

WORKERS' COMPENSATION

New Law Creates COVID-19 Claim Framework



GOVERNOR GAVIN Newsom has signed legislation that creates a new framework for COVID-19-related workers' compensation claims.

SB 1159 replaces an executive order that Newsom made on March 18 that required all employees working outside the home who contracted COVID-19 be eligible for workers' compensation benefits if they file a claim.

The new law expands that "rebuttable presumption" that a coronavirus case is work-related to front-line workers, as well as employees in workplaces that have had an outbreak of cases.

The new law is retroactive to July 6, the day after Newsom's executive order expired, and is set to expire Jan. 1, 2023.

Employers with fewer than five employees are exempt under the statute.

SB 1159's three parts

Part 1. The law codifies Newsom's prior executive order that provided a "rebuttable presumption" that COVID-19 was contracted in the scope and course of work by employees working outside of the home who get infected.

Part 2. The law provides a rebuttable presumption that firefighters, law enforcement officers, health care workers and home care workers who contract COVID-19, contracted it in the workplace.

Part 3. The law creates a rebuttable presumption that a worker's COVID-19 diagnosis is work-related within 14 days of a company outbreak. Under SB 1159, an outbreak is defined as when four employees test positive at a specific place of employment with 100 or fewer employees and, for larger places of employment, when 4% of the employees test positive.

It's also deemed a workplace outbreak if the employer had to shut down due to the coronavirus.

Rebutting a claim

Employers can rebut the presumption that COVID-19 was contracted at work if they have:

- Proof of measures they put in place to reduce potential transmission of COVID-19,
- Evidence of the employee's non-occupational risks of contracting COVID-19,
- Statements made by the employee, or
- Any other evidence normally used to dispute a work-related injury.

REPORTING REQUIREMENTS

When an employer learns of an employee testing positive, they must report to the insurer the following information within three business days:

- The date the employee tested positive.
- The address or addresses of the employee's specific place(s) of employment during the 14-day period preceding the date of their positive test.
- The highest number of workers who reported to work in the 45-day period preceding the last day the employee worked at each specific site.

See 'Filing' on page 2

Contact Us



**Bolds Risk &
Insurance Services**

Bolds Risk & Insurance Services
101 Larkspur Landing Circle, Ste 222
Larkspur, CA 94939

Tel: (415) 461-RISK

info@boldsrisk.com

CA License No.: 0K14423

AB 5 FIX

Law Adds Independent Contractor Exemptions

A NEW LAW has come to the rescue of a number of freelance professions by exempting them from the onerous requirements of AB 5, which required most independent contractors to be classified as employees in California.

Governor Gavin Newsom on Sept. 1 signed AB 2257 as an urgency measure, so that it took effect immediately.

If you remember, AB 5 set a new standard for hiring independent contractors, requiring many to be reclassified as employees covered by minimum wage, overtime, workers' compensation, unemployment and disability insurance. It created a three-pronged test that needs to be satisfied to determine if someone is an independent contractor or an employee.

To be independent contractors under AB 5's "ABC test," workers must (A) work independently, (B) do work that is different from what the business does, and (C) offer their work to other businesses or the public. All three conditions must be met.

It is prong B that's problematic. For example, a freelance writer working for a magazine would not be doing something different than the business does. The new law sets limits on the amount of income someone can receive while doing this kind of work before being considered an employee.

AB 2257 also expands the "business-to-business" definition in AB 5 to cover a relationship between two or more sole proprietors. ❖

PROFESSIONS NOW EXEMPT FROM AB 5

- Youth sports coaches
- Specialized performers
- Home inspectors
- Appraisers
- Underwriting inspectors
- Premium auditors
- Risk management, or loss control specialists
- Sports competition judges, umpires and referees
- Graphic designers
- Web designers
- Tutors
- Consultants
- Caddies
- Wedding planners and event vendors
- Yard cleanup
- Interpreters and translators

FREELANCE EXEMPTIONS

- Fine artists
- Freelance writers
- Translators
- Editors and content contributors
- Advisors, narrators, cartographers, producers and copy editors
- Illustrators, and newspaper cartoonists working under written contracts.



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Filing False Information Can Result in a \$10,000 Fine

The Rossi Law Group has the following recommendations for employers in California:

- Keep track of all locations each employee works at, the number of employees on each day at each location, as well as a log of those that test positive (including the date the specimen was collected).
- If you are aware of any staff who have tested positive between July 6 and Sept. 17, you have 30 days after Sept. 17 to report the positive test to the claims administrator.
- You must also report to the claims administrator positive COVID-19 results for employees that are not filing claims. In that case, you must omit personal identifying information of the employee.

- Provide any factual information to the claims administrator that could help rebut any claim of work-relatedness.

The law also has some teeth: Anyone who submits false or misleading information shall be subjected to a civil fine up to \$10,000.

One last thing...

The governor also signed into law AB 685, which requires employers to report an outbreak to local public health officials. Employers must also report known cases to employees who may have been exposed to COVID-19 within one business day. ❖

WORKERS' COMPENSATION

COVID-19 Prompts Rate Hike Recommendation

THE COVID-19 pandemic seems to have reversed years of falling workers' compensation rates in California, as the Workers' Compensation Insurance Rating Bureau has recommended that average benchmark rates be increased by 2.6% for 2021.

The recommendation was forwarded to the California Department of Insurance, which will schedule a hearing on the recommendation in the fall.

It should be noted that the 2.6% increase recommendation would be an average across all class codes, as the Rating Bureau plans to allocate the expected COVID-19 costs by weight across the state's overall industrial sector. Note that even low exposure classes will be surcharged.

The Bureau in its recommendation aims to apply the surcharge on a weighted basis according to each class code's share of growing COVID-19 claims costs.

It is considering a tiered surcharge model based on an employer's risk, as follows (for examples, see list at right):

High risk – A 12-cent surcharge per \$100 of payroll.

Medium risk – A 6-cent surcharge per \$100 of payroll.

Low risk – A 4-cent surcharge per \$100 of payroll.

The X-factor

The Bureau's actuarial committee noted that the pandemic does present challenges for predicting workers' compensation costs. "The 2021 policy year will still be impacted by COVID-19, but some trends may stabilize.

The challenge will be projecting exposure and claims frequency (for COVID-19 claims)," the committee wrote in a report.

Actually, the overall effect of COVID-19 on rates going into 2021 was 4%, according to the Rating Bureau. Had it not included the COVID-19 surcharge, it would be asking for a 1.3% decrease in benchmark rates.

The reason is that claims costs and claims frequency have been falling and long-term claims are costing less than originally anticipated.

The Bureau also forecast that the recession caused by the pandemic will also have a profound effect on overall claims: it projects an overall 6.3% decrease in claims frequency due to slowing economic conditions.

Interestingly, COVID-19 claims are not supposed to count against employers' experience rating and loss histories, according to new rules that took effect in May.

However, the claims are having an overall effect in terms of workers' comp benefit payments.

The Bureau also has to price in the uncertainty over the future of COVID-19.

Will it get worse, or will it begin to wane?

Will there be a vaccine and new and improved treatment regimens that reduce mortality or decrease symptoms and hospitalizations?

INDUSTRIAL RISK CATEGORIES

High risk

- Health care and social assistance
- Agriculture, forestry, fishing and hunting

- Construction
- Wholesale trade
- Mining, quarrying, and oil and gas extraction

Medium risk

- Accommodation and food services
- Transportation and warehousing
- Retail trade
- Public administration
- Utilities
- Other services (except public admin)
- Educational services
- Manufacturing

Low risk

- Real estate, rental and leasing
- Arts, entertainment and recreation
- Finance
- Professional, scientific and technical services
- Information
- Management of companies and enterprises.



These questions unfortunately remained unanswered now, and the Rating Bureau is in uncharted territory as a result.

It is concerned that some low-risk industries may be getting a surcharge that is still out of proportion to their actual risk, particularly for people who are working remotely.

It plans to further study the issue and will likely amend the filing depending on the results. ❖

CAL/OSHA RULEMAKING

Permanent Wildfire Safety Rules on Tap

AS WILDFIRES continue raging throughout California, Cal/OSHA has issued a reminder to employers that they are required to protect their outdoor workers from smoke if the Air Quality Index exceeds 150.

Cal/OSHA has extended an emergency regulation it put in place in August 2019 through January 2021 as it works on a permanent regulation on wildfire smoke protection for outdoor workers in the state.

For the safety of your workers and to comply with the regulation, it's important that you follow the regs and know when you will need to take action to protect them from outdoor smoke.

The regulation applies when the AQI for airborne particulate matter 2.5 microns (PM2.5) or smaller is 151 or greater in an area where employees are working outdoors.

Here are the details:

Identification

Employers must monitor the AQI for PM2.5. You can monitor the index using the following websites:

- U.S. EPA AirNow
- U.S. Forest Service Wildland Air Quality Response Program
- California Air Resources Board
- Local air pollution control district websites or local air quality management district websites.

Training and instruction

Employers with outdoor workers need train their workers in:

- The health effects of wildfire smoke.
- Their right to obtain medical treatment without fear of reprisal.
- How they can obtain the current AQI for PM2.5.
- Actions they must take if the AQI exceeds 150 PM 2.5

Communication

Employers must implement a system for communicating wildfire smoke hazards to all affected employees, as well as a system for employees to inform the employer of smoke hazards.

OPTIONS FOR PROTECTING WORKERS

The regs provide three ways employers can protect their workers:

1. Modifications – If possible, employers should implement modifications to the workplace in order to reduce exposure. Examples include providing enclosed structures or vehicles for employees to work in, where the air is filtered.

2. Changes to procedures and schedules – Another option is to change work procedures or schedules. Examples include changing the location where employees work or reducing the amount of time they work outdoors or are exposed to unfiltered outdoor air.

3. Respiratory protection – Employers also have the option to provide proper respiratory protection equipment, such as disposable respirator masks for voluntary use without fit-testing.

Respirators must be labeled N-95, N-99, N-100, R-95, P-95, P-99 or P-100, and must be approved by the US National Institute for Occupational Safety and Health.

If the AQI is above 300, fit-testing and a medical examination prior to use would be mandatory.

The takeaway

If you have outside employees who may have to work in smoky conditions, you should stockpile a two-week supply of N-95 masks for all of them if you are unable to implement other controls to reduce their exposure.

Cal/OSHA is in the process of making the emergency rules permanent and has sent them out for public comment. We will continue monitoring the agency's progress on the rules and update you when they have been completed. ❖

