

COVID-19 and AB 685/SB 1159: What Employers Need to Know

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November 24, 2020



Questions?

Please direct them to the following email address:

webinarquestions@alvaradosmith.com

Please include your name, company, and phone number



AB 685: Overview

- ❑ **Governor Newsom signed AB 685 on September 17, 2020 as non-emergency legislation**
- ❑ **Goes into effect January 1, 2021**
- ❑ **Expires on January 1, 2023**
- ❑ **Provides for new employer notice and reporting requirements**
- ❑ **Expands Cal/OSHA's authority to shut down worksite which are experiencing an "outbreak" as defined in the statute**
- ❑ **Exempts Cal/OSHA serious citations alleging a serious violation relating to COVID-19 from the precitation standardized "1BY" form provision process**

AB 685: New Employer Notice Requirements

- ❑ Effective January 1, 2021, employers who receive a “*notice of potential exposure*” to COVID-19 must provide a *written notice* to other employees within *one day* of notice of the potential exposure
- ❑ The notice must be provided to all employees and employers of subcontracted employees who were on the employer’s “*worksites*” at the same time as the “*qualifying individual*” within the “*infectious period*” that they may have been exposed to COVID-19

AB 685: New Employer Notice Requirements

- ❑ A “*qualifying individual*” is any person who has any of the following:
 - ❑ A laboratory-confirmed case of COVID-19, as defined by the State Department of Public Health; **or**
 - ❑ A positive COVID-19 diagnosis from a licensed health care provider; **or**
 - ❑ A COVID-19-related order to isolate provided by a public health official; **or**
 - ❑ Died due to COVID-19, in the determination of a county public health department or per inclusion in the COVID-19 statistics of a county
- ❑ A positive test means a positive result on any viral test for COVID-19 (this clarifies a previous uncertainty as to whether a presumptive positive COVID-19 test (the individual has tested positive for the virus at a local or state level, but the results have not yet been confirmed by the CDC) would be considered a laboratory-confirmed case)

AB 685: New Employer Notice Requirements

- ❑ **“*Notice of potential exposure*”** means **any** of the following:
 - ❑ Notification to the employer or representative **from a public health official or licensed medical provider** that an employee was exposed to a qualifying individual at the worksite; or
 - ❑ Notification to the employer or representative from an **employee, or their emergency contact**, that the employee is a qualifying individual; or
 - ❑ Notification through the **testing protocol of the employer** that the employee is a qualifying individual; or
 - ❑ Notification to the employer or representative from a **subcontracted employer** that a qualifying individual was on the worksite of the employer

AB 685: New Employer Notice Requirements

- ❑ **“*Worksite*”** means the building, store, facility, agricultural field, or other location where a worker worked during the infectious period
- ❑ It does not apply to buildings, floors, or other locations of the employer that a qualified individual did not enter
- ❑ In a multiworksite environment, the employer need only notify employees who were at the same worksite as the qualified individual

AB 685: New Employer Notice Requirements

☐ “*Infectious period*”

- ☐ For individuals *with symptoms*, the infectious period begins 2 days before first development of symptoms and ends when the following criteria are met
 - ☐ 10 days have passed since symptoms first appeared; *and*
 - ☐ At least 24 hours have passed with no fever (without the use of fever-reducing medication); *and*
 - ☐ Other symptoms have improved
- ☐ For individuals *without symptoms*, but who test positive, the infectious period begins 2 days before the specimen for their first positive test was collected and ends 10 days thereafter

AB 685: New Employer Notice Requirements

- ❑ **Written notice must be provided to:**
 - ❑ **All employees who were at the worksite within the infectious period who may have been exposed to COVID-19**
 - ❑ **All employers of subcontracted employees who were at the worksite within the infectious period who may have been exposed to COVID-19**
 - ❑ **All employee representatives, including unions and sometimes attorneys, who may represent employees**
- ❑ **Written notice may be given via personal service, email, or text message if it can reasonably be anticipated to be received by the employee within one business days of sending**
- ❑ **Written notice must be in both English and the language understood by the *majority* of employees**

AB 685: New Employer Notice Requirements

- ❑ **Written notice must contain:**
 - ❑ **Notification that a potential exposure has occurred; and**
 - ❑ **Information regarding COVID-19-related benefits to which the employee may be entitled under applicable federal, state, or local laws, such as workers' compensation benefits, emergency paid sick leave, company sick leave, or and other leaves which the company may make available; and**
 - ❑ **Anti-retaliation and anti-discrimination protections the employee has pursuant to state law; and**
 - ❑ **Information regarding the company's disinfection and safety plans which the company plans to implement and complete per CDC guidelines**

AB 685: New Employer Reporting Requirements

- ❑ AB 685 also requires employers to report COVID-19 “**outbreaks**” to the local public health agency in the jurisdiction of the worksite
- ❑ “**Outbreak**” is defined by the California Department of Public Health as “at least three probable or confirmed COVID-19 cases within a 14-day period in people who are epidemiologically-linked in the setting, are from different households, and are not identified as close contacts of each other in any other case investigation.”
- ❑ Any outbreak must be reported within **48 hours** of learning of the outbreak
- ❑ The employer must provide notification to the local health department of the names, numbers, occupations, and worksite of employees who meet the definition of a “qualifying individual”
- ❑ The employer must also report the business address and NAICS code of the worksite where the qualifying individuals work

AB 685: New Employer Reporting Requirements

In addition...

- The employer that has an outbreak must continue to give notice to the local health department of any subsequent laboratory-confirmed cases of COVID-19 at the worksite

The reporting obligation is ongoing...

AB 685: New Authorities for Cal/OSHA

- ❑ AB 685 fast tracks the timeline for issuing serious citations
- ❑ Usually, when Cal/OSHA intends to issue a serious citation, it first sends the employer a “1BY” notice, providing 15 days for the employer to provide additional evidence to support a defense, which could potentially inform whether Cal/OSHA will issue a serious citation
- ❑ AB 685 removes the “1BY” notice provision for COVID-19-related hazards.

Employers must closely monitor the statute of limitations to ensure that once they receive a serious citation, they immediately evaluate the classifications, allegations, and proposed penalties and determine whether an appeal is necessary

AB 685: New Authorities for Cal/OSHA

- ❑ AB 685 grants Cal/OSHA expansive new authorities to close down worksites which constitute an ***“imminent hazard to employees”*** due to COVID-19
- ❑ The closure must be limited to the immediate area where the “imminent hazard exists,” and Cal/OSHA cannot prohibit entry to any areas that are outside of the hazard area
- ❑ Cal/OSHA must post a notice in a conspicuous place at the place of employment making this determination
- ❑ Cal/OSHA must permit entry to the worksite for activities to eliminate the dangerous condition
- ❑ Waives some of the notice provisions Cal/OSHA must usually comply with, so employers must be prepared to act immediately if a worksite gets closed

SB 1159: Workers' Compensation Presumptions Expanded

- ❑ SB 1159 codifies Governor Newsom's executive order which created a rebuttable presumption that certain employees who test positive for COVID-19 contracted the virus at work for workers' compensation purposes
- ❑ Newsom's order expired on July 5, 2020
- ❑ SB 1159 creates a "***disputable presumption***" of workers' compensation coverage for an employee who suffers illness or death resulting from COVID-19 on or after July 6, 2020 through January 1, 2023
- ❑ Any positive tests which occurred prior to July 6, 2020 would still be covered by the Governor's executive order

SB 1159: Workers' Compensation Presumptions Expanded

- ❑ The presumption applies to all employees who:
 - ❑ Test positive during an “**outbreak**” and the employee’s “**specific place of employment**”; and
 - ❑ Whose employer has five or more employees
- ❑ The presumption only applies if all of the following conditions are met:
 - ❑ The employee tests positive within 14 days after a day that the employee performed labor or services at the employee’s place of employment
 - ❑ The day the employee performed labor or services was on or after July 6, 2020
 - ❑ The employee’s positive test occurred during a period of an outbreak at the employee’s specific place of employment
- ❑ A looser presumption applies for certain frontline and healthcare employees

SB 1159: Workers' Compensation Presumptions Expanded

- ❑ An “**outbreak**” exists if within 14 calendar days one of the following occurs at a specific place of employment:
 - ❑ If the employer has 100 employees or fewer at a specific place of employment, 4 employees test positive for COVID-19
 - ❑ If the employer has more than 100 employees at a specific place of employment, 4 percent of the number of employees who reported to the specific place of employment test positive for COVID-19
 - ❑ A specific place of employment is ordered to close by a local public health department, the State Department of Public Health, Cal/OSHA, or a school superintendent due to a risk of infection with COVID-19

SB 1159: Workers' Compensation Presumptions Expanded

- ❑ A “***specific place of employment***” is defined as the building, store, facility, or agricultural field where an employee performs work at the employer’s direction
- ❑ Does ***not*** include the employee’s home or residence, unless the employee provides home health care services to another individual at the employee’s home or residence
- ❑ For employees who perform work at the employer’s direction in multiple locations within 14 days of the employee’s positive test, the positive test will be counted for purposes of determining the existence of an outbreak at each of those places of employment
- ❑ If an outbreak exists at any one of those places of employment, that place will be deemed the employee’s specific place of employment

SB 1159: Workers' Compensation Presumptions Expanded

- The presumption can be rebutted with evidence, which may include but is not limited to:**
 - Evidence of measures in place in the workplace to reduce the potential transmission of COVID-19**
 - Evidence of an employee's nonoccupational risks of COVID-19 infection**
 - Statements made by the employee**
 - Any other evidence normally used to dispute a work-related injury**

SB 1159: Expanded Claims Reporting Requirements

- ❑ When an employer “knows or reasonably should know that an employee has tested positive for COVID-19,” the employer must report to its claims administrator the following information *within three business days via fax or email*:
 - ❑ An employee has tested positive. The employer may not identify the employee unless the employee asserts the infection is work-related or has filed a DWC-1
 - ❑ The date the employee tested positive—this is the date the specimen was collected for testing
 - ❑ The address/addresses of the employee’s specific place(s) 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

SB 1159: Expanded Claims Reporting Requirements

- ❑ **There are separate reporting requirements for positive tests between July 6, 2020 and September 17, 2020 (the date the law went into effect)**
- ❑ **If an employer is aware of an employee who has tested positive (regardless of whether the infection is work-related) during this period, the employer must report the information to its claims administrator within 30 business days of September 17, 2020**
- ❑ **The employer must report the highest number of employees who reported to work at each of the employee's specific places of employment on any work date between July 6, 2020 and September 17, 2020**

SB 1159: Deadlines to Dispute the Presumption

- ❑ For dates of injury before July 6, 2020, the claims administrator has 30 days to deny a claim, or the injury is presumed compensable
- ❑ If the date of injury is after July 6, 2020, the claims administrator has 45 days to deny a claim, or the injury is presumed compensable
- ❑ The presumption can be rebutted, but only with evidence discovered *subsequent* to the applicable investigation period
- ❑ Certain “essential employees” are subject to a 30-day denial period regardless of the date of injury (certain firefighters, peace officers, frontline healthcare providers and healthcare facility workers)

SB 1159: Civil Penalties

- ❑ **Employers who fail to timely report information to their claims administrator or who intentionally submit false or misleading information are subject to a \$10,000 civil penalty to be assessed by the Labor Commissioner**

Questions?

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NOTICE REGARDING POSSIBLE COVID-19 WORKPLACE EXPOSURE
PLEASE READ THIS CAREFULLY

TO: All Employees
FROM: [Company Representative]
DATE: [Date]
RE: Potential COVID-19 Workplace Exposure

Please be advised that the Company was notified that an employee, customer, or other third party either tested positive for and/or has been diagnosed with COVID-19 and you may have been exposed to the virus. As an immediate response to protect the health and safety of our workforce, we are providing this notice and [physically excluding you from the workplace/enforcing a home quarantine for 14 days/telework option/insert circumstance as applicable].

The following COVID-19 related benefits and options (as applicable) are available to you [employers must provide specific details about the available benefits and options]:

- California Family Rights Act: Job-protected leave.
- Company-provided paid sick leave benefits.
- California COVID-19 Supplemental Paid Sick Leave.
- Federal Families First Coronavirus Response Act benefits:
 - Emergency Paid Family and Medical Leave.
 - Emergency Paid Sick Leave.
- Pandemic Unemployment Assistance.
- State Disability Insurance and Paid Family Leave.
- State Workers' Compensation.

If you have any questions regarding these benefits and your eligibility for them, the Company encourages you to contact [Human Resources contact].

In response to this incident, the Company is taking the following steps which are compliant with the federal Centers for Disease Control and Prevention ("CDC") disinfection and safety plan:

- [Closing off areas used by the person who is sick.]
- [Opening outside doors and windows.]
- [Waiting 24 hours before cleaning and disinfecting.]
- [Cleaning and disinfecting all areas used by the person who is sick.]
- [Vacuuming the space, if needed, with HEPA filters, if available.]
- [Specific processes, PPE, cleaning chemicals, complying with Cal/OSHA standards, etc.]

NOTICE REGARDING POSSIBLE COVID-19 WORKPLACE EXPOSURE
PLEASE READ THIS CAREFULLY

The Company also asks that you abide by the following CDC guidelines to protect your health and those around you:

- Wash your hands often with soap and water for at least 20 seconds. Key times to wash your hands include:
 - Upon arrival to the worksite.
 - After blowing your nose, coughing, or sneezing.
 - After using the restroom.
 - Before eating or preparing food.
- Wear a cloth face covering as a measure to contain your respiratory droplets and help protect others.
- Cover your coughs and sneezes.
- Frequent use of the hand sanitizers provided by the Company.
- Avoid using other employee's work phones, desks, offices, and other work tools and equipment, when possible.
- If you are sick, stay home.

Applicable law prohibits discrimination, harassment, and retaliation against employees who:

- Have contracted COVID-19
- Are regarded as having contracted COVID-19
- Are associated with someone who has contracted COVID-19 or is regarded as having contracted COVID-19
- Have made complaints regarding the Company's COVID-19 health and safety protocols

THE COMPANY TAKES COVID-19 SERIOUSLY, AND YOUR ASSISTANCE IN UPHOLDING AND ADHERING TO THE COMPANY'S HEALTH AND SAFETY PROTOCOLS IS ABSOLUTELY VITAL. THE COMPANY ENCOURAGES YOUR INPUT AND PARTICIPATION IN THESE EFFORTS TO ENSURE THE HEALTH AND SAFETY OF EVERYONE IN THE WORKPLACE.