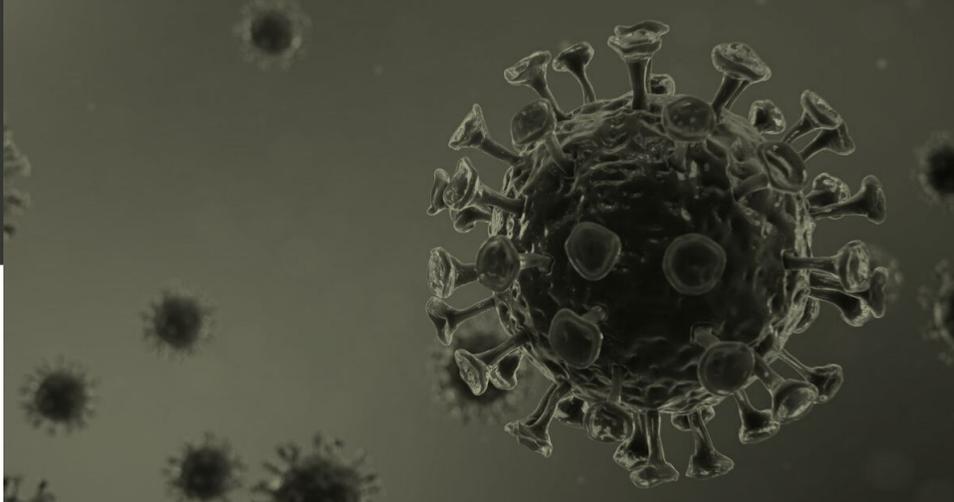


More COVID-19 Heads Ups for CA Employers

01.05.21 | Linda J. Rosenthal, JD



In ordinary times, employment law is no walk in the park.

Employers – businesses and nonprofits alike – face lots of requirements and guidelines from all levels of government touching on many of the usual hot-potato topics: pay and benefits, leave, working conditions, collective bargaining, discrimination, wrongful termination, occupational safety and health, and workers compensation.

Throw into the mix a sudden global pandemic: fast-moving and serious enough to shut down vast sections of the nation for ... who knows how long. Then toss in the erratic course of this highly infectious disease: multiple cycles of flare ups, reopenings, retrenchments, and a mutation that's more contagious. Since last March, there's been a crush of special requirements and recommendations because of COVID-19. And this avalanche of new compliance duties is not static; the shifting realities on the ground preclude that. They quickly become irrelevant or obsolete. Government officials and lawmakers race to draft new ones.

The bottom line: Get professional help. This is not a do-it-yourself moment. Even employment-law specialists are tearing their hair out trying to keep up. Talk with your lawyers and accountants on these critical issues that are as dangerous as quicksand.

And that other professional help? It's probably a good idea to keep them on speed dial, too.

COVID-19 Statutes Affecting Employers

A few months ago, after the California Legislature adjourned in late summer, we discussed two new statutes beefing up employee leave and pay rules in light of the COVID-19 emergency. See [Newest CA Employee Leave Laws](#) (October 29, 2020).

Here, we cover two more of those 2020-Session state laws. The first is an important change in the workers compensation rules; it went into effect immediately in mid-September. The second is a health-and-safety-reporting statute that starts on New Year's Day 2021. Here is where the new developments are flying at us fast and furious. In August, the lawmakers were acting through the prism of the apparent facts-on-the-ground then. The situation now is quite different.

The most consequential turn of events, of course, is the approval and rollout of not one but two vaccines – with more on the way. They bring not only great hope but lots of issues and questions. The nation's frenzied and slowly balding employment attorneys have been kept especially busy in the several weeks. They've churned out an astonishing volume of blog posts and articles with important insights and – of course – more questions than answers.

1. Workers Compensation Rules

California [Senate Bill \(SB\) 1159 \(2020\)](#) adds several sections to the Labor Code to “protect the health and safety of all employees and the public by facilitating the provision of workers’ compensation benefits.” Effective September 17, 2020 (but relating back to events on and after July 6th) they remain in effect for two years through January 1, 2023. The California Department of Industrial Relations has published a detailed but plain-English explanation of what these changes do and why they were enacted. See [Workers’ Compensation Presumption \(SB 1159\) Frequently Asked Questions](#).

In a nutshell, the new statutes turn some of the usual workers’ comp rules on their heads to make it easier for certain groups of workers to claim and receive benefits ([medical care, disability, etc.](#)) due to workplace COVID-19 exposure and illness. They build on (but are not identical to) a temporary [May 2020 Executive Order](#) by Governor Newsom that expired on July 6th.

SB 1159 provides a new “rebuttable presumption” that two specific categories of workers who contract COVID-19 while working at a job or office site are eligible for workers comp benefits. They are: 1. “First Responders and Health Care Workers” (more particularly listed); and 2. “Employees whose employers have five or more employees, and who test positive for COVID-19 during an outbreak at their specific workplace.”

These eligible workers “... who are sick [can stay home](#) and be provided workers’ compensation benefits, thereby reducing the spread of the virus to others at work and in the community.”

2. Potential Exposure Notification

The second new COVID-19-specific law is California [Assembly Bill \(AB\) 685 \(2020\)](#): “COVID-19: imminent hazard to employees: exposure: notification: serious violations.” It was signed into law on the same day last September that Governor Newsom signed SB 1159, but the effective date of AB 685 was delayed until January 1, 2021. It continues in effect until January 1, 2023 (when other provisions take over.)

In a nutshell, under AB 685, employers’ first duty is to promptly notify workers of potential COVID-19 exposure on notice that any person at the worksite has received a laboratory-confirmed COVID-19 case, medical diagnosis, or isolation order. Second, within a single business day of learning about that potential exposure, the employer has to notify in writing “potentially infected employees about the potential exposure” and also let them know about COVID-19-related benefits and protections as well as the employer’s “disinfection and safety plans.” Third, within 48 hours of “becoming aware of

a COVID-19 outbreak,” the employer must notify local health agencies.

Oh, by the way, while the boss is telling the agencies and the “potentially infected” fellow workers about all this, care must be taken not to improperly disclose private medical information or retaliate against any worker including the “qualifying individual” (aka the COVID-19-infected employee) who might want to spread the word about the danger far and wide to co-workers and the public.

Also new under AB 685 is Cal/OSHA’s authority to close down a worksite if that state health-and-safety agency determines there is an “imminent hazard.”

Even non-lawyers are likely sophisticated enough to hear alarm bells about all these ambiguous terms and definitions. Who is a “qualifying individual”? What is an “outbreak”? What is “potential exposure”? When is a hazard “imminent”?

For the record, AB 685 (written last summer) defines “outbreak” as “three or more laboratory-confirmed COVID-19 cases among employees who live in different households within a two-week period.” But even these definitions needs definitions. For instance, what are “different households” for purposes of AB 685? And about those lab tests? Whatever the legislators had in mind several months ago, it still takes forever to get any results (much less accurate ones) and the FDA has recently approved new technology including at-home, rapid COVID-19 tests. See the California Department of Public Health’s [*Employer Guidance on AB 685: Definitions*](#).

See, too, the California Department of Industrial Relations’ (DIR) well-written guide to help California employers understand these new laws: [*COVID-19 Infection Prevention Requirements \(AB 685\): Enhanced Enforcement and Employer Reporting Requirements \(updated November 13, 2020\)*](#).

The DIR’s website page comes complete with an adorable chatbot bear dressed in safety helmet and goggles who immediately pops up asking: “Any questions? Talk to me.” (There’s a disclaimer: “Just to let you know, you’re talking to a bot. These responses aren’t coming from a real person.”)

In line with the earlier advice: Call your lawyer. Don’t rely on the cute bear. You’ll see why in the next section.

More COVID-19 Developments

The plot thickens.

The folks at the California Department of Industrial Relations remind us that employers must look beyond these two new state statues. They must comply as well “with all local health directives and guidance concerning safely reopening businesses to reduce risk of exposure and mitigate outbreaks in the workplace.” Also highly relevant are recommendations from federal agencies including the Centers for Disease for Control & Prevention (CDC) and the Food and Drug Administration (FDA).

It goes without saying that this is an ongoing duty: The course and progression of COVID-19 is rapidly evolving and there are continual new developments. There are three in particular we’ll briefly mention here, subject to more discussion in posts coming soon.

a. Cal/OSHA Emergency Rules

There’s an important new [emergency COVID-19 Order](#) from Cal/OSHA, effective November 30, 2020

through October 2, 2021. The 21-page regulation is intended to minimize the spread of the disease in nearly all California workplaces.

With few exceptions, California employers must either revise their existing policies and procedures or implement a new written COVID-19 Prevention Program (CPP). Either way, there are at least seven mandatory elements; and each element “has a laundry list of additional requirements, some of which – like the outbreak reporting requirements – appear to conflict with existing California laws, such as AB 685 and SB 1159.”

The agency has posted a Model Plan here. On December 1, 2020, Cal/OSHA published a “much-anticipated FAQs ... to clarify the regulation and provide practice guidance to employers for compliance...” Cal/OSHA says it will continue to expand the FAQs “on an ongoing basis” and hold a “stakeholder meeting” to “further explain the regulation and answer questions.” Translation: It’s complex, confusing, and subject to change.

Nevertheless, the cute little chatbot bear appears once again with the same message: “Any questions? Talk to me.” Same advice, but even more so in light of this problematic regulation that conflicts with other rules. Speed-dial human legal counsel.

[Update 1/11/21]: Trade groups have filed a joint lawsuit challenging these emergency regulations
b. Governor’s Executive Order

On December 16, 2020, Governor Gavin Newsom issued Executive Order N-84-20.

At the time Cal/OSHA’s temporary regulation was being drafted, the Centers for Disease Control and Prevention had certain guidelines in place on when workers exposed to COVID-19 but who are asymptomatic may discontinue quarantine. Since then, the CDC shortened some of these time frames, and the California Department of Public Health followed suit.

The Governor’s Executive Order modifies the new emergency Cal/OSHA regulation to reconcile it with the modified CDC guideline. See Newsom Signs Executive Order Modifying CalOSHA’s Emergency Temporary COVID-19 Regulations (December 17, 2020) Ramona Carillo, Esq., Weintraub Tobin.

c. COVID-19 Vaccines

Way ahead of the game-changing developments in December 2020 involving COVID-19 vaccine emergency-use authorizations, lawyers were busy thinking about what it would all mean for the reopening or normalizing of American life. See for example COVID-19 Vaccinations Arriving For the Holidays: What Employers Need to Know and Can Do (November 24, 2020) Bret Daniel, Esq. et al., Ogletree Deakins.

All along, one of the major points of speculation and debate has been about whether employers will or should make vaccination mandatory. Then, on December 16, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) chimed in to this conversation in a big way: see What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws: Technical Assistance Questions and Answers (updated 12/16/20).

The long and the short of it – according to the EEOC – is that an employer may mandate COVID-19 vaccines for its workers except for two narrow exceptions: (1) when a person cannot be vaccinated

due to a disability or (2) if a worker objects because of a “sincerely held religious belief.” This EEOC guidance also covers thorny issues including, for example, pre-vaccination medical screening questions. See, for instance: [EEOC Updates COVID-19 Guidance on Employer Administered or Mandated Vaccinations](#) (December 17, 2020) Jennifer Barna, Esq. et al, Epstein Becker & Green; see also [EEOC Issues Revised Guidance Addressing COVID-19 Vaccines](#) (December 17, 2020) Michael Eckhard, Esq., Ogletree Deakins.

This is just the tip of the iceberg of commentary emerging on this significant issue.

Conclusion

There is hope on the horizon but a complicated path to getting through the winter COVID-19 surge and to the other side of whatever normalcy we can or should regain. For employers, the next several months will continue to be enormously challenging.

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