnosis of COVID within 14 days of working for the employer at the employer's location
- Diagnosis must have a Positive Test within 30 days (test can be the Antibody Test!!!)

What does the EO say?

- only applies to EE who worked at their job site at ER's "direction"

- does not apply to employees who only work from home
- no limitation to "essential workers"
  meaning?
  =applies to all types of businesses

EO: What does it say?



- EE must have a positive test result/diagnosis of COVID-19 w/in 14 days of performing work for the employer
- Big change: Per SB 1159, a MD or DO or licensed PA/NP acting under review of supervision can make diagnosis.
- only has a diagnosis and not a positive test result?

  MUST confirm the diagnosis w/testing within 30 days from date of diagnosis

EO: How quickly?

- must accept/deny within 30 days
- clock starts ticking when claim form is filed (don't forget *Honeywell*...*not* "reasonably certain")
- not denied w/in 30 days = "presumed compensable"
- can only be rebutted with evidence that is "discovered subsequent to the 30-day period."

Executive Order TD/LC 4850?

1) A MD/DO must be certified TD w/in first 15 days after initial diagnosis

+

be recertified for TD every 15 days thereafter

"certify-every-15 days" must occur for first 45 days of the claim

OR...

2) if tested positive or a positive diagnosis between 3/19-5/5, must obtain TD certification by MD/DO w/in 15 days of May 6. In other words, get TD cert by May 21, 2020

SB 1159: Police/Fire/Health

- Rebuttable presumption that COVID-19 is industrial if they:
- Have tested positive within 14 days the employee performed labor or services at the employer's "place of employment" AND at the "employer's direction."
- Applies to all firefighters, "peace officers," law enforcement, and specific health care workers. [Labor Code § 3212.87]
- Health care ERs can rebut by showing no direct COVID patient contact within 14 days of LDW.

SB 1159: Police/Fire/Health

- Q: Which HC workers does it mention?
- A: An employee who provides direct patient care, or a custodial employee in contact with COVID-19 patients, who works at a health facility.
- An authorized registered nurse, emergency medical technician-I, emergency medical technician-II, emergency medical technician-paramedic.
- An employee who provides direct patient care for a home health agency.

SB 1159: Police/Fire/Health

Like the Executive Order, this has a 30-day decision timeframe:

- If not denied within 30 days, presumed compensable.
- If presumed compensable, only evidence "discovered" after Day 30 may be used to rebut claim. [Labor Code § 3812.87(f)]
- 30-day decision timeframe triggered by filing of DWC-1 form.

SB 1159: "Everyone Else"

- So what about the rebuttable presumption that applies to "everyone else?"
- Key difference: Has a 45-day decision timeframe. This is triggered by filing of DWC-1.
- Any claim not denied within the 45-day period can only be rebutted with evidence discovered after Day 45. **[Labor Code § 3212.88(f)]**

SB 1159: "Everyone Else" Presumption Applies When…

All of these criteria are met:

- Test positive within 14 days of performing work for employer at employer's place. (At-home excluded.)
- ER must have 5+ employees.
- "Outbreak" must have occurred at the employee's specific place of employment within 14 days of the date of test. Outbreak is defined by the "Four and Four" Rule.

25

SB 1159: "Everyone Else"

Outbreak: Defined by the "Four or Four" Rule

- If the employer has less than 100 or fewer people at a location, **four (4) employees** must test positive for COVID-19 in a 14-day period, OR
- If the employer has more than 100 employees at a specific place of employment, **4% of the employees** at a particular facility testing positive for COVID-19 in a 14-day period.

Depending on the facts, it may be possible to have multiple outbreaks over a period of time. (Hopefully these are rare.)

SB 1159: Hold Up, What's This 14 Days Stuff?

- DOI is defined by last day employee worked for employer.
- Date of test is defined by the date the employee was physically tested.
- People don't file COVID-19 claims until they realize they're symptomatic. They stop working when symptomatic, because who wants to work when you have COVID-19?
- Thus, the outbreak must have occurred during their positive test.
- Ex: Date of test 8/31/20? Outbreak may not be known between 8/17/20-9/14/20.

SB 1159: But What if No Outbreak?

- Remember, we're still under the "Everyone Else" section of the Rebuttable Presumption.
- If no "outbreak," then no presumption.
- Who decides if there's an outbreak? Adjusters at first. Then later, if AA disagrees with defendant's "lack of outbreak," a judge will probably examine that at trial.

SB 1159: "Everyone Else"

How is an adjuster supposed to decide if there is an outbreak? The law has mandatory reporting requirements that ERs send administrators:

- An employee has tested positive, w/ date and location (address).
- No personal info about that EE, unless they're alleging it's industrial.
- Highest # of EEs who worked there in last 45 days.
- ERs: Must keep records and track this info.

SB 1159: What Types of Tests?

- We talk a lot about positive tests. Well what types of tests?
- Yes: PCR tests approved by FDA that find COVID-19's RNA.
- Yes: Any other FDA-approved test (aka molecular tests) that detects viral RNA that has the same or higher sensitivity than the PCR test.
- No: Serologic testing, or antibody testing.
- Test types: https://www.fda.gov/consumers/consumer-updates/coronavirus-testing-basics

SB 1159: No DWD!

- Like the Executive Order said, SB 1159 says Death Without Dependents Unit will not seek death benefits in death cases with no dependents.
- That being said, expect anyone/everyone to allege that they are dependents. Always try to seek out all dependents (don't want to settle with one dependent, only to find out there are others).

31

What can defendants do?

Do a thorough factual investigation from the outset of the claim, including:

- Subpoena any/all medicals
- Contact tracing
- Ask about family/friends
- Check social media

Build a timeline of

- when the applicant worked
- when they stopped working
- when the infection occurred
- when other possible exposures may have occurred

What can defendants do?

- Ask ER about use of protective gear
  - social distancing
  - masks
  - gloves
  - sanitizers
  - disinfectant

- Did ER enforce use of those tools

33

COVID sick leave must predate TD/LC 4850 benefits

- SB 1159 mandates that COVID-related sick leave must be exhausted before TD/LC 4850 benefits begin.
- Feds: Mandated COVID sick leave in the FFCRA in March 2020 with many exceptions for:
  - ERs with more than 500 employees
  - Health care workers
  - ERs with less than 50 employees can be exempt

34

Sick leave? What sick leave?

- CA's AB 1867 plugged the FFCRA's exceptions and exclusions that were in the federal legislation, so it pretty much applies to almost all employers.
- Short version: Full time EE = 80 hours sick leave at regular pay. Part time EE = proportional sick leave.
- AB 1867 = effective immediately.
- Expires: When FFCRA expires. Either 12/31/20 (when FFCRA expires), or if FFCRA is extended.

AB 1867: Sick Leave

- How much? Regular rate of pay for last pay period or the state and local minimum wage.
- Highest rate of pay: $511/day, up to a max of $5,110 total for 80 hours.
- Doesn't provide sick leave for workers:
  - Caring for a quarantined family member.
  - Caring for a minor child whose school/childcare closed.
- Does mandate food sector workers wash hands every 30 minutes.

AB 685: Tell your employees

- AB 685, takes effect 1/1/21, requires ERs to give written notice to all employees and subcontractor's employees who worked at the same worksite as the infected person within the "infectious period."
- CDC defines "infectious period" as 2-14 days, although CA may clarify with a more specific definition in rules and regs.
- Notify all employees about all COVID-19 benefits under state/federal/local laws.
- Don't name the infectious person to coworkers!

AB 685: But wait, there's more!

- Notify all employees about the ER's disinfection and safety plan, which is supposed to conform to CDC guidelines.
- Written notice needs to contain the same information located in an incident report in a Cal/OSHA Form 300 injury and illness log in most cases.

AB 685: There's still more . . .

- AB 685 also has an "outbreak reporting" mechanism. It requires employers to notify local health departments about any outbreak as defined by the State Department of Health. Of course, the state uses a different definition of "outbreak" than the one defined in SB 1159.
- According to the State Department of Health's website, an outbreak is defined as "three or more laboratory-confirmed cases of COVID-19 among workers who live in different households within a two-week period."

SB 1146: Making Zoom Depos Easier

- Prior to SB 1146, some applicant's attorneys were objecting to Zoom depositions purely as a delay and obstruction tactic.
- CA Judicial Council adopted Emergency Rule 11 to allow court reporters to participate in depositions remotely. Eliminated the need for AA's consent to do a remote deposition.
- SB 1146 codified this by implanting it in the Code of Civil Procedure. (CCP 2025.310)
- SB 1146 = effective immediately!

Great, so what next?

- Generally speaking: expect more COVID legislation and regulations in 2021.
- Rules and regs from the DWC to clarify some of the oddities and inconsistencies in SB 1159. Could clarify:
  - Do HC ERs need to report under the outbreak statute?
  - Should cases before 7/6/20 be considered for an outbreak?
  - What presumptions do nonessential workers at police/fire/HC get?
- More OMFS updates for COVID drugs.
- More rules and regs impacting practice of law and court filings at WCAB.
- The 2021 Labor Code book will have all the rules/regs with correct numbers. (2020's did not, you had to look online.)

What next from CA in 2021?

- Vaccines, once widely available, could be required for kids to go back to school. Why not for the presumption to apply too? (Moderna and Pfizer have large recent trials showing 90%-95% efficacy.)
- More industry-specific worker protections.
- Probably some tweaks to how EDD administers unemployment benefits. (Their director just resigned in the wake of the unemployment mess.)
- A continued fight over independent contractors/employees as Newsom meets with labor to potentially challenge Prop 22.

What next from the feds in 2021?

- Biden administration reportedly plans on creating federal ER guidelines for COVID.
- Extension of program that allows hospitals to bill federal gov't for COVID.
- May see guidelines as to who gets the vaccine in tiers, ie Tier 1: highest risk, Tier 2: second highest risk, Tier 3: medium risk, Tier 4: everyone else.
- Vaccine cost subsidies.
- Health care worker protections.
- More unemployment subsidies?

California Rules and Regs

- Despite the pandemic, the DWC has plugged ahead with work on copy service fee proposal and med-legal fee proposal.
- Copy service fee proposal: Forum comments were posted in October 2020.
- Med-legal fee proposal: Forum comments posted in June 2020, hearing set for Dec. 14.

Copy Service Fee Proposal

- Subpoena reimbursement rate would increase from $180 to $210 for 500 pages or less.
- Would require a statement under penalty of perjury that:
  - Party who requested the records actually requested them.
  - Signed by that party who allegedly requested them.
  - Request was in good faith.
  - Request was not duplicative.
  - Request was necessary to litigate the claim.

Copy service fee proposal

- Why require a statement under penalty of perjury in the first place?
  - Long-running practices by bad actors automatically issuing subpoenas without a request from AAs to rack up billing.
  - (See comments under WCC article here.)
- Criticisms of the statement under penalty of perjury came from both sides of the aisle.
  - Labor: Creates an unnecessary burden on plaintiffs.
  - Defendants: Has no teeth, easily manipulated, and unenforceable.

Med-legal fee proposal

- Would increase med-legal evaluation to flat rates of:
  - $2,015 for initial evaluation.
  - Re-evaluations would be worth $1,316.25.
  - Both include 200 pages of records.
  - More than 200 pages of records? $3 a page.
- Supplemental report?
  - $650 for 50 pages of records.
  - Additional records? $3 per page.
- Declaration required by firm sending records, attesting to total number of pages.

Med-legal fee proposal

- Med-legal testimony? Taking a doctor depo?
  - $455 an hour
- Missed appointment?
  - $503.75
  - ERs could seek missed appointment fees against award.

Med-legal fee proposal

- Modifiers will go up for:
- Psyche QME:
  - Evals increase to 200%. Interpreter for psyche eval? Proposed to increase payments to 210%.
- AMEs:
  - Evals see increased fees by 135%, up to 145% when interpreter involved.
  - Psyche AMEs: Increased by 235% for eval, up to 245% when interpreter involved.
- Toxicology/oncology:
  - QMEs: 150% for evaluation, 160% for interpreter.
  - AMEs: 185% for eval, 195% for interpreter.

Med-legal fee proposal

- Agree or disagree? Make your voice heard on Dec. 14 at this hearing via Zoom or telephone!
- Access information is located at this link:
- https://www.dir.ca.gov/dwc/DWCPropRegs/2020/Medical-Legal-Fee-Schedule/Med-Legal-Fee-Schedule.htm

Brief Case Law Update

En bancs:
- Anthony Dennis and the voucher
- Kris Wilson and catastrophic injuries

Others:
- Hikida/Justice and apportionment
- Colamonico and copy service liens

En banc WCAB: Anthony Dennis

- Fact pattern:
  - Applicant injured while working as an inmate. Parties settled via stipulated award. Defendant prison sent offer of work, even though applicant was no longer in prison.
- Issue: Defendant liable for voucher?
- Answer: Yes.
- Takeaways:
  - Offer of work must be "bona fide" in order to avoid voucher liability.
  - WCAB is proper venue to decide if voucher owed.
  - https://bradfordbarthel.blogspot.com/2020/05/anthony-dennis-and-bona-fide-offer-of.html

6th DCA: Justice published decision

- *County of Santa Clara v. Justice, 5/27/20 6th DCA*
- Appellate court stated defendant is able to apportion to preexisting nonindustrial arthritis after applicant had a slip and fall that caused knee injuries.
- Applicant required two total knee replacements, but bulk of cause was due to nonindustrial arthritis.
- Trial judge and WCAB used Hikida to deny apportionment, but 6th DCA reversed them.

6th DCA: Justice decision

Takeaways from this decision:

- If applicant has a significant preexisting nonindustrial condition that is later aggravated by a work injury and creates a larger PD award, then Justice decision can be used to argue for apportionment of PD to nonindustrial factors.
- Here, applicant's total knee replacement wasn't caused by the slip and fall – but by the years of nonindustrial arthritis.
- Apportionment warranted.

En banc WCAB: Colamonico

Ashley Colamonico v. Secure Transportation 11/14/19

Takeaways:

- Copy service LCs must establish that:
  - There is a contested claim
  - Services were incurred for proving/disproving contested claim
  - Expenses were reasonable and necessary
- Defendant's failure to issue EOR does not constitute a waiver of objections. Still, we recommend issuing EORs or some kind of objection to copy service liens.

En banc WCAB: Kris Wilson

- The WCAB explained how psyche PD secondary to orthopedic trauma can be compensable due to an injury being "catastrophic" in *Wilson v. State Cal Fire*, 84 Cal. Comp. Cases 393, 2019 Cal. Wrk. Comp. LEXIS 29 (W.C.A.B. May 10, 2019).
- SB 863 normally bars psyche PD secondary to orthopedic trauma.
- Exception: If it's catastrophic!

En banc WCAB: Kris Wilson

- Applicant was a firefighter who got smoke inhalation. Looked minor at first, required hospitalization shortly after.
- Month long hospital stay, involuntary coma, near death experience.
- Waking up while intubated, causing panic attacks/nightmares later.
- Renal failure and liver problems.
- Can't return to work as a firefighter, too strenuous, too many restrictions on ADLs.
- AMEs/QMEs in 4+ specialties

En banc WCAB: Kris Wilson

Takeaway: Catastrophic injuries are not your standard, run-of-the-mill case, and that the applicant:

- was unconscious for a few weeks in the ICU and almost died from his injuries;
- has numerous restrictions on his activities daily living, ranging from vision, memory, sleep, orthopedic limitations, and breathing issues;
- cannot return to his work as a firefighter.

Board won't consider when deciding "catastrophic":

- impact on earnings,
- there is no "magic number" of PD makes it catastrophic.

John Kamin, Esq.
B&B Woodland Hills
Office: (818) 654-0412
jkamin@bradfordbarthel.com

Zane Uribarri, Esq.
B&B Ontario
Office: (909) 476-0552
zuribarri@bradfordbarthel.com