

SUMMARY OF SB 1159 (Hill and Daly)

The end of the California legislative session witnessed a contentious debate over how the workers' compensation system would respond to COVID-19 cases. Following is a description of the provisions of Senate Bill 1159 (Hill and Daly), signed by Governor Newsom on September 17, 2020. Because this bill was an urgency measure, it became effective immediately when signed on September 17, 2020.

NEW LABOR CODE § 3212.86

Labor Code § 3212.86 codifies Governor Newsom's Executive Order N-62-20 (EO), which created a rebuttable presumption that COVID-19 and related conditions were compensable for workers not subject to the Governor's stay-home order. New Labor Code § 3212.86, however, expands the EO and applies to *any* employee with a COVID-19 related illness who was working outside the home between March 19 and July 5 of this year.

Labor Code § 3212.86 has requirements which must be met before the rebuttable presumption applies. These are:

1. The employee has 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(s) of employment at the employer's direction.
2. The employee's place(s) of employment do *not* include the employee's residence.
3. The day that the employee performed labor or services is between March 19 and July 5.
4. If the employee makes a claim for workers' compensation benefits based upon a diagnosis of COVID-19, the diagnosis must be done by a licensed physician and surgeon holding an M.D. or D.O. degree, or a state licensed physician assistant or nurse practitioner, acting under the review or supervision of a physician and surgeon pursuant to standardized procedures or protocols within their lawfully authorized scope of practice, and that diagnosis is confirmed by testing or by a COVID-19 serologic test within 30 days of the date of the diagnosis.
5. If an employee has paid sick leave benefits specifically available in response to COVID-19, those benefits shall be used and exhausted before any temporary disability benefits or benefits under Section 4800, 4800.5, or 4850 are due and payable.

If an employee does not have those sick leave benefits, the employee shall be provided temporary disability benefits or Section 4850 benefits, if applicable, from the date of disability. There shall not be a waiting period for temporary disability benefits.

6. If temporary disability (TD) is awarded, the employee must be recertified for TD by a physician every 15 days for the first 45 days following the diagnosis.
7. The claims administrator has 30 days in which to reject or accept the claim. After that 30 days, the claim can only be contested with evidence discovered after the 30 day period.

8. The law sunsets on January 1, 2023.

NEW LABOR CODE § 3212.87

Labor Code § 3212.87 creates a rebuttable presumption of compensability for an extensive list of certain health care and public safety/rescue personnel. Please carefully review the employments covered by this presumption, particularly the health care classifications of employment, to understand whether a COVID-19 claim is entitled to a presumption under this section. (See following list.)

In order to claim a presumption that COVID-19 is compensable, the employee must meet most of the same standards as would have been required under the Executive Order. Because this new provision applies to dates of employment after the expiration of the Order, the following criteria apply:

1. The last day worked by the employee is on or after *July 6, 2020*.
2. The employee has tested positive for 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.

Unless otherwise indicated, "test" or "testing" means a PCR (Polymerase Chain Reaction) test approved for use or approved for emergency use by the United States Food and Drug Administration to detect the presence of viral RNA. "Test" or "testing" does not include serologic testing, also known as antibody testing. "Test" or "testing" may include any other viral culture test approved for use or approved for emergency use by the United States Food and Drug Administration to detect the presence of viral RNA which has the same or higher sensitivity and specificity as the PCR Test.

3. The employee's place of employment does not include the employee's residence.
4. If an employee has paid sick leave benefits specifically available in response to COVID-19, those benefits shall be used and exhausted before any temporary disability benefits or benefits under Section 4800, 4800.5, or 4850 are due and payable.

If an employee does not have those sick leave benefits, the employee shall be provided temporary disability benefits or Section 4850 benefits, if applicable, from the date of disability. There shall not be a waiting period for temporary disability benefits.

5. The rebuttable presumption shall be extended to employees subject to this subdivision 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.

Note: For employees who work for a health facility but do not provide direct patient care, the presumption shall not apply if the employer can establish that the employee did not have contact with a health facility patient within the last 14 days who tested positive for COVID-19.

6. The claims administrator has 30 days in which to reject or accept the claim. The claim can only be contested after that 30 day period with evidence discovered after the 30 day period.
7. The law sunsets on January 1, 2023.

Covered Employment Under Labor Code § 3212.87

Employees of Public Employers

1. Active firefighting members, whether volunteers, partly paid, or fully paid, of all of the following fire 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.
 - d. A county forestry or firefighting department or unit.
2. Active firefighting members of a fire department that serves a United States Department of Defense installation and who are certified by the United States Department of Defense as meeting its standards for firefighters.
3. Active firefighting members of a fire department that serves a National Aeronautics and Space Administration installation and who adhere to training standards established in accordance with Article 4 (commencing with Section 13155) of Chapter 1 of Part 2 of Division 12 of the Health and Safety Code.
4. Active firefighting members of a fire department that provides fire protection to a commercial airport regulated by the Federal Aviation Administration (FAA) under Part 139 (commencing with Section 139.5) of Subchapter G of Chapter 1 of Title 14 of the Federal Code of Regulations and are trained and certified by the State Fire Marshal as meeting the standards of Fire Control 5 and Section 139.319 of Title 14 of the Federal Code of Regulations.
5. Peace officers, as defined in Section 830.1 of the Penal Code, subdivisions (a), (b), (e), (f), and (h) of Section 830.2 of the Penal Code, subdivision (a) of Section 830.3 of the Penal Code, subdivisions (a) and (b) of Section 830.37 of the Penal Code, subdivisions (a) and (b) of Section 830.5 of the Penal Code, and subdivision (a) of Section 830.53 of the Penal Code, who are primarily engaged in active law enforcement activities.
6. Fire and rescue services coordinators who work for the Office of Emergency Services. For purposes of this paragraph, "fire and rescue services coordinators" means coordinators with any of the following job classifications: coordinator, senior coordinator, or chief coordinator.

Employees of Private Employers

7. An employee who provides direct patient care, or a custodial employee in contact with COVID-19 patients, who works at a health facility. For the purposes of this subdivision, “health facility” means a health facility as defined in subdivision (a), (b), (c), (m), or (n) of Section 1250 of the Health and Safety Code.
8. An authorized registered nurse, emergency medical technician-I, emergency medical technician-II, emergency medical technician-paramedic, as described in Chapter 2 (commencing with Section 1797.50) of Division 2.5 of the Health and Safety Code.
9. An employee who provides direct patient care for a home health agency, as defined under Section 1727 of the Health and Safety Code.
10. Employees of health facilities, other than those who provide direct patient care.
11. A provider of in-home supportive services under Article 7 (commencing with Section 12300) of Chapter 3 of Part 3 of Division 9 of, or Sections 14132.95, 14132.952, and 14132.956 of, the Welfare and Institutions Code, when they provide the in-home supportive services outside their own home or residence.

NEW LABOR CODE § 3212.88

This section of the Labor Code applies to employees not covered under new Labor Code § 3212.87. Workers in these classifications of employment whose employers employ five or more workers will be entitled to a rebuttable presumption that COVID-19 is a work-related injury if there is an **outbreak** at a specific place of employment.

1. The last day worked by the employee is on or after *July 6, 2020*.
2. The employee has tested positive for 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.

Unless otherwise indicated, “test” or “testing” means a PCR (Polymerase Chain Reaction) test approved for use or approved for emergency use by the United States Food and Drug Administration to detect the presence of viral RNA. “Test” or “testing” does not include serologic testing, also known as antibody testing. “Test” or “testing” may include any other viral culture test approved for use or approved for emergency use by the United States Food and Drug Administration to detect the presence of viral RNA which has the same or higher sensitivity and specificity as the PCR Test.

3. The employee’s positive test occurred during a period of an **outbreak** at the employee’s *specific place of employment*.

4. A *specific place of employment* means the building, store, facility, or agricultural field where an employee performs work at the employer's direction. A specific place of employment 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.
5. An **outbreak** exists if within 14 calendar days one of the following occurs at a specific place of employment:
 - a. If the employer has 100 employees or fewer at a specific place of employment, **Four (4) employees** test positive for COVID-19.
 - b. If the employer has more than 100 employees at a specific place of employment, **Four (4%) percent** of the number of employees who reported to the specific place of employment, test positive for COVID-19.
 - c. A specific place of employment is ordered to close by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent due to a risk of infection with COVID-19.
6. If an employee has paid sick leave benefits specifically available in response to COVID-19, those benefits shall be used and exhausted before any temporary disability benefits or benefits under Section 4800, 4800.5, or 4850 are due and payable.

If an employee does not have those sick leave benefits, the employee shall be provided temporary disability benefits or Section 4850 benefits, if applicable, from the date of disability. There shall not be a waiting period for temporary disability benefits.

7. The rebuttable presumption shall be extended to employees subject to this subdivision 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 does not affect an employee's rights to compensation for an injury or illness under this division in accordance with a preponderance of evidence.

Evidence relevant to controverting the presumption may include, but is not limited to, evidence of measures in place to reduce potential transmission of COVID-19 in the employee's place of employment and evidence of an employee's nonoccupational risks of COVID-19 infection.

8. The claims administrator has 45 days in which to reject or accept the claim. The claim can only be contested following that 45-day period with evidence discovered after the 45-day period.
9. A claim is not part of an outbreak if it occurs during a continuous 14-day period where the requisite number of positive tests have not been met. For purposes of applying the presumption in this section, the claims administrator shall continually evaluate each claim to

determine whether the requisite number of positive tests have occurred during the surrounding 14-day periods.

10. In the case of an employee who performs work at the employer's direction in multiple places of employment within 14 days of the employee's positive test, the employee's positive test shall be counted for the purpose of determining the existence of an outbreak at each of those places of employment, and if an outbreak exists at any one of those places of employment, that shall be the employee's "specific place of employment."
11. The law sunsets on January 1, 2023.

Senate Bill 1159 also requires certain actions to be taken by the employer. These requirements are independent of any presumption regarding compensability of an employee claim of occupational COVID-19. Employer failure to comply with these requirements may also result in penalties assessed against the employer by the Labor Commissioner:

12. When the employer knows or reasonably should know that an employee has tested positive for COVID-19, the employer shall report to their claims administrator, in writing via electronic mail or facsimile within three business days, all of the following:
 - a. An employee has tested positive. For purposes of this reporting, the employer shall not provide any personally identifiable information regarding the employee who tested positive for COVID-19 unless the employee asserts the infection is work related or has filed a claim form pursuant to Section 5401.
 - b. The date that the employee tests positive, which is the date the specimen was collected for testing.
 - c. The specific address or addresses of the employee's specific place of employment during the 14-day period preceding the date of the employee's positive test.
 - d. 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.
13. Any employer who is aware of an employee testing positive between July 6, 2020 and September 17, 2020, shall report to their claims administrator, in writing via electronic mail or facsimile, **within 30 business days** of September 17, 2020, all of the data required as noted above (See #12). The employer shall 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 between July 6, 2020, and September 17, 2020.

The claims administrator shall use the information reported under this paragraph to determine if an outbreak has occurred from July 6, 2020, to September 17, 2020 for the purpose of applying the presumption under this section.

14. An employer or other person acting on behalf of an employer who intentionally submits false or misleading information or fails to submit information when reporting (See #11) is subject to a civil penalty in the amount of up to **ten thousand dollars (\$10,000)** to be assessed by the Labor Commissioner.

Supplement Sick Leave Laws

“...paid sick leave benefits specifically available in response to COVID-19”

Labor Code §§ 3212.86(d), 3212.87(d) and 3212.88(d) as added by SB 1159 (Hill and Daly)

Families First Coronavirus Response Act (FFCRA):

- Effective Dates: April 1 – December 31
- Employment Covered: Businesses with fewer than 500 employees (some exemptions for employers with fewer than 50 employees)
- Total Amount of Benefit: employees taking leave are entitled to pay at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).
- Link: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>

State of California (Executive Order N-51-20)¹:

- Effective Dates: April 16 – until lifted
- Employment Covered: Food Sector Workers for employers not subject to FFCRA (500+ Employees)
- Total Amount of Benefit: Same as FFCRA
- Link: <https://www.dir.ca.gov/dlse/FAQ-for-PSL.html>

State of California (Labor Code §§ 243, 243.1):

- Added by Assembly Bill 1867 (Budget Committee) effective upon signature of the Governor
- Effective Dates: Date of Signature – December 31, 2020 *unless* FFCRA is extended beyond December 31, 2020 then until FFCRA expires
- Employment Covered: Food Sector Workers for employers not subject to FFCRA (500+ employees)
- Employment Covered: Health Care Providers and Emergency Responders whose employers are not subject to FFCRA (500+ employees) or elected to exclude such employees from the FFCRA
- Total Amount of Benefits: Same as FFCRA
- Link: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB1867

City of Los Angeles:

- Effective Dates: April 7 – 2 weeks following end of local emergency period
- Employment Covered: Employees of employers not subject to FFCRA (500 or more employees in the City or 2000 nationwide) There are a number of exemptions to the Ordinance for certain

¹ Per the Division of Workers’ Compensation, FAQ Paragraph 8, the FFCRA and EO N-51-20 benefits are cited as examples of paid sick leave specifically related to COVID-19 that must be used before getting TD.
<https://www.dir.ca.gov/dwc/Covid-19/FAQs.html?fbclid=IwAR12W70JwgG5Kx-WCkSKn5JtA1nn6Wluye1WACTGx-vBGjpCtlu5HvrDmq>

classifications of employment, new businesses as defined, and if an employer has a “generous” leave policy.

- Total Amount of Benefit: Same as FFCRA
- Link: <https://www.lamayor.org/sites/g/files/wph446/f/page/file/SUPPLEMENTALPAIDSICKLEAVE.pdf>

City of Oakland:

- Effective Dates: May 12 – December 31
- Employment Covered: All private employers except “small employers” (fewer than 50 employees). There are a number of exceptions.
- Total Amount of Benefit: Same as FFCRA
- Link: <https://cao-94612.s3.amazonaws.com/documents/EPSSL-FINAL-corrected-amended-5-12-20-Council-corrected.pdf>

City of San Francisco:

- Effective Dates: April 17 – October 15
- Employment Covered: Employees of employers not subject to FFCRA (500 or more employees)
- Total Amount of Benefit: Regular rate of pay for 80 hours if an employee as of February 25, or the number of hours that the employee worked, on average, over a two-week period between the date of hire and the date upon which the leave is taken, including hours for which the employee took leave of any type, if an employee after February 25, but in no case more than 80 hours. February 25 is the date of San Francisco’s emergency declaration.
- Link: <https://sfgov.org/olse/sites/default/files/PHEL%20FAQ%20-%20updated%2008.26.20.pdf>

City of San Jose:

- Effective Dates: April 7 – December 31
- Employment Covered: Employees who are essential workers as defined in the County of Santa Clara shelter in place order dated March 16 for employers not subject to FFCRA (500 or more employees)
- Total Amount of Benefit: Same as FFCRA
- Link: <https://www.sanjoseca.gov/your-government/departments-offices/public-works/labor-compliance/urgency-covid-19-paid-sick-leave-ordinance>

County of Los Angeles:

- Effective Dates: March 31 – December 31
- Employment Covered: Employees of employers not covered by FFCRA (500 or more employees) but employees of employers subject to Executive Order N-51-20 are not covered under the ordinance
- Total Amount of Benefit: Same as FFCRA
- Link: <http://file.lacounty.gov/SDSInter/bos/supdocs/145533.pdf>