



# California Enacts New COVID-19 Employer Reporting Requirement

Insights

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Governor Newsom just signed into law a bill that will require public and private California employers to provide detailed notices to employees when there is a COVID-19 exposure in the workplace, and to provide notice to local public health departments for COVID-19 “outbreaks.” [AB 685 \(Reyes\)](#), which will go into effect on January 1, 2021, uses vague language and three different definitions of who must receive notice, so employers will need to pay close attention in order to be in compliance come January.

## What Triggers The Notice Requirement?

The new law requires California employers to provide notice within one business day when they receive notice of a potential exposure of COVID-19. So when does an employer receive “notice of potential exposure” to COVID-19? The new law defines it to include any of the following:

- Notification from a public health official or licensed medical provider that an employee was exposed to a “qualifying individual” at the worksite;
- Notification from an employee or their emergency contact that the employee is a “qualifying individual”;
- Notification through the testing protocol of the employer that the employee is a “qualifying individual”; or
- Notification from a subcontracted employer that a “qualifying individual” was on the worksite.

A “qualifying individual” is someone who (1) has a laboratory-confirmed case of COVID-19; (2) has a positive COVID-19 diagnosis from a licensed health care provider; (3) has a COVID-19 related order to isolate from a public health official; or (4) has died from COVID-19.

In addition, if the number of cases meets the definition of a COVID-19 “outbreak” as defined by the State Department of Public Health (generally three cases), the employer must provide notice within 48 hours to the local public health agency. This notice must include the names, number, occupation and worksite of the employees, and the business address and NAICS code of the worksite. An employer that has such an outbreak must also notify the local public health department of any subsequent laboratory-conformed cases of COVID-19 at the worksite.

## Who Must Be Notified? What Must The Notice Include?

### **WHO MUST BE NOTIFIED? WHAT MUST THE NOTICE INCLUDE?**

The new law requires that written notice must be provided to employees, their exclusive representative (if any), and the employers of any subcontracted employees.

However, the new law uses unclear and conflicting language in describing the different types of notice that must be provided to different categories of employees.

**First**, the new law provides that the employer must give notice to employees (and their exclusive representative, if any) and the employers of subcontracted employees, ***who were on the premises at the same worksite as the qualifying individual*** within the infectious period (as defined by the State Department of Public Health) that they may have been exposed to COVID-19.

This written notice must be provided in the manner the employer normally uses to communicate employment-related information and may include, but not be limited to, personal service, email, or text message if it can reasonably be anticipated to be received by the employee within one business day. The notice shall be in both English and the language understood by the majority of the employees.

In addition, the new law provides that this notice to any exclusive representative must contain the same information as would be required in an incident report in a Cal/OSHA Form 300, unless the information is inapplicable or unknown to the employer.

**Second**, the new law requires the employer to provide all employees (and their exclusive representative, if any) ***who may have been exposed*** with information regarding COVID-19-related benefits to which the employee may be entitled under applicable federal, state, or local laws. This includes, but is not limited to, workers' compensation, and options for exposed employees, including COVID-19-related leave, company sick leave, state-mandated leave, supplemental sick leave, or negotiated leave provisions. This also must include anti-retaliation and anti-discrimination protections of the employee.

**Third**, the new law requires employers to notify ***all employees*** (and their exclusive representative, if any) of the disinfection and safety plan that the employer plans to implement and complete per the guidelines of the federal CDC.

Therefore, because the new law uses three potential different categories of employees to whom notice must be provided (those who were on the premises at the same time as a qualifying individual, those who "may have been exposed," and "all employees"), the groups of employees who receive these notices do not match. This makes complying with the different notice requirements confusing, complex and potentially duplicative.

### **Are There Any Exemptions?**

The written notice requirement does not apply to a "health facility" as defined in Section 1250 of the Health and Safety Code. However, in a subsequent "Letter to the Journal" (stating the author's legislative intent), the author indicated that the law is also intended to exempt "additional health

facilities that are defined elsewhere but that are also already required to report workplace COVID-19 exposures and cases to the state Department of Public Health, or local health departments pursuant to state or federal law.”

In addition, the new law does not apply to employees who, as part of their duties, conduct COVID-19 testing or screening or provide direct patient care or treatment to individuals who are exposed to or test positive for COVID-19, unless the qualifying individual is an employee at the same worksite.

### **The Shame Game**

Unfortunately, the new law also includes a troubling “name and shame” provision that requires the State Department of Public Health to publish information that it receives for local public health departments on their website. This information must allow the public to track the number and frequency of COVID-19 outbreaks and the number of COVID-19 cases and outbreaks by industry reported by any workplace.

This requirement seems particularly troubling from a timing standpoint. By the time a positive case is reported to the employer, reported to the local public health department, and then reported to the state and published on the state website, one or two weeks may have passed. During that time, the infected employee is likely to have already received treatment and the workplace will already have been cleaned and disinfected. However, the public and customers may see this information and incorrectly assume that there is a current hazard at the business.

Unfortunately, this dynamic is likely to influence customer behavior for no rational public health reasons. Despite strong opposition from the business community, this “name and shame” provision was included in the final version of the bill that was enacted.

### **Shut ‘Em Down!**

Although Cal/OSHA likely already had the authority to shut down places of employment under certain circumstances related to COVID-19, the new law also specifically provides that Cal/OSHA can prohibit operations where a worksite exposes employees to COVID-19 so as to constitute an imminent hazard. This provision remains in effect only until January 1, 2023.

### **Next Steps**

California employers should immediately begin the planning process for complying with the notice requirements contained in AB 685. Of course, the best way to avoid having to provide notice of COVID-19 exposure is to have good protocols in place to prevent workplace exposures in the first place. However, even with the best plans in place, there are no guarantees that workplace exposures can be completely eliminated in light of community spread of COVID-19.

Because the new law has very detailed written notice requirements that must contain very prescriptive information (and very little time to provide it), employers should work with counsel now to establish procedures and protocols to be ready to go by January 1, 2021.

For further information on how to prepare for compliance with these new requirements, contact your Fisher Phillips attorney, any attorney in [our California offices](#), or any [member of our COVID-19 Taskforce](#). You can also review our nationwide [Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus](#) and our [FP Resource Center for Employers](#), maintained by our Taskforce.

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*This Legal Alert provides an overview of a specific law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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**Benjamin M. Ebbink**

Partner

916.210.0400

Email

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