

### GOVERNOR NEWSOM'S EXECUTIVE ORDER CREATES WORKERS' COMPENSATION PRESUMPTION FOR COVID-19 DIAGNOSIS

On May 6, 2020, Governor Gavin Newsom signed an executive order establishing a rebuttable, time-limited legal presumption that certain cases of COVID-19 arise out of and occur in the course of employment for purposes of workers' compensation coverage. This order was signed after much debate in the insurer, employer and injured worker communities, and was different in important ways from earlier drafts as well as from the presumption bills that are currently under consideration in the legislature. Important aspects of the executive order are discussed in more detail below.

**The presumption is rebuttable, which means that an employer can provide evidence that the employee's exposure to COVID-19 did not arise out of and occur in the course of employment.** Earlier drafts of the order would have established a "conclusive" presumption, which would have precluded an employer from introducing such evidence. However, a rebuttable presumption still shifts the burden of proof from the employee to the employer, which means that it is no longer the employee's burden to prove that their work caused their illness. Instead, with a rebuttable presumption, the employer must prove that the work did not cause the illness, which is very difficult to prove. Additionally, the order provides just 30 days for an employer to deny compensability, as opposed to the 90 days under the Labor Code.

**The presumption is time-limited.** The order applies the presumption to claims occurring from March 19 until 60 days after the issuance of the order (or July 5, 2020). This does not mean that claims made for illness occurring outside this period will be denied. It just means that claims made by employees to whom the presumption applies for illness arising during that time will not be subject to a burden of proof that the illness was work-related. There is also a potential that either a further executive order or legislation could expand the current time limits on the presumption.

**The presumption applies to all employees working outside of their home or residence.** Normally, workers' compensation presumptions apply to narrow classes of employees whose jobs put them at higher risk for certain types of illness. This order grants the presumption to any employee who is diagnosed or tests 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. This would at least seem to leave a question as to whether the presumption applies to an employee who was not directed by the employer to go to their place of employment but did so of their own volition.

**The presumption requires a positive test or diagnosis.** An employee must either test positive for COVID-19 or be diagnosed with COVID-19 by a California-licensed physician and have that diagnosis confirmed by further testing within 30 days of that diagnosis. This is an improvement over prior draft language which would have provided workers' compensation coverage to individuals who were exposed and caused to quarantine, regardless of whether they were infected.

**Covered benefits include full hospital, surgical, medical treatment, disability indemnity and death benefits.** This is an improvement over some draft presumptions which would also cover costs of temporary

housing, personal protective equipment and other expenses that are not normally covered by workers' compensation.

**An employee needs a certification of disability to qualify for temporary disability benefits.** To qualify for temporary disability benefits, an employee must satisfy one of the following:

- If the employee's positive test or diagnosis is on or after May 6, 2020, the employee must be certified for temporary disability within the first 15 days after the initial diagnosis and must be recertified for temporary disability every 15 days thereafter, for the first 45 days following diagnosis.
- If the employee's positive test or diagnosis was prior to May 6, 2020, the employee must obtain a certification within 15 days of the May 6, 2020 (that is, before May 22, 2020), documenting the period for which the employee was temporarily disabled and unable to work, and must be recertified for temporary disability every 15 days thereafter, for the first 45 days following diagnosis.

**Certain paid sick leave benefits must be exhausted before temporary disability benefits or benefits under Section 4850 of the Labor Code are paid.** The order 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 available under Labor Code § 4850 are due and payable. If a claimant does not have such sick leave benefits, he or she shall be provided temporary disability or Labor Code § 4850 benefits from the date of disability. In no event should there be a waiting period for temporary disability benefits. While it appears that the intent of this provision is to prevent employees from double-dipping on paid leave time, it could be problematic to administer, especially for claims where an employee has already received temporary disability benefits. The order does not give any guidance on how to coordinate the payment of benefits with sick leave or the reimbursement of benefits already paid.

The order also lacks specificity with regard to which sick leave benefits are "specifically available in response to COVID-19." COVID-related emergency paid sick leave benefits have been made available to certain workers through the federal Families First Coronavirus Response Act (FFCRA). Those benefits are available to employees of state and local public agencies as well as employees of private sector employers with fewer than 500 employees, and employers may exclude employees who are health care providers or emergency responders from taking paid sick leave under FFCRA. Local jurisdictions including Los Angeles County have enacted their own COVID-19 related paid sick leave ordinances, and certain employers have also created special COVID-19 related sick leave entitlements for their employees. We are currently working with the Division of Workers' Compensation (DWC) to obtain clarity on what leaves are considered "specifically available in response to COVID-19" in the coming days.

Moreover, for schools and colleges, the Education Code provides for industrial accident leave benefits. While the executive order does not specifically address Education Code benefits, it appears the intent is for the paid sick leave available in response to COVID-19 to be paid first and then the integration of Education Code benefits (60 days industrial accident leave, etc.) with temporary disability benefits. This is another area where we are seeking clarification from the DWC.

**The order waives collections on unclaimed death benefits.** Under Labor Code § 4706.5, if an employee dies without dependents, the employee's death benefit would be payable to the Department of Industrial Relations. This welcome provision recognizes the extraordinary circumstances of the COVID-19 pandemic and waives

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collection on any death benefits due to the DIR pursuant to Labor Code § 4706.5 arising out of claims covered by the order.

**Impacts will vary by industry.** For schools and colleges, the vast majority of teachers and faculty have been working remotely during the time period covered by the order. The presumption will apply to staff members, like custodians, food service workers and others who have been required to work at school sites. For healthcare providers, the presence of a presumption will not have an enormous impact on the claims of front-line medical providers who have tested positive after coming into contact with source patients—the claims of those workers have not generally been disputed. However, the presumption will apply to a wider swath of healthcare workers who are required to be at the worksite and may not be providing direct patient care, including administrative, custodial, and other employees.

**The DWC will issue more guidance.** The order gives the DWC regulatory authority to enact its provisions. As the DWC issues guidance, we will continue to alert clients and incorporate it into our processes and procedures.

**The executive order may not be the final word.** The legislature is considering a number of bills that would enact a presumption for COVID-19. With the Assembly and Senate back in session, we may see the legislature change the rules before the end of the summer.

If you have any questions about this *Briefing* or how the Governor's executive order impacts your workers' compensation program, please contact your Keenan Risk Management Analyst.

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### COVID-19: DIR ISSUES Q&A DOCUMENT REGARDING EXECUTIVE ORDER N-62-20

On May 18, 2020, the California Department of Industrial Relations (DIR) issued a Q&A document clarifying and providing implementation guidance for Governor Newsom's Executive Order N-62-20, which established a rebuttable presumption that certain workers contracting COVID-19 between March 19 and July 5, 2020 had done so at work and were therefore eligible for workers' compensation benefits.

Of special interest to employers are question and answer numbers 8 and 12 regarding the use of paid sick leave benefits.

As a reminder, the Families First Coronavirus Response Act (FFCRA), issued March 18, 2020, among other things provides for 80 hours of paid sick leave for those employed by public agencies and private employers with fewer than 500 employees. Hospitals and certain first responders are exempt. More information regarding FFCRA can be found here:

<https://www.keenan.com/Resources/Briefings/Briefings-Detail/hr-6201-families-first-coronavirus-response-act-provides-new-provisions-aimed-at-coronavirus-preparedness>

#### Q&AS SPECIFIC TO EMPLOYERS REGARDING PAID SICK LEAVE BENEFITS

**Q8.** I was diagnosed with COVID-19 and have been using my own sick leave while I have been unable to work. Under Executive Order N-62-20, if my illness is deemed related to my work, is my employer required to give me my sick leave back?

**A:** As explained below, it depends upon the type of sick leave benefits you are using.

- If your employer is providing you paid sick leave specifically available in response to COVID-19 (such as under the Families First Coronavirus Response Act or Executive Order N-51-20), then you must use that sick leave before you receive temporary disability benefits.
- If you do not have any supplemental paid sick leave specifically available in response to COVID-19, temporary disability benefits or benefits paid under Labor Code section 4850 should have been paid by your employer from the time you became disabled. This means that, if you took paid leave (sick leave, vacation time, personal time off) through your employer's plan, that leave should be restored back to you. If you have any questions about this or to address your specific situation, please speak with your employer.

**Q12.** How long does my employer have to decide whether it will accept or deny my claim?

**A:** If you meet the criteria for this presumption, your employer will have up to 30 days to investigate and make a decision whether to accept or deny your claim. If your employer fails to reject your claim within

30 days, your injury or illness is presumed compensable, and your employer can then rebut that presumption only with evidence it discovered after the 30-day period. Until your employer makes that decision, you will be eligible for up to \$10,000 in medical treatment for your COVID-19-related illness. During that time, you may be eligible to receive federal, state, or local COVID-19-specific paid sick leave benefits, so you should speak to your employer about those benefits. If such benefits are not available, you may be eligible for benefits from the Employment Development Department.

Keenan's Briefing on Executive Order N-62-20 can be found at the links below:

<https://www.keenan.com/Resources/Briefings/Briefings-Detail/governor-newsoms-executive-order-creates-workers-compensation-presumption-for-covid-19-diagnosis>

The complete Q&A guidance can be found on the DIR's website at:

<https://www.dir.ca.gov/dwc/Covid-19/FAQs.html>

Employers are encouraged to have close communication with their workers' compensation claims administrator regarding the payment of sick leave in response to COVID-19 and, in particular, when a potential claim for workers' compensation benefits has been filed. Temporary disability benefits, when due, are not paid until the 80 hours of paid sick leave under FFCRA is exhausted. When temporary disability is paid, close integration with other available sick leaves or other available leave provisions is important to ensure employees are paid correctly and not overpaid.

For more questions regarding how various sick time and leave provisions integrate with workers' compensation temporary disability, please contact your Keenan Risk Management Analyst.

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### COVID-19 UPDATE: NEW EXECUTIVE ORDER N-63-20 NEW DEPARTMENT OF INDUSTRIAL RELATIONS DEADLINES

On May 8, 2020, Governor Gavin Newsom issued Executive Order N-63-20 which, among other things, extends some critical deadlines that impact employers' obligations with regard to employee notices, safety and workers' compensation programs impacted by the COVID-19 pandemic.

Sections 8 and 9 of the Order extend by 60 days certain procedural deadlines of the Department of Industrial Relations, including the deadline for workers to file wage claims with the Labor Commissioner; the deadline for employers to appeal Cal/OSHA citations; and the deadline for Workers' Compensation Administrative Law Judges to issue decisions. Section 10 modifies the employee notice posting requirements for public employers.

Details on the sections that impact Keenan's clients are as follows:

#### SECTION 8

The deadlines specified in the following statutes and regulations shall be extended for a period of 60 days:

- b) Labor Code section 99, related to the Labor Commissioner's filing of claims and liens of employees, and Civil Code section 8414 to the extent it governs the deadlines for filing and recording such claims and liens (usually the earlier of 90 days after completion of the work of improvement or 30 days after the owner records a notice of completion or cessation);
- c) Labor Code sections 4616(b)(1) and California Code of Regulations, Title 8, sections 9767.2(a) and (b) and 9767.8(d), related to the period in which the administrative director must act upon Medical Provider Network applications or requests for modifications or reapprovals (normally within 60 days of submitting a complete new plan and 180 days of submitting a complete plan for reapproval);
- d) California Code of Regulations, Title 8, section 17304, related to the period in which the Return-To-Work Supplement Program must receive an application for a Return-to-Work Supplement (usually within one year from the date the voucher was served on the individual);
- e) California Code of Regulations, title 8, section 17309, related to filing a Return-to Work Supplement appeal (usually within 20 days of the service of the decision) and any reply or responsive papers (normally within 15 days following the date of filing the appeal);
- f) Labor Code section 123.5 and California Code of Regulations, Title 8, sections 9713, 9714, and 9714.5, related to the period in which Workers' Compensation Administrative Law Judges must file decisions (usually, 90 days);

- g) Labor Code 5313, related to the period in which the Workers' Compensation Appeals Board must act on any decision submitted by a Workers' Compensation Administrative Law Judge (under the statute, within 30 days after the case is submitted);

Please note, Section 8, subsections a, h, i, and j do not apply to Keenan clients.

## SECTION 9

The deadlines specified in or that apply to the following statutes and regulations shall be extended for a period of 60 days to the limited extent that the time to issue a citation or file a complaint, claim, or appeal would otherwise elapse in the 60-day period following this Order:

- a) All Labor Code sections and related regulations setting the time for the Labor Commissioner to issue any citation under the Labor Code, including a civil wage and penalty assessment pursuant to Labor Code section 1741 (under the statute, no later than 18 months after the filing of a valid notice of completion in each county in which the public work was performed, or 18 months after acceptance of the public work, whichever occurs last);
- b) All Labor Code sections and related regulations setting deadlines for any employer or other person to appeal or petition for review of any citation issued by the Labor Commissioner;
- c) Labor Code sections 98 (notice to the parties within 30 days after the filing of a complaint, and hearing within 90 days of the determination to hold a hearing), and 98.7 (filing a complaint of discrimination within six months of the violation), related to workers' rights to file complaints and initiate proceedings with the Labor Commissioner;
- d) Labor Code section 6317, related to the issuance of Cal/OSHA citations (stating that a citation or notice shall not be issued more than six months after the occurrence of the violation); and
- e) Labor Code sections 6319, 6600, 6600.5, 6601, and 6601.5, related to the appeal of citations, notices, or orders of Cal/OSHA (normally 15 working days).

## SECTION 10

Any statute or regulation that requires a public employer to post notice on "employee bulletin boards" is suspended, provided that the public employer provides such notice to its employees through electronic means, such as through electronic mail to its employees, posting on an employer-operated website frequented by its employees, or any other electronic means customarily used by the public employer to communicate with its employees.

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The full text of Executive Order N-63-20 can be found here:

<https://www.gov.ca.gov/wp-content/uploads/2020/05/5.7.20-EO-N-63-20.pdf>

For more information, please contact your Account Manager.

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