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COVID-19 and Workers' Compensation

New Tracking Rules Challenge Employers

SB 1159, signed into law in September, requires that when a California employer learns that an employee has tested positive for coronavirus, it must report that positive case to its workers' compensation carrier within three business days.

There is a lot of ground to cover in these reports and the legislation was passed without much fanfare, so many employers may not even know about their obligations. And that could cost them: the fine for non-compliance is \$10,000 per incident.

The report must include a number of details that legal experts say will create a significant reporting burden for employers.

WHAT MUST BE REPORTED

- The date the worker tested positive,
- The address of the worker's place(s) of employment during the 14 days preceding the positive test, and
- The highest number of employees who reported to work in the 45 days preceding the last day the employee worked in the workplace.

The task will be made even more difficult if an employee works at multiple worksites, and an employer could have to spend a significant amount of time doing all that detective work.

Employers will have to go through the same process for each COVID-19 case among its staff.

The law creates a presumption that workers who come down with COVID-19 between July 6 this year and Jan. 1, 2023, contracted the virus at work, which makes them eligible for workers' compensation benefits.

The presumption applies to all workers: (1) who test positive during an outbreak at work; and (2) whose employer has five or more employees.

WHEN IT APPLIES

All of the following conditions must exist for the COVID-19 presumption to apply:

- The employee tests positive within 14 days of working at a worksite;
- The date of illness shall be the last date the employee worked at the workplace prior to the positive test.
- The positive test occurred during an outbreak at the workplace.

What is an 'outbreak'?

An "outbreak" exists if, during a 14-day period, one of the following occurs at a worksite:

- If the employer has 100 employees or fewer at a specific place of employment, four employees test positive for COVID-19;
- If the employer has more than 100 employees at a specific place of employment, 4% of the number of employees who reported to the specific place of employment test positive for COVID-19; or
- 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.

The takeaway

The most important thing is that you are prepared for the paperwork and detective work you'll have to engage in in case one of your workers contracts the coronavirus. You may want to put systems in place now so that gathering the information will be easier in case of a COVID-19 infection at your workplace. ❖

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Workplace Safety

Law Imposes New COVID-19 Reporting Requirements

CALIFORNIA EMPLOYERS already have a lot to digest after Cal/OSHA issued sweeping new COVID-19 safety regulations in November. Now they face additional requirements starting Jan. 1, 2021, thanks to a new law.

AB 685 expands Cal/OSHA's authority to issue stop-work orders to workplaces it deems a COVID-19 "imminent hazard."

It also requires employers to send notices to a number of parties (state agencies, local authorities, employees, contractors and more) if they have coronavirus infections in any of their facilities.

The law, which comes into effect January 1, covers a lot of territory and employers need to understand their obligations if any of their employees test positive to avoid penalties, fines or possible legal action. Here are the main points to be aware of:

Employee notice requirements

The new law requires employers who learn of an employee's COVID-19 infection to send out notifications to all employees and subcontracted workers who were on site at the same time as the infected person.

An infected employee (or qualifying individual in the law) is defined as any person who has:

- A laboratory-confirmed case of COVID-19,
- A positive COVID-19 diagnosis from a licensed health care provider,
- A COVID-19-related order to isolate provided by a public health official, or
- Died due to COVID-19, as determined by a county public health department.

The notice must provide information regarding COVID-19-related benefits the employee may be eligible for under federal, state and local laws, such as:

- Workers' compensation benefits,
- COVID-19-related leave,
- Company sick leave,
- State-mandated leave, and
- Supplemental sick leave.

The notification must also include the employer's COVID-19 disinfection and safety plan.

Public health agency notification

AB 685 also requires that employers notify their local public health agency within 48 hours of learning of an "outbreak" among their workers. An outbreak is defined as: At least three probable or confirmed COVID-19 cases within a 14-day period at a worksite.

HEALTH AGENCY NOTIFICATIONS MUST INCLUDE:

- Information about the worksite – name of company, business address, and North American Industry Classification System (NAICS) industry code.
- Names and occupations of workers with COVID-19.
- Additional information requested by the local health department as part of their investigation.

If there are additional laboratory-confirmed COVID-19 cases at the workplace, the employer will once again need to send notice to the local health department.

Expanded Cal/OSHA authority

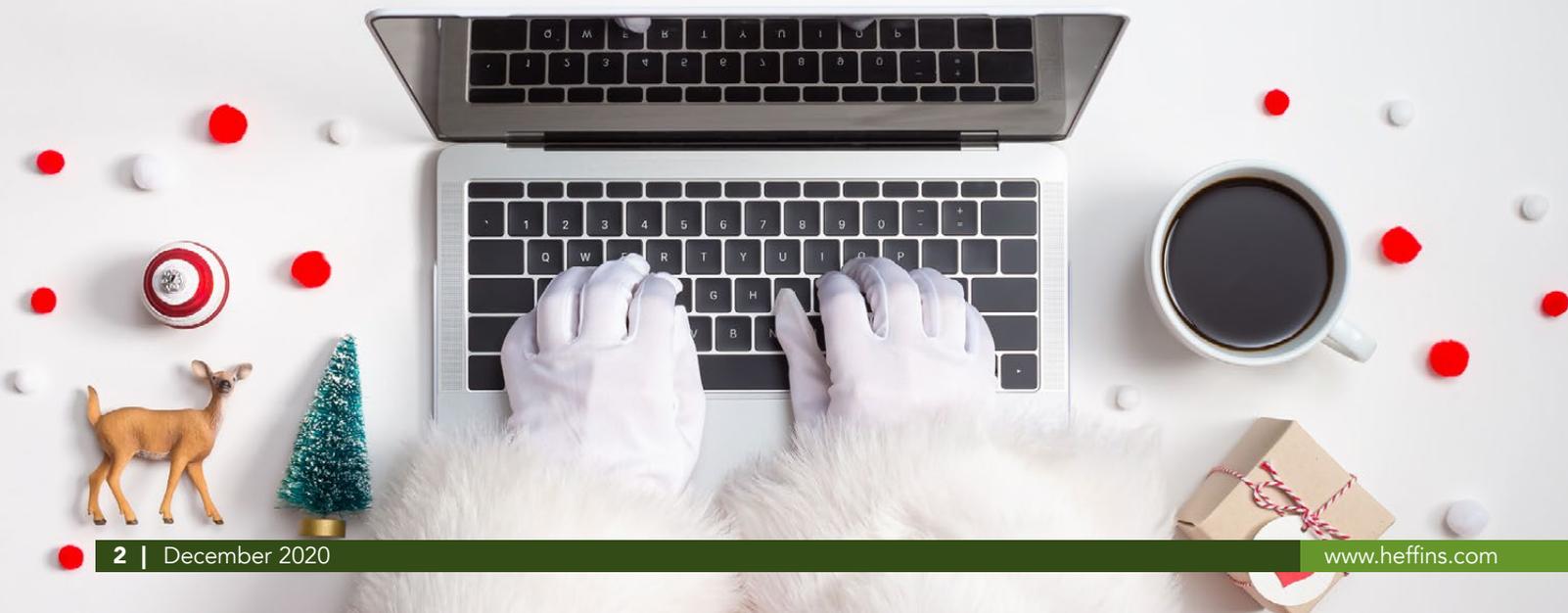
AB 685 grants Cal-OSHA authority to close workplaces that "constitute an imminent hazard to employees" due to COVID-19.

But the stop-work order must be limited to the immediate area in which an "imminent hazard exists." Cal-OSHA is not authorized to bar entry to any areas outside the hazard zone.

When issuing a stop-work order, the agency must post a notice in the workplace. Entry will only be permitted for cleaning, disinfecting and eliminating the danger.

The timeline for issuing serious citations is also greatly reduced. Typically, whenever Cal/OSHA plans to issue a serious citation it has to provide notice and give the employer 15 days to provide additional evidence to refute the need for a serious citation.

For a COVID-19 serious citation, Cal/OSHA will not have to provide this notice, meaning that the employer will not have 15 days to mount a defense. ❖





Emergency Regulations

COVID-19 Workplace Safety Rules Take Effect

THE CAL/OSHA Standards Board has approved new emergency regulations that will impose strict rules on employers to implement safeguards in order to reduce the risk of COVID-19 spreading in the workplace.

The sweeping regulations extend the reach of protections to employer-provided housing and transportation, as well as imposing new reporting requirements on employers who have workers that contract the coronavirus.

The new rules took effect Nov. 30, so employers need to ramp up immediately to comply with them.

HIGHLIGHTS OF THE NEW REGULATIONS

- Physical distancing and mask-wearing are required unless it is not possible to wear masks on the job. If physical distancing is not possible, the employer would have to explain why.
- Employers must provide face coverings and ensure they are worn by employees over the nose and mouth.
- At fixed work locations where it is not possible to maintain physical distancing, the employer shall install cleanable partitions that effectively reduce aerosol transmission between employees.
- Employers must implement cleaning and disinfecting procedures for frequently touched surfaces and objects, such as doorknobs, elevator buttons, equipment, tools, handrails, handles, controls, bathroom surfaces and steering wheels.
- Employers will be required to have a written COVID-19 prevention program. Cal/OSHA will allow the program to be incorporated into an existing injury and illness prevention plan or be stand-alone.
- Employers must identify and evaluate COVID-19 hazards with participation from employees, and then correct those hazards.
- Employers must investigate cases among their employees. If they discover one of their staff has contracted COVID-19, they must notify all employees at a worksite who might have been exposed, within one day. Workers who may have been exposed must be offered COVID-19 testing at no cost.
- Employers must report coronavirus cases in their workplaces to local health authorities.
- Employers must maintain medical records related to COVID-19 and provide those records to the local health department, the California Department of Public Health, Cal/OSHA, and the National Institute for Occupational Safety and Health (upon request).
- Employers must implement a system of record-keeping to track all COVID-19 cases in the workplace.
- Employees with COVID-19 symptoms may not return to work until at least 10 days since symptoms first appeared, and not until after 24 hours have passed since the employee had a fever of 100.4 or higher and after all symptoms have passed.

There are even rules for disinfecting and cleaning employee housing and transportation if the company provides them.

The regs also include provisions that are beyond the scope of workplace safety regulations, such as requiring employers to maintain employees' earnings, seniority and benefits when they are off work because of COVID-19.

Key takeaways

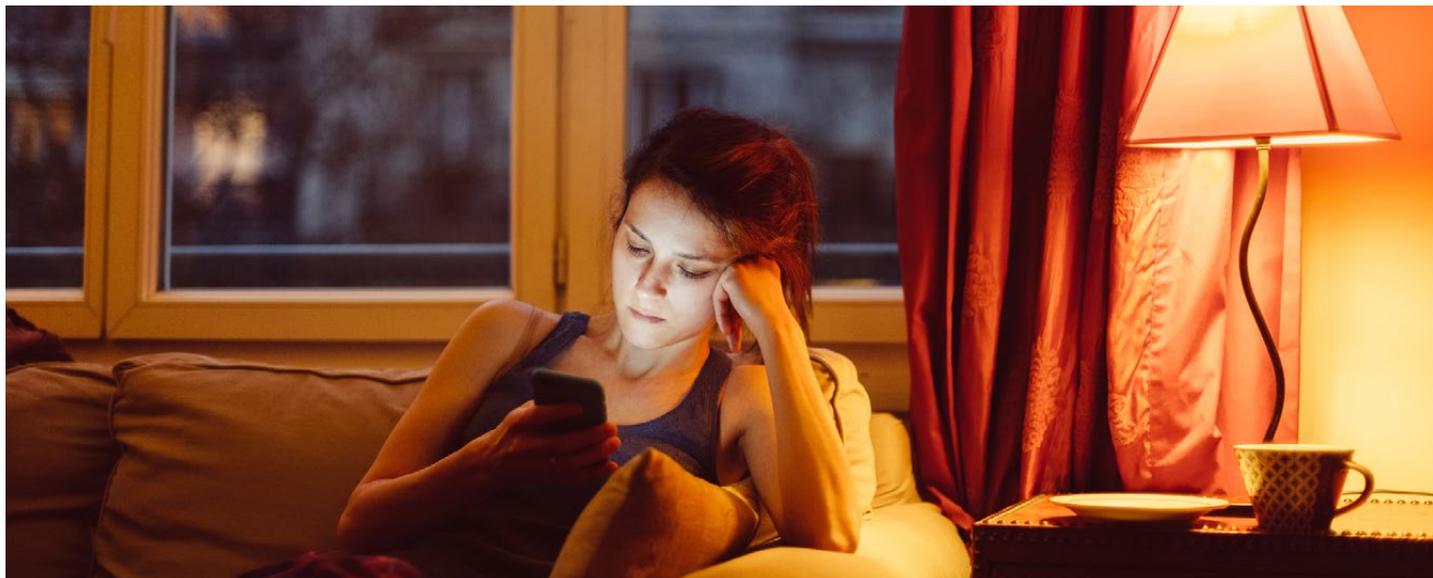
The new rules took effect Nov. 30, so you will need to immediately prepare. You should:

- Prepare for new record-keeping requirements,
- Write COVID-19 prevention program guidelines,
- Implement testing protocols according to the regulations, and
- Prepare policies and procedures for notifying affected staff and others of possible COVID-19 exposure. ❖

GET THE FULL REGULATIONS HERE

Pandemic Fallout

Telecommuting and the Wage and Hour Dilemma



WITH THE coronavirus pandemic forcing so many people to work remotely, and with mobile technology allowing them to work from anywhere, your employees may be working when they are off the clock.

They may feel pressured to do so or maybe they just want to get their work done, but if they are working past normal hours, it could spell trouble for your organization.

The proliferation of smartphones had already led to a rising number of lawsuits by employees claiming they were required to work uncompensated on evenings and weekends when not on the clock. Now, labor lawyers are expecting a second surge in these lawsuits as more people work from home during the pandemic.

The class-action danger

Often it may just be as simple as an employee receiving a text message from the boss asking for something; they take a few minutes and send them what they need.

The problem for employers is that when one employee complains to the Labor Department that they are not being compensated for time working when away from work, the agency's investigators won't stop with the complaining employee. They also look at how many others are "similarly situated."

A single employee's complaint can turn in to a class action when all the other similarly situated employees are included.

Just a few minutes a day over months or years can add up if employees regularly use their phones for uncompensated work.

In the last several years, the courts have seen a flood of lawsuits in which groups of employees claim the time they spend reading and responding to e-mail should be considered work time, and therefore paid.

The danger is that when a boss sends a worker a message off-hours and asks them to read something or send an e-mail, the employee will

usually feel compelled to do as they're told, even if they don't want to.

When employees sue to claim they should be compensated for after-hours remote work, the employer typically uses the *de minimis* defense, but that's a dead end. Here's why.

De minimis means very little, perhaps just a minute or two. The employer maintains that the time spent is *de minimis*, but it isn't. Just five minutes a day adds up to almost a half hour a week. There are precedent-setting court decisions that have said that even 30 minutes extra a week is not *de minimis*.

Also, besides federal law, you have state laws to contend with.

Additionally, you may not even know that some employees are checking work e-mail at home whether they're told to or not.

Just because the employer doesn't require employees to stay tied to their phones, doesn't eliminate legal risk. The law defines work time as the time an employee is "suffered or permitted" to work.

So, an employer doesn't have to require employees to answer e-mail and perform other tasks off the clock to run into trouble. Merely permitting that work without counting it as compensable time, puts the employer at risk.

What should you do?

The extension of work time made possible by technology and the pandemic's push towards more telecommuting, poses a new danger for employers.

To ensure you don't find yourself the target of a wage and hour lawsuit, you need to put in place a solid policy about non-exempt employees working from home.

You should then communicate it to your staff in a tele-conference, as well as include the policy in your employee handbook.

Once the policy has been communicated, you have to monitor and survey staff to make sure they are not breaching the rules. ❖