



### **Background Summary and Industry Impact**

On September 17, 2020, Governor Newsom signed [SB 1159](#) into law. For employers with more than 5 employees, the bill established a workable presumption of compensability for employees who contract COVID-19 from any employer that experiences an "outbreak" of COVID-19 cases at a particular work location from July 6, 2020. The bill also retroactively codified the Executive Order (E.O.) previously signed by Governor Newsom, which covered workers' compensation liability only from March 19, 2020 through July 5, 2020. On September 29, 2022, [AB 1751](#) extended the presumptions in this law until January 1, 2024.

It should be noted that this law does not remove or change the recent industry amendments to the California Workers' Compensation Uniform Statistical Reporting Plan—1995 (USRP) and the California Workers' Compensation Experience Rating Plan—1995 (ERP) which exclude COVID-19 claims from a contractor's experience modification rate (EMR).

**For compliance purposes, below is an overview of SB 1159 as it relates to the construction industry, and steps contractors must take.**

### **Rebuttable Presumptions – When COVID-19 Cases are Considered Work-Related**

Rebuttable presumptions were established for employers to owe workers' compensation to employees contracting COVID-19. In other words, in the situations defined by this law, employees are presumed to have contracted COVID-19 while working for the employer, unless the employer can prove otherwise.

**The bill specifically allows employers to refute the presumption by pointing to measures they took to reduce the potential transmission of the disease or pointing to a worker's non-occupational risks of COVID-19 infection.**

1. **Labor Code 3212.86:** Retroactively codifies Governor Newsom's May 6, 2020 Executive Order N-62-20 that created a rebuttable presumption that workers who contracted COVID-19 while working outside of their homes did so during employment. This only applies to Dates of Injury (DOI) from 3/19/2020 through 7/5/2020, with three minor clarifications/changes to the original Executive Order:
  - The DOI is to be considered the LAST date on which the employee performed services at the place of employment.
  - A diagnosis that is provided within 14 days of the DOI must be done by a licensed physician or surgeon holding an MD or DO degree, or a state licensed Physician's Assistant or Nurse Practitioner acting under review/supervision.
  - The diagnosis must be confirmed by a COVID-19 test (PCR test), or a serologic test (aka, an antibody test), within 30 days of the date of the diagnosis.
2. **Labor Code 3212.88:** Effective from 7/6/2020 until 1/1/2024, COVID-19 claims will be rebuttably presumed compensable **only** during a period defined as an "outbreak."
  - **"Outbreak" is when one of the following occurs within a 14-calendar day period:**
    - An employer has 100 or fewer employees at that specific place of employment and at least four (4) employees test positive for COVID-19.

- An employer has more than 100 employees at that specific place of employment, including job sites, and at least 4% of the number of employees who reported to the site test positive for COVID-19.
- If the employee works at multiple sites at the direction of his/her employer, then the employee's positive test must be counted at each of those sites, and if any of them is thus determined to be an "outbreak" location then that location is the "specific place of employment," and the employee is considered to have a DOI during an outbreak.
- The location is ordered to close by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent due to a risk of infection with COVID-19.
- **COVID-19 is rebuttably presumed compensable for workers during an outbreak if:**
  - An employee tests positive for COVID-19 within 14 days after a day that employee performed labor or services at the employee's site at the employer's direction, and the positive test occurred during a one-calendar day period of an outbreak as previously defined.
  - The "Test" is a PCR (Polymerase Chain Reaction) test approved for use to detect the presence of viral RNA. (Note: approved testing does not include "serologic testing," aka, antibody testing).
  - Presumption applies for 14 days after last date worked, even if employee has been terminated.
  - 45 Day Compensability Decision: If a claim is not rejected within 45 days after the date the claim form is filed, the COVID-19 claim is presumed compensable.
- If the definition of an "outbreak" is not met and there are still employees who test positive for COVID-19, the presumption and rules outlined above do not apply. In this scenario, the standard rules around establishing compensability will apply, meaning the employer and claim administrator have 90 days in which to conduct their investigation from the date the DWC-1 claim form is filed.

## **What this Means for Employers Reporting and Filing Claims**

### **1. Reporting Requirements**

- **Outbreaks on or after September 17, 2020:** Employers need to keep records of a possible COVID-19 outbreak, regardless of whether an employee who tests positive for COVID-19 files a claim or not. When the employer knows or reasonably should know that an employee tested positive for COVID-19, they must report all of the following data to their claim administrator **within three business days** (in writing via electronic mail or fax):
  - That an employee has tested positive. For purposes of this reporting, the employer shall not provide any personally identifiable information regarding the employee who tested positive for COVID-19 unless the employee asserts the infection is work related or has filed a claim form pursuant to [California Labor Code Section 5401](#).
  - The date that the employee tests positive, which is the date the specimen was collected for testing.
  - The specific address or addresses of the employee's specific place of employment during the 14-day period preceding the date of the employee's positive test.
  - The highest number of employees who reported to work at the employee's specific place of employment in the 45-day period preceding the last day the employee worked at each specific place of employment.
- **Employees who tested positive on or after July 6, 2020 and prior to September 17, 2020:** Employers must retroactively report any employees who tested positive for COVID-19 within 30 business days of September 17, 2020. The report must be made in writing via electronic mail or fax and include all of the following:
  - That an employee has tested positive. For purposes of this reporting, the contractor shall not provide any personally identifiable information regarding the employee who tested positive for COVID-19 unless the employee asserts the infection is work related or has filed a claim form pursuant to [California Labor Code Section 5401](#).

- The date that the employee tested positive, which is the date the specimen was collected for testing.
- The specific address or addresses of the employee's specific place of employment during the 14-day period preceding the date of the employee's positive test.
- The highest number of employees who reported to work at each of the employee's specific places of employment on any given workday between July 6, 2020 and September 17, 2020.

## **2. Record-Keeping Recommendations**

- Maintain daily records that are able to show which employees worked at specific locations on given days, or that may be working from home, including any employees that may work from home on a part-time basis and go into their place(s) of employment the remainder of the work week.
- Keep a log of the actual number of employees that reported to work at the affected employee's place of employment and the specific number of employees that test positive for COVID-19.
- Any time an employee believes the infection is work-related and requests to file a workers' compensation claim, a [DWC-1 claim](#) form should be provided to the employee and the claim should be reported to the carrier regardless of whether there is an "outbreak" or potential presumption. The carrier will assess whether the presumption applies or whether the general compensability rules apply.

## **3. Penalties for Failure to Report Employees with COVID-19**

Where an employer fails to submit timely or intentionally submits false or misleading information, they shall be subject to a \$10,000 civil penalty.

*Contact your workers' compensation insurance carrier or broker with any questions.*