California Enacts Workers' Compensation Presumption That Applies To Most Employers With COVID-19 "Outbreaks"

Insights
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California Governor Gavin Newsom just signed legislation that establishes a workers' compensation presumption that will apply to most employers in the state that have a COVID-19 "outbreak" through 2022 – meaning it is much more likely that worker infections will be covered under workers' comp coverage. This legislation, Senate Bill 1159, will shift the burden of proof to presume that covered workers who contracted COVID-19 did so at work, unless the employer can prove otherwise. The new legislation also enacts a rebuttable presumption that applies to first responders and certain health care workers. Finally, the law requires employers to provide notice to their workers' compensation carrier of employees who test positive for COVID-19. SB 1159 was enacted as an "urgency" measure and therefore went into effect immediately. What do California employers need to know about this new law?

Quick Background

As we noted back in May, Governor Newsom enacted an Executive Order that created a COVID-19 workers' compensation presumption for any employee who worked outside the home during the statewide shelter-in-place order.

Under the California workers' compensation system, employees need to present some medical evidence that their illness or injury was related to work in order to qualify for benefits. To meet that important threshold, they need to establish some reasonable factual basis for asserting that the workplace caused their illness or injury.

However, the Executive Order turned that analysis on its head. Instead, if any "covered worker" contracted COVID-19 during the period of time covered by the order, the illness would be automatically "presumed" to be work-related without the employee having to provide any further proof.

The Executive Order expired on July 5, 2020. When the California legislature returned to Sacramento this summer, there was a flurry of activity to establish a COVID-19 presumption moving forward, and at least three separate bills were introduced to do so. Ultimately, the only measure to make it to the governor's desk was SB 1159, which he just signed into law and which goes into effect immediately.

Codification of Previous Executive Order

When Governor Newsom issued his Executive Order in May, there was some speculation about whether he had the legal authority to create such a presumption unilaterally, without legislative involvement. Therefore, the first thing SB 1159 is to put these legal arguments to rest by codifying the terms of the previous Executive Order into a rock-solid state statute.

Rebuttable Presumption For First Responders And Health Care Workers

SB 1159 establishes a similar rebuttable presumption for COVID-19 cases contracted by certain first responders and health care workers. This presumption applies from July 6, 2020 and will operate until January 1, 2023.

Specifically, this presumption covers firefighters, peace officers, employees of health facilities who provide direct patient care or custodial services, nurses, EMTs, and employees who provide direct patient care for home health agencies. The presumption also applies to other employees of health facilities, but the presumption for these employees does not apply if the employer can show the employee did not have contact with a patient who tested positive for COVID-19.

"Outbreak" Presumption Applies To Most Other California Employers

For all other California employers with five or more employees, SB 1159 adopts a complicated "outbreak" analysis that will be complex to implement and administer. The new law establishes a rebuttable presumption that will apply if an "outbreak" occurs, which is defined as any of the following:

- If the employer has 100 employees or fewer: four employees test positive for COVID-19 with 14 calendar days;
- If the employer has more than 100 employees: 4% percent of the number of employees test positive for COVID-19 within 14 calendar days; or
- The place of employment is ordered closed by public authorities due to a risk of infection with COVID-19.

This presumption goes into effect immediately, and relates back to cases arising or after July 6, 2020. This presumption will apply until January 1, 2023.

New Employer Reporting Requirements

SB 1159 also contains some new reporting requirements about which California employers need to be aware.

First, the new law says when an employer "knows or reasonably should know" that an employee has tested positive for COVID-19, it shall report the following information to its workers' compensation claims administrator within three business days:

- An employee has tested positive;
- The date that the employee tests positive (the date the specimen was collected for testing);

- The specific address or addresses of the employee's place of employment during the 14-day period preceding the positive test; and
- The highest number of employees who reported to work in the 45-day period preceding the last day the employee worked at the place of employment.

SB 1159 allows the Labor Commissioner to impose up to a $10,000 civil penalty against an employer that submits false or misleading information or fails to submit information in violation of these new reporting requirements.

Second, SB 1159 requires covered employers to go back and report any positive tests (and the same information above) to their claims administrator dating back to July 6, 2020. Because the presumption applies retroactively back to July 6, employers have to report this information to see if the rebuttable presumption will apply. You will need to move quickly as you only have 30 business days from the date the bill was signed (September 17) to report this previous information to their claims administrator.

What's Next For California Employers?
California employers should take heed of these significant developments as SB 1159 goes into effect immediately. As discussed above, the new law has some significant reporting requirements (including going back and reporting on positive cases dating back to July 6, 2020 by October 17). SB 1159 also has some shortened timeframes and other procedural changes to handling COVID-19 workers' compensation claims. Therefore, employers should immediately work with employment counsel and the workers' compensation claims administrator how to implement these new reporting requirements and how to best manage claims handling starting immediately.

Conclusion
Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, any attorney in our California offices, or any member of our Post-Pandemic Strategy Group Roster. You can also review our FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers and our FP Resource Center For Employers.

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