

California Coronavirus AOE/COE Presumptions

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3

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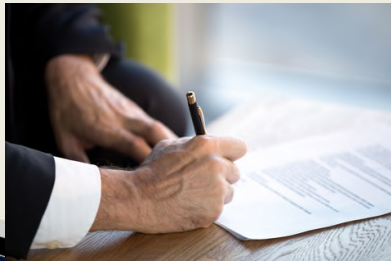


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4

SB 1159: Up for Newsom's approval

- ▶ Legislature sent to Gov. Newsom on 8/31.
- ▶ Gov. Newsom has until 9/30 to sign, veto, or request more changes.
- ▶ Seems most likely he will sign/approve it.
- ▶ Once signed, it takes effect immediately.
- ▶ Contains multiple rebuttable presumptions, which are...



5

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.



6

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.
- ▶ Okay, now let's move onto the presumptions.



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7

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 direction.
- ▶ Applies to all firefighters, "peace officers," law enforcement, and specific health care workers.



8

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.



9

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 after Day 30 may be used to rebut claim.
- 30-day decision timeframe triggered by filing of DWC-1 form.



10

SB 1159: Police/Fire/Health

Additional note about the Police/Fire/Health presumption:

- Employers of the health care workers mentioned in this section of the bill can rebut claims by proving the applicant didn't have contact with a patient who tested positive for COVID within last 14 days of their employment.



11

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.



12

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 injury. Outbreak is defined by the “Four and Four” Rule.



13

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.)



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

- ▶ DOI is defined by last day employee worked for employer.
- ▶ 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 within 14 days from their last day of work.
- ▶ Ex: Last day of work 8/31/20? Outbreak may not be known between 8/17/20-9/14/20.



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SB 1159: But What if No Outbreak?

- ▶ Remember, we're still under the "Everyone oElse" 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.



16

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.



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SB 1159: More 14 Day Notes

- ▶ Remember earlier, when we said “testing positive within 14-day period of LDW?”
- ▶ That means that EE:
 - Took a test within 14 days of last day of work for employer.
 - If test result comes back later, it probably still counts as a timely test because the EE took it within 14 days of last day of work. EE has no control over how quickly labs return results.
 - For “outbreaks,” the test must have occurred during the 14-day outbreak period.



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SB 1159: Date of Injury?

- ▶ Under Valley Fever cases, DOI is usually a CT centered around when symptoms began.
- ▶ Not the case with COVID-19 and SB 1159, which clearly say:
 - DOI is last date of work employee performed at the employer's place of employment. (Remember, at-home employees still excluded.)

***Raises the possibility of having two claims for COVID-19 if concurrent employers. Reimbursement theory to recoup costs, instead of contribution.



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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>



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20

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).



21

SB 1159: Recap

- ▶ Three rebuttable presumptions:
 - ▶ Police/Fire/Health Care Workers
 - 30-day decision timeframe
 - 7/6/20-1/1/23
 - ▶ "Everyone Else"
 - 45-day decision timeframe
 - 7/6/20-1/1/23
 - ▶ Executive Order
 - 30-day decision timeframe
 - 3/19/20-7/5/20



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22

Executive Order

- ▶ We've talked so much about the new stuff in SB 1159, let's not forget about the Executive Order which governs 3/19/20–7/5/20.
- ▶ SB 1159 codified the Executive Order, ie they copied/pasted the bulk of the EO into the Labor Code.



23

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!!!)



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What does the EO say?

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



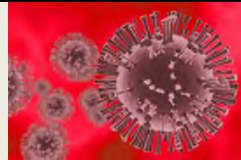
- ▶ does not apply to employees who only work from home
- ▶ no limitation to "essential workers" meaning?
=applies to all types of businesses



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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



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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"



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How quickly?

- ▶ can only be rebutted with evidence that is "discovered subsequent to the 30-day period."

SURPRISE: it does not say "evidence that could have been discovered" during the initial 30-day timeframe



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Meaning?



discover new evidence after initial 30 days?
=
may use to rebut presumption



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29

TD

Hopefully EE won't be out of work too long...

Got paid sick leave benefits available in response to COVID-19

=
must be exhausted before TD
or



Labor Code 4850 benefits
(public safety officers)
may begin



30

Hopefully EE won't be out of work too long...

Disabled?

When does TD begin?

NOW

(no "waiting period")

But then "how does EE qualify for TD or LC 4850 benefits?"

Let's find out...



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"how does EE qualify for TD or LC 4850 benefits?"



1) 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...



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“how does EE qualify for TD or LC 4850 benefits?”

- 2) if tested positive or a positive diagnosis between 3/19–5/5, must obtain TD certification w/in 15 days of May 6

HUH?

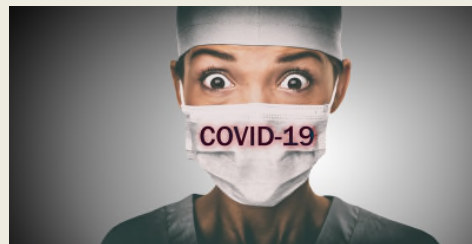
IF DOI is March 19 – May 5,
THEN must get TD cert by May 21, 2020



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Who can certify for TD/LC 4850?



Only “a physician pursuant to Chapter 5, Division 2 of the Business Code.” In other words, a MD or DO. (This is slightly different from the original version of the Executive Order.)



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34

30 days have passed?

Don't stop discovery!

REMEMBER: even if claim is presumed compensable, subsequently discovered evidence can rebut the presumption



35

EO: No DWD!

DIR is instructed to waive collection on any death benefit payment due pursuant to Labor Code section 4706.5 arising out of claims covered by Executive Order

Meaning?
Death case?

No one entitled to dependency death benefit?

=

DIR/General Fund gets NOTHING

How much saved?
equal to the **total dependency** payable to a **surviving spouse**



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36

Any other death benefit savings?

No dependents?

Accrued and unpaid compensation (TD/PD)?

=

DIR/General Fund gets NOTHING



YAWN!

Who cares...?

It's only for a few months...

RIGHT?



NOPE!

Despite length listed on Exec. Order will have far-reaching (expensive) effects

There WILL be death claims
There WILL be huge medical complications resulting in MASSIVE medical costs



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39

What can ERs do?

Do a thorough factual investigation from the outset of the claim

Build a timeline of

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



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What can ERs do?

- ▶ Ask EE about other potential sources of exposure



- family members
- friends
- shopping trips
- recreation (hiking, walking, bike paths, etc).



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What can ERs do?

- ▶ Ask ER about use of protective gear

- social distancing
- masks
- gloves
- sanitizers
- disinfectant



- ▶ Did ER enforce use of those tools



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42

What can ERs do?

Issue subpoenas for medical records from

- urgent care clinics
- personal physicians
- hospitals



- ▶ Pay attention to available contact tracing data
- ▶ Performing medical canvassing if one does not know exactly where the applicant has treated (suspicious if EE can't tell you!)



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43

30 days have passed?

Don't stop discovery!

REMEMBER: even if claim is presumed compensable, subsequently discovered evidence can rebut the presumption



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44

TAKEAWAY



It's not forever (it just seems that way!)

GOOD NEWS: expires 1/1/23

BAD NEWS: could be extended with additional legislation in future years



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45

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46