





Presenters



Michael Sullivan mike@sullivanattorneys.com 310-337-4480



Adam Dombchik adam@geklaw.com 213-739-7000



About Michael Sullivan & Associates LLP

- The firm provides high-quality litigation in defense of workers' compensation claims, employment issues, immigration law and insurance litigation.
- Offices in El Segundo, Fullerton, San Diego, Westlake Village, Ontario, Fresno, Emeryville, Sacramento and San Jose.
- Author of "Sullivan on Comp," which covers the complete body of California workers' compensation law.



About Gordon, Edelstein, Krepack, Grant, Felton & Goldstein, LLP

- For over 30 years, the law firm of Gordon Edelstein has established itself as a recognized leader in Workers' Compensation and Personal Injury.
- Offices in Los Angeles, Camarillo,
 Ontario and Santa Ana.

COVID-19 Webinar Series

- > Part 1: Workers' Compensation Liability & Employment Law Practices for the Coronavirus
- > Part 2: The Interactive Process and Reasonable Accommodation
- > Part 3: COVID-19 Update the Burning Issues
- > Part 4: COVID-19 Update Duty to Provide a Claim Form
- > Part 5: COVID-19 Update Liability for Temporary Disability Benefits
- > Part 6: COVID-19 Update When is COVID-19 Work-Related?
- > Part 7: COVID-19 Update Interplay Between COVID-19 and Other Conditions
- > Part 8: Gov. Newsom's New Executive Order re COVID-19 and What it Means Now

www.app.sullivanoncomp.com/webinars

COVID-19 Webinar Series

- > Part 9: COVID-19 Update Psychiatric Injuries
- > Part 10: COVID-19 Update Planning for Return to Work
- > Part 11: COVID-19 Update A Conversation with Jake Jacobsmeyer
- > Part 12: COVID-19 Update Issues in WC Litigation
- > Part 13: COVID-19 Update Employers Frequently Asked Questions
- > Part 14: COVID-19 Update Workers' Compensation Frequently Asked Questions
- > Part 15: COVID-19 Update The Developing Medical Landscape

www.app.sullivanoncomp.com/webinars



Visit www.sullivanattorneys.com/navigating-covid-19 for more information



Professional Development with IEA

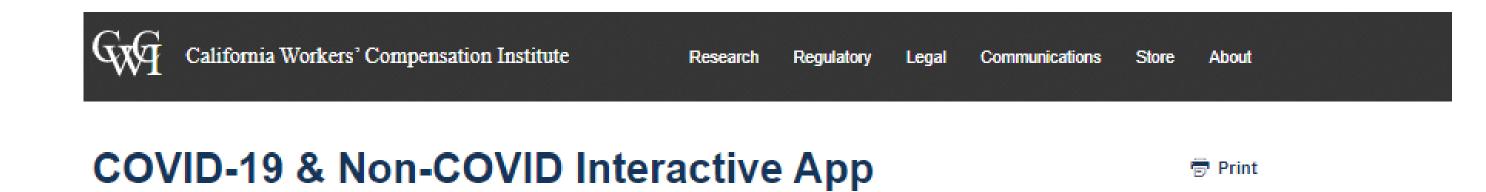
Fall 2020 offerings include:

- Introduction to Workers' Compensation Claims
- New Adjuster Training (120 Hours)
- Workers' Compensation Claims Administration Certificate

- Workers Compensation PD Rating Instruction
- Self-Insured Exam Prep
- Certified Professional in Disability Management

Learn more at <u>ieatraining.org</u>

Tracking COVID-19 claims:

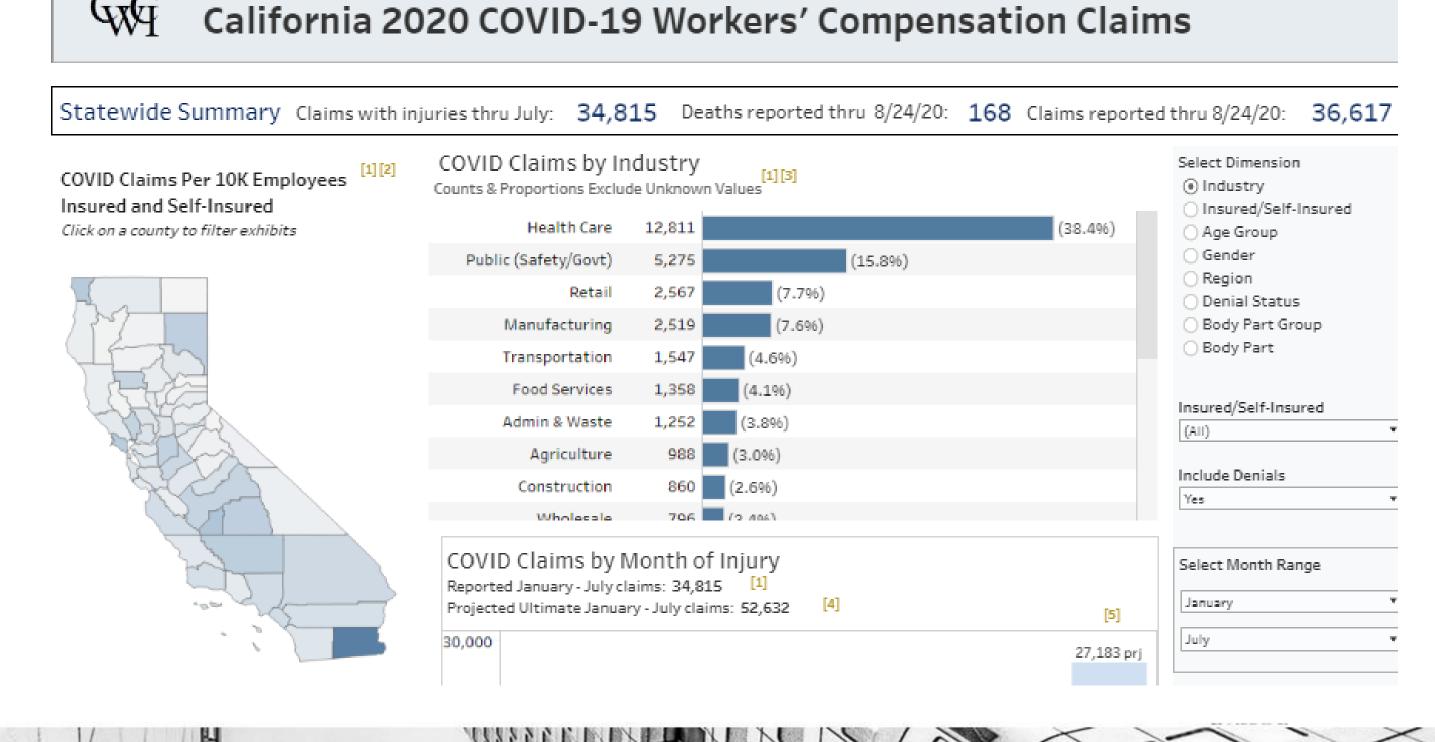


Research > COVID-19 & Non-COVID Interactive App

2020 COVID-19 Claims | 2019/2020 Claims | Trends | Breakouts | References

California Workers' Compensation Institute COVID-19 & Non-COVID Interactive Map:

https://www.cwci.org/CV19claims.html



The Plan For Today

- Senate Bill 1159.
- The presumptions under the new Labor Code Sections.
- The new reporting and claims administration requirements for COVID-19 claims.
- What it means in practice.



Senate Bill 1159

- On Aug. 31, 2020, the California Legislature passed Senate Bill 1159 (SB 1159), which establishes rebuttable presumptions that illness or death resulting from COVID-19 arose out of and in the course of employment for specified employees.
- Gov. Gavin Newsom has until Sept. 30 to sign or veto the bill.
- SB 1159 was passed as an urgency statute, meaning it will take effect immediately upon signing.



Senate Bill 1159

- SB 1159 adds three new Labor Code sections:
 - Labor Code § 3212.86 codifies Gov. Newsom's Executive Order (N-62-20).
 - Labor Code § 3212.87 presumption for front-line workers (peace officers, firefighters, health-care providers, home care workers and IHSS workers).
 - Labor Code § 3212.87 presumption for employees who contract COVID-19 due to a workplace outbreak.
- SB 1159 establishes new reporting requirements for employers and new claims administration requirements.
- It also requires a study on the impacts of COVID-19 and the new presumptions.
- The presumptions remain in effect until Jan. 1, 2023, and as of that date would be repealed.



Purpose of SB 1159

- In general, to have a valid claim for an infectious disease, employees must prove that the had an increased risk of exposure compared with the general public.
- The Legislature recognized that the pandemic nature of COVID-19 challenged how infectious diseases historically have been handled in the workers' compensation system.
- In the legislative history, it is explained, "As a result of the Governor's 'shelter-in' order, anyone who was not an 'essential employee' was by definition NOT exposed more than the general population, and any 'essential employee' was exposed more than the general population, because these employees were out in the community due to work obligations."
- It adds, "The purpose of the bill is to provide presumptive workers' compensation benefits to those who are 'subjectively' infected at work, but who may have difficulty proving this fact."



Purpose of SB 1159

- The Legislature also recognized, "While COVID-19 is present in all California communities, the burden of fighting the disease has fallen disproportionately to a small group of workers in both the private and public sectors. These workers keep California's lights on, water running, food stocked, and treat our ill and injured."
- "Therefore, it intuitively makes sense that extending a presumption to these workers would further the cause of justice: by reducing the barriers to accessing the workers' compensation system, essential workers suffering from COVID-19 will receive the healthcare they need when they need it without delay."



- Labor Code § 3212.86 codifies Gov. Newsom's May 6, 2020 executive order.
- It provides that an illness or death related to COVID-19 is presumptively compensable if all of these are established:
- 1. The employee performed labor or services at the employee's place of employment at the employer's direction between March 19, 2020 and July 5, 2020.
- 2. The employee tested positive for or was diagnosed with COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction.
- 3. The place of employment was not the employee's residence.



- If the presumption is satisfied with a COVID-19 diagnosis, rather than a test, the diagnosis must be:
 - 1. Made by a licensed physician and surgeon holding an M.D. or D.O. degree or state licensed physician assistant or nurse practitioner, acting under the review or supervision of a physician, and
 - 2. Confirmed by testing or by a COVID-19 serologic test within 30 days of the date of the diagnosis.
- The presumption may be rebutted by "other evidence" without limitation.



- For employees who qualify for this presumption, an employer must deny liability for a claim of an illness related to COVID-19 within 30 days after the date the claim form is filed.
- Otherwise, the illness will be presumed compensable and the presumption will be rebuttable only by evidence discovered subsequent to the 30-day period.
- This is an additional presumption based on an untimely denial.



- Compensation awarded for an injury under § 3212.86 includes full hospital, surgical, medical treatment, disability indemnity and death benefits.
- If an employee has paid sick leave benefits specifically available in response to COVID-19, they must be used and exhausted before any temporary disability benefits or benefits under §§ 4800, 4800.5 or 4850 are due and payable.
- If an employee does not have those sick leave benefits, temporary disability benefits or benefits under those sections must be paid from the date of disability.
- There is no waiting period for TD benefits.



- To qualify for temporary disability or § 4800, § 4800.5 or § 4850 benefits, an employee must satisfy either of the following:
 - 1. If the employee has tested positive or is diagnosed with COVID-19 on or after May 6, 2020, the TD must be certified within the first 15 days after the initial diagnosis, and recertified every 15 days for the first 45 days following diagnosis.
 - 2. If the employee tested positive or was diagnosed with COVID-19 before May 6, 2020, the employee must have obtained a certification no later than May 21, 2020, documenting the TD period, and must be recertified every 15 days thereafter, for the first 45 days following diagnosis.
- The TD must be certified by a physician.



- Labor Code § 3212.87 establishes a COVID-19 presumption for frontline workers. Specifically, it covers:
 - 1. active firefighting members, whether volunteers, partly paid or fully paid, of all of these departments:
 - a) a fire department of a city, county, city and county, district or other public or municipal corporation or political subdivision;
 - b) a fire department of the University of California and the California State University;
 - c) the Department of Forestry and Fire Protection (Cal Fire);
 - d) a county forestry or firefighting department or unit;
 - 2. active firefighting members of a fire department that serves a U.S. Department of Defense installation and who are certified by the U.S. Department of Defense as meeting its standards for firefighters;



- active firefighting members of a fire department that serves a National Aeronautics and Space Administration (NASA) installation and who adhere to specified training standards;
- 4. active firefighting members of a fire department that provides fire protection to a commercial airport regulated by the Federal Aviation Administration (FAA) and are trained and certified by the State Fire Marshal as meeting the specified standards;
- 5. specified peace officers who are primarily engaged in active law enforcement activities;
- 6. fire and rescue services coordinators who work for the Office of Emergency Services (OES);



- 7. an employee who provides direct patient care, or a custodial employee in contact with COVID-19 patients, who works at a health facility;
- 8. an authorized registered nurse, emergency medical technician-I, emergency medical technician-II or emergency medical technician-paramedic;
- 9. an employee who provides direct patient care for a home health agency under Health and Safety Code § 1727;
- 10. employees of health facilities, other than those described in No. 7, if the employer cannot establish that the employee did not have contact with a health facility patient within the last 14 days who tested positive for COVID-19;
- 11. a provider of in-home supportive services, when he/she provides the services outside his/her own home or residence.



- To receive the presumption under § 3212.87, these employees must establish that:
 - 1. They performed labor or services at their place of employment at the employer's direction on or after July 6, 2020.
 - 2. They tested positive for COVID-19 within 14 days after a day that they performed labor or services at their place of employment at the employer's direction.
 - 3. Their place of employment is not their home or residence.
- The presumption extends to such employees following termination of service for a period of 14 days, commencing with the last date actually worked.
- The presumption is rebuttable by "other evidence."



- Section 3212.87 requires a claim falling under that section to be to be denied within 30 days after the date the claim form is filed.
- If not timely denied, the illness is presumed compensable, and this presumption is rebuttable only by evidence discovered subsequent to the 30-day period.
- If the presumption applies, an employee will be entitled to regular workers' compensation benefits including full hospital, surgical, medical treatment, disability indemnity and death benefits.



- Section 3212.87 provides that if an employee has paid sick leave benefits specifically available in response to COVID-19, those benefits must be used and exhausted before any temporary disability benefits or benefits under § 4800, § 4800.5 or § 4850 are due and payable.
- If an employee does not have those sick leave benefits, he or she must be provided temporary disability benefits or other benefits, if applicable, from the date of disability without application of the normal waiting period for temporary disability benefits.
- Unlike for COVID-19 related illnesses before July 6, 2020, there is no requirement for employees to be certified for temporary disability every 15 days for the first 45 days following the COVID-19 diagnosis.



- Section 3212.88 establishes a COVID-19 presumption for employees who are not covered by § 3212.87.
- It applies to employees who test positive during an outbreak at their place of employment if the employer has five or more employees.



- To qualify for this presumption, these must be established:
- 1. The employee tested positive for COVID-19 within 14 days after a day that he/she performed labor or services at the place of employment at the employer's direction.
- 2. The employee performed labor or services at the place of employment at the employer's direction on or after July 6, 2020.
- 3. The employee's positive test occurred during a period of an outbreak at his/her specific place of employment (i.e., the building, store, facility or agricultural field where he/she performs work at the employer's direction).
- 4. The specific place of employment was not the employee's home or residence, unless he/she provides home health care services to another individual at his/her home or residence.



- An "outbreak" exists for the purposes of § 3212.88 if within 14 calendar days, one of these occurs at a specific place of employment:
 - 1. Four employees test positive for COVID-19 at a specific place of employment with 100 employees or fewer.
 - 2. Four percent of the number of employees test positive for COVID-19 where more than 100 employees reported to the specific place of employment.
 - 3. The place of employment is ordered to close due to a risk of infection with COVID-19 by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health or a school superintendent.



- If an employee performs in multiple places of employment within 14 days of his or her positive test, the positive test must be counted for the purpose of determining the existence of an outbreak at each of those places of employment.
- If an outbreak exists at any one of them, that is the employee's "specific place of employment."
- If these conditions are met, the injury or death related to COVID-19 is presumed to arise out of and in the course of the employment.
- The presumption will be extended to any covered person employee following termination of service for a period of 14 days, commencing with the last date actually worked in the specified capacity at the employee's place of employment.



- This presumption is disputable and may be controverted by "other evidence."
- Evidence relevant to rebutting presumption may include, but is not limited to:
 - 1. Evidence of measures in place to reduce potential transmission of COVID-19 in the employee's place of employment
 - 2. Evidence of an employee's nonoccupational risks of COVID-19 infection.



- Section 3212.88 requires liability for claims of COVID-19-related illness to be rejected within 45 days after the date the claim form is filed.
- If the claim is not denied within the 45-day period, the claim is presumed compensable and the presumption is rebuttable only by evidence discovered subsequent to the 45-day period.



- An employee covered by § 3212.88 is entitled to benefits including full hospital, surgical, medical treatment, disability indemnity and death benefits.
- If an employee has paid sick leave benefits specifically available in response to COVID-19, they must be used and exhausted before any temporary disability benefits, benefits under § 4800, § 4800.5 or § 4850 or Education Code § 44977, § 44984, § 45192, § 45196, § 87780, § 87787, § 88192 or § 88196 are due and payable.
- If an employee does not have those sick leave benefits, the employee must be provided the appropriate benefits from the date of disability. The waiting period for temporary disability benefits will not apply.



- Section 3212.88 establishes COVID-19 reporting requirements for employers.
- Must report to claims administrator when it knows or reasonably should know that an employee has tested positive for COVID-19.
- The report must be made writing via electronic mail or facsimile within three business of knowledge.



- The employer must report all the following:
- 1. An employee has tested positive. (The initial report need not provide the employee's personally identifiable information unless he/she asserts that the infection is work related or has filed a claim form pursuant to § 5401.)
- 2. The date the employee tested positive, the date the specimen was collected for testing.
- 3. The address of the employee's specific place of employment during the 14-day period preceding the positive test.
- 4. The highest number of employees worked the employee's specific place of employment in the 45-day period preceding the last day the employee worked at each place.



- The statute also requires employers to retroactively report information.
- Any employer who is aware of an employee testing positive on or after July 6, 2020, and prior to the effective date of the statute, must report the required information to its claims administrator, within 30 business days of the effective date.
- For the number of employees under reporting requirement #4, employers must instead report the highest number of employees at each of the employee's specific places of employment on any given workday between July 6, 2020 and the effective date.



- Claims administrators must use the information "to determine if an outbreak has occurred for the purpose of administering a claim."
- "The claims administrator shall use the information reported under this paragraph to determine if an outbreak has occurred from July 6, 2020, to the effective date of this section, for the purpose of applying the presumption under this section."
- A claims administrator must also "continually evaluate each claim to determine whether the requisite number of positive tests have occurred during the surrounding 14-day periods."



- An employer or other person acting on behalf of an employer who intentionally submits false or misleading information or who fails to submit the required information is subject to a civil penalty of as much as \$10,000 to be assessed by the Labor Commissioner.
- The Labor Commissioner may issue a citation following inspection or investigation.
- Section 3212.88 set out procedures to contest a civil penalty citation.



Labor Code § 77.8 – Study on Impacts of COVID-19

- Labor Code § 77.8 requires the Commission on Health and Safety and Workers' Compensation to conduct a study of the impact of COVID-19 claims on the workers' compensation system.
- The study must review the overall impact on indemnity benefits, medical benefits and death benefits, including differences in the effects across different occupational groups.
- The study also must include the effect of § 3212.87 and § 3212.88.
- A preliminary report or a final report must be delivered to the Legislature and the governor by Dec. 31, 2021, and the final report must be delivered to the same parties no later than April 30, 2022.



Who's Not Covered?

- Although the legislative history states the purpose of the presumptions was to protect essential workers who were disproportionately affected by COVID-19, only a specified essential workers are covered (i.e., public safety officers and health-care workers.)
- Other essential workers (e.g., farm workers, grocery store workers, shipping workers, etc.) only receive a presumption if there is an "outbreak" at their workplace.
- But, the "outbreak" presumption applies to both essential and nonessential workers.
- Workers must rely on their employers to accurately report COVID-19 claims to receive this presumption.



Rebutting the Presumptions

- The presumptions are all rebuttable by "other evidence."
- The legislative history states that "the employer would have to 'prove' that the employee affirmatively did NOT become infected on the job."
- Very difficult if not impossible to prove a negative.
- The Legislature believed specifying two types of evidence that could rebut the presumption (i.e., safety measures adopted by the employer and evidence of an employee's nonoccupational risks of COVID-19 infection) would alleviate these concerns.
- It will be up to WCJs to review the evidence to determine whether the presumptions are rebutted.



Benefits Covered

- Employees entitled to the presumptions only receive normal workers' compensation benefits (e.g., medical treatment, disability indemnity and death benefits.)
- Other bills considered reimbursement for personal protective equipment and benefits if employees had to quarantine.
- The Legislature recognized that many employees who quarantined ultimately do not test positive for COVID-19 but missed time from work.
- Nevertheless, it stated, "Any benefit of this sort would be outside of normal workers' compensation benefits, as these not-infected employees never had an industrial disease or condition. The bill does not address this scenario, as it requires either a positive test or physician diagnosis to trigger benefits."



Analysis of the Reporting Requirements

- An employer must report information when it "knows or reasonably should know that an employee has tested positive for COVID-19."
- It is the employers' knowledge that triggers the reporting requirement. Not clear if employers must investigate every time an employee calls in sick.
- Per the terms of the statute, there must be a positive test. If there is only a diagnosis, but no positive test, no report is required.



Analysis of the Reporting Requirements

- Once knowledge is established, employers must report information to their claims administrators including the addresses where the employee worked in the past 14-days before the positive test and 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.
- Employers must keep track of the number of employees working at each location every day.
- Need to implement new procedures making sure employees are properly counted.
- Need to make sure employee's personal information not disclosed unless the employee asserts the infection is work-related or filed a claim.



Analysis of the Reporting Requirements

- Employers must also retroactively report all positive tests from July 6, 2020 to the date the bill is signed within 30 business days.
- They must report the highest number of employees who reported to work at each of the employee's specific places of employment on any given work day during this period.
- Not clear what employers should do if they did not maintain this information. May need to check payroll records for every employee.



Analysis of the Claims Administration Requirements

- Moving forward, claims administrators must use the information "to determine if an outbreak has occurred for the purpose of administering a claim."
- For positive tests from July 6, 2020 to the date the bill is signed, claims administrators must use the information "for the purpose of applying the presumption under this section."
- The statute does not explain how claims administrators must begin administering a claim if they determine that an outbreak occurred.
- Not clear if a claims administrator's notice of an outbreak is equivalent to notice of an injury.



Analysis of the Claims Administration Requirements

- Claims administrators will likely need to provide a claim form if they determine that the employees fall without the "outbreak" period.
- Unclear if they need to do anything else before a claim form is filed.
- Claims administrator will need to work closely with employers to make sure all positive COVID-19 tests are properly reported.









WWW.SULLIVANONCOMP.COM

TOLL-FREE: +1 866 458 8762 REMEMBER: +1 866 I LUV SOC SULLIVANATTORNEYS.COM