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Returning to Work from COVID-19: Navigating Through Employer Concerns in Uncertain Times

An exploration of employment and workers' compensation considerations as companies transition to reopen, restructure and manage their workplaces as the COIVID-19 restrictions are lifted.

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When can business go back to work?

Anticipated Timeline

- **Good News:**
  - According to Gov. Gavin Newsom on April 29, 2020: “We believe ***we are weeks, not months***, away from making meaningful modifications” in the current restrictions.
- **Uncertain News:**
  - Newsom also stated that “while current public health indicators such as hospitalizations and testing capacity look promising, additional progress needs to be made toward slowing the spread of the virus.”
  - Newsom reiterated ***the state is monitoring six indicators*** to guide its decision to modify the stay-at-home order and these indicators will be consulted before the state moves into each stage. Those include:
    1.) Increased testing and contact tracing;
    2.) Systems for protecting the most vulnerable populations such as seniors;
    3.) Ensuring hospitals are equipped to handle a patient surge;
    4.) Engaging research partners to develop therapeutics;
    5.) Issuing new social distancing guidelines for businesses, schools and childcare facilities; and
    6.) Developing the capacity to reinstate new orders when necessary.

Four Phase Plan

- In advance of the anticipated modifications, Newsom announced a four-phase plan that did not come with a guaranteed timetable.
  - i. **Stage 1**: California is currently in Stage 1, but is rapidly moving to Stage 2. People are staying home except for essential workers such as health care and grocery workers.
  - ii. **Stage 2**: In this stage, schools, summer programs, childcare facilities and low-risk businesses stores with (including retail will reopen with curbside pickup and non-essential manufacturing for products such as clothing and toys) adaptations and modifications to promote social distancing.
    1. To prepare for the next stage, the state is building testing and contact-tracing programs and equipping hospitals with PPE to prepare ***for potential surges in patients***.
    2. Also, ***counties can choose to relax stricter local orders*** at their own pace.
  - iii. **Stage 3**: In this stage high-risk work places will reopen. Newsom said those include: personal care (hair and nail salons, gyms), entertainment venues (movie theaters, sports without live audiences) and in-person religious services (churches, weddings).
  - iv. **Stage 4**: This marks the end of the stay-at-home order and reopening of the highest-risk parts of the economy including concerts, convention centers and live audience sports events. Newsom said this stage will be implemented when therapeutics to treat patient infected with COVID-19 have been developed.

Do the rules and best practices differ between Fortune 100 companies and small businesses or essential or non-essential business?

Short Answer: No. Everyone is in the same position trying to navigate through the same written guidance and executive orders.

- Even once the stay-at-home order is lifted, Newsom mentioned that society won't snap back to normal. For example, restaurants will likely have to limit capacity and face coverings in public will likely be common.

- "There's no light switch here. It's more like a dimmer." - Newsom

- "Normal, it will not be until we have herd immunity and a vaccine. You may be having dinner with the waiter wearing gloves and maybe a face mask...where your temperature is checked before walking in. These are likely scenarios." - Newsom

When we return to work, what laws/rules/protocols do we follow?

Types of Rules & Regulations

1. **Federal Laws/Restrictions/Protocols**: HR 6201 - Families First Coronavirus Response Act
2. **State Executive Orders/Protocols**: California Executive Order N-33-20
3. **Local County Executive Orders/Protocols**: Orange County's Public Health Order issued by the County Health Officer on March 17, 2020 and Subsequent Amendment on March 18, 2020.

Conflict in Laws

- The Constitution grants the federal government enumerated powers: it can print money, declare war, and regulate commerce, for instance.
- The 10th Amendment says that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, ***are reserved to the States respectively***, or to the people."
  - An important authority is the Supreme Court's decision in *Jacobson v. Massachusetts* (1905) 197 U.S. 11, which upheld a state's right to enforce such a program. The court held: "The safety and the health of the people of Massachusetts are, ***in the first instance, for that Commonwealth to guard and protect. They are matters that do not ordinarily concern the National Government***. So far as they can be reached by any government, they depend, primarily, upon such action as the State in its wisdom may take, and we do not perceive that this legislation has invaded any right secured by the Federal Constitution."
- The Centers for Disease Control and Prevention (CDC) also has limited authority to quarantine individuals but not to impose broad stay-at-home orders.

Where can Business Look to Find Guidelines/Protocols?

While there are no bright line rules, there are numerous written guidelines to follow from the following state and federal Administrative Agencies: EEOC, CDC, FDA, OSHA, DOL, DLSE, DFEH, EDD, CCPA (*Insert Any Applicable Acronym Here*)…

Local Ordinances Will Likely Provide Best Practices/Guidelines for Businesses

- Example – Orange County which released their best practices on April 28, 2020:
  - **Physical Distancing in the Workplace**. Physical distancing of a minimum of six feet should be maintained between customer-facing employees and the general public, and – to the extent practical – between employee workstations. Where six feet of physical distancing between workstations is impractical, face coverings should be worn. Businesses are encouraged to allow telecommuting by employees when practical.
  - **Handwashing, Personal Protective Equipment, and Testing**. Employers doing business in Orange County should require all customer-facing employees every thirty minutes to either wash their hands or use hand sanitizer, or wear disposable gloves. Face coverings should be provided to all employees. All employees, before starting a shift, should have their temperatures taken and not be permitted to work upon a temperature reading above 100.4 degrees. Businesses should make every effort to limit touch points. Businesses should significantly increase frequency of sanitizing workstations and equipment that come into contact with the general public.

Local Ordinances Will Likely Provide Best Practices/Guidelines for Businesses

- Example – Orange County which released their best practices on April 28, 2020 (Continued):
  - **Face coverings and gloves should be worn by all customer-facing employees**. Visitors to business establishments should also wear appropriate face coverings. Physical barriers are preferred, if available, but are not required as the general public will make individualized decisions about which businesses to patronize. For the benefit of the public and employees, handwashing or hand sanitizing should be done as soon as possible following the handling of materials that come in contact with the general public.
  - **Vendor Compliance**. Businesses should attempt to assure compliance with these guidelines by all vendors; failure of a vendor to adhere to these guidelines may subject the vendor to law enforcement action.
- **Another Great Resource**:
  - The EEOC updated its recommendations for employers endeavoring to comply with the ADA and other employment laws amidst the challenges posed by the COVID-19 pandemic. Most saliently, the guidance includes a new section on returning employees to the workplace.

What can an employer do to prepare when businesses return to keep their employees safe at the workplace?

Best Practices

Checklist of Items To Discuss Before Reopening Business

1. Determine who should return to work first (identify essential business functions and essential employees).
2. Prepare communication to employees regarding return to work.
3. Develop a written protocol for confirmed or suspected COVID cases.
4. Anticipate employee anxiety, rumors, misinformation, and plan accordingly.
5. Take steps to make the workplace more safe.
6. To the extent possible, implement social distancing requirements, such as staggered shifts, breaks, spacing between desks and community areas.

Best Practices

Checklist of Items To Discuss Before Reopening Business

(Continued)

7. Limit in-person meetings in favor of virtual meetings where possible.
8. Minimize physical contact (i.e. handshakes, cough etiquette, elevators).
9. Limit or close off gatherings in common areas (e.g. breakrooms or kitchens).
10. Educate employees regarding best hygiene practices. Intensify sanitation.
11. Promptly respond to any safety related concerns.
12. Consider temperature checks and COVID testing for employees and/or visitors.

Best Practices

Checklist of Items To Discuss Before Reopening Business

(Continued)

13. Consider whether face masks, gloves, or other protective equipment are mandatory or optional.

   - If ***mandatory***, the Company must provide or reimburse employees for masks, gloves, and other protective equipment.

   - If ***optional***, *d*etermine whether employer will place any limitations on employee created protective equipment or the type of masks, gloves, or protective equipment permitted.

   - Ensure that PPE does not otherwise pose a safety concern. Follow CDC Guidelines relating to proper use of PPE.

Best Practices

What type of PPE gear is required?

Answer: Check CDC's website, which also contains guidelines for use of PPE gear.

vs.

Are there any best practices that employers should consider when conducting body temperature testing?

What should I be concerned about?

- Yes, there are ***legal*** and ***practical*** concerns related to screening employee body temperatures which are focused towards the goal of reducing the transmission and risk of the COVID-19 virus.

- There are also important ***privacy*** law and ***employment*** law considerations that an employer will need to contemplate in developing and implementing a program to assess employee health and potential contraction of the disease, which will ultimately affect the shape and scope of such a program.

- Employers should also consult with a ***qualified medical professionals*** to obtain the latest medical information to ensure the safety and efficacy of the proposed temperature testing.

Other Possible Concerns

- Possible False Positives/Negatives: Employers should consider the frequency of false-positives or false-negatives and must also note that testing only reveals if the virus is currently present. Further, employers should still require that employees observe social distancing, regular handwashing, and other infection control measures.
  - The EEOC cautions, however, that employers should ensure that the tests are accurate and reliable by reviewing guidance from the U.S. Food and Drug Administration (FDA), the CDC, CAL/OSHA, and other pubic heath authorities.
- Application to Third Parties: The rules for testing employee body temperatures is not meant to apply to any other demographic groups, such as customers, contractors, supplier or other patrons, as different laws and other considerations may apply.

Legal Standard for Body Temperature Testing

- The ADA requires that any mandatory medical test of employees be "**job-related and consistent with business necessity**." Thus, in applying this standard to the current environment, employers may take steps to determine if employees entering the workplace have the virus because such an individual ***will pose a direct threat to the health of others***. Taking employees' temperatures is permitted.

- Per the EEOC, whether an employee poses a "direct threat" to him/herself or to others ***is to be determined based on the best available objective medical evidence***, such as guidance from the CDC or other public health authorities. Employers may continue to take temperatures and ask questions about symptoms, or require self-reporting by all those entering the workplace. Employers should make sure not to engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion.

Possible Questions From Managers

What type of temperature readings are we looking for?

- The CDC considers a person to have a fever when he or she has a measured temperature of at least 100.4°F/38°C.

What symptoms should we looking for?

- The CDC has identified the following as the symptoms associated with COVID-19 (https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html): fever, cough, shortness of breath or difficulty breathing, chills, repeated shaking with chills, muscle pain, headache, sore throat, new loss of taste or smell.

Other Best Practices/Considerations for Body Temperature Testing

A. Establish Clear, Objective Parameters for Body Temperature Measurement and Workplace Exclusion.
B. Notify Employees About the Testing Program with California Consumer Privacy Act Compliant Notice.
C. Use Touchless Thermometers to Take Employee Temperatures.
D. Conduct Body Temperature Measurements for Each Employee at the Start of His or Her Shift or Workday.
E. Ensure All Applicable Employees Are Subject to the Testing Program.
F. Guard Employee Privacy During and After Administration of Test. Do Not Share Results of Employee Body Temperature Testing Unless Otherwise Required Under Applicable Law, Regulation, or Ordinance.
G. Provide PPE and Training for Body Temperature Monitors And Provide Hand Hygiene Facilities For All Near The Testing Station.

The above is general guidance. If an employer is going to go forward with a body temperature measurement program, please consult with your employment attorney to review for compliance with appropriate standards including CAL/OSHA.

How should employers handle disability accommodation requests during the pandemic?

Standard Applied To Pandemic Related Request For Accommodations:

Employers receiving requests for reasonable accommodations from employees who fall into this categories must process the requests as they would for any other employee. The standard considerations apply in assessing an accommodation request by such an employee.

If an employee requests an accommodation for a medical condition either at home or in the workplace, and the disability is not obvious or already known, ***an employer must engage in the interactive process*** to determine if the employee is disabled and whether there is a reasonable accommodation that would enable the employee to work.

What can I ask my employee about or request during the interactive process?

First, the employer ***may request information and medical documentation*** to determine if the condition is, in fact, a disability under the ADA, i.e., whether the employee has a "physical or mental impairment that substantially limits a major life activity, or a history of a substantially limiting impairment."

Second, employers ***may request information from the*** **employee** to address fashioning a reasonable accommodation and assessing the accommodation requested by the employee.

- According to the EEOC, employers may inquire about (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the "essential functions" of his or her position.

How long will the interactive process take in this pandemic climate?

Short answer is, it will depend and will be a case-by-case determination.

Temporary Accommodations Will Be Critical: Where there is ***some urgency*** to providing an accommodation or the employer has ***limited time available*** to discuss the request, an employer may choose to forgo or shorten the interactive process and grant the request. Employers may also choose to provide ***temporary accommodations while they await medical documentation***, for example, or due to changes in government restrictions. An employer may choose to place an end date on the accommodation or provide a certain accommodation on an interim or trial basis.

- The EEOC notes that choosing one of these alternatives may be particularly helpful where the requested accommodation would provide protection that an employee may need because of a ***pre-existing disability that puts him or her at greater risk*** during this pandemic or for an employee who has a disability that has been exacerbated by COVID-19.

Extensions Are Also Valid Accommodation Requests: Employees may also request ***an extension of the accommodation***, which an employer must consider, particularly in light of extended or new government restrictions impacting the workplace.

Undue Hardship During The Pandemic:

As always, an employer does not have to provide a particular reasonable accommodation if it poses an "undue hardship," which means a "significant difficulty or expense." In some instances, an accommodation ***that would not have posed an undue hardship prior to the pandemic may pose one now***. The EEOC advises that if a particular accommodation poses an undue hardship, employers and employees should work together to identify potential alternatives.

- Significant Difficulty: In determining whether a requested accommodation poses an undue hardship, an employer may consider ***whether current circumstances create "significant difficulty"*** in acquiring or providing certain accommodations, considering the facts of the particular job and workplace.
    - For example, it may be more difficult during the pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, it may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions.

- Significant Expense: In determining whether a requested accommodation poses a "significant expense" during a pandemic, undue hardship considerations that may come into play include the sudden loss of some or all of an employer's income stream, the amount of discretionary funds currently available when considering other expenses, and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted).

  - However, these considerations ***do not mean that an employer can reject any accommodation that costs money***. An employer must instead weigh the cost of an accommodation against its current budget, while taking into account constraints created by this pandemic. Even in the current climate, there may be practical no-cost or low-cost accommodations.

What You Can Do Now?

Questionnaires are also a possible solution to get ahead of the issues. Employers may ask employees with disabilities if they will need reasonable accommodations in the future when the workplace re-opens. Employers can begin the interactive process now before employees return to the workplace.

What are some of the potential post-pandemic claims we can expect to see against employers?

a. **Pandemic-Related Harassment or Discrimination Claims**: Issues may arise based upon National Origin, Race, and Possibly Other Protected Characteristics.

   i. Employers should take steps to address possible harassment and discrimination against coworkers when the workplace re-opens, ***including reminding employees that it is unlawful to harass or otherwise discriminate against coworkers*** based on race, national origin, color, sex, religion, age (40 or over), disability, or genetic information.

   ii. Harassment of Asian employees is expected to be a focus of workplace issues and potentially claims. It may be particularly helpful for employers to advise supervisors and managers of their roles in watching for, stopping, and reporting any harassment or other discrimination. An employer should also make clear that it will immediately review any allegations of harassment or discrimination and take appropriate action.

b. Expense Reimbursement: Work From Home Claims (For Internet Costs, Cell Phone Costs, Other Reasonable Expenses)

i. Labor Code Section 2802: “An employer shall indemnify his or her employee ***for all necessary expenditures or losses*** incurred by the employee ***in direct consequence of the discharge of his or her duties***.”

ii. The telework transition may have forced some workers to buy equipment or use personal devices for work, and businesses may be on the hook for some of the costs.

iii. Best Practice: Seek counsel to implement a Temporary Telecommuting Policy and Agreement to set the expectations for all telecommuting employees.

c. Other Wage and Hour Claims Arising From Telework Timekeeping Challenges:

i. Properly Calculating Wages Owed: The Fair Labor Standards Act and its state equivalents require employers to pay non-exempt employees a minimum wage for every hour they work, and overtime wages when that requirement is so triggered.

- In traditional employment settings, there's a lot of tracking mechanisms that are utilized by employers. When working from home, you may have issues with employees utilizing those mechanisms or properly accounting for their meal periods or all time performing work for the company.

Working from home=Sleeping at home

ii. Off the Clock Claims: Employers may incur liability after employees return to work if they make their workers take certain measures ***before clocking in***. Wage laws generally put businesses on the hook for any time workers spend under their control, which may mean paying workers while they wait for temperature checks or clean personal protective equipment.

Best Practice: Monitor telework employees timesheets and make sure they sign written acknowledgements expressing that they have received payment for all time worked and taken all of their legally required breaks.

d. Disability Leave Claims:

i. New Leave Laws Mean New Liabilities: If employers deny time off to eligible workers or miscalculate their pay, they may face lawsuits. As the pandemic continues, it becomes more likely that employers will see claims for in the improper leave compliance.

ii. New Leave Laws: Congress passed the Families First Coronavirus Response Act, which imposed the first-ever federal paid sick time regulations and extensions to FMLA (the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act).

   i. The laws makes employers (with fewer than 500 workers) provide employees with a certain amount of time off at full or partial salary for many reasons tied to coronavirus, including if they fall ill or can't work because they have to care for a child whose school has closed.

iii. Possible Spin Off Retaliation Leave Claims: Employers may also see retaliation suits alleging that employees believe they were retaliated because they requested leave.

e. **Wrongful Termination Claims**: The recent health orders and forced closures for non-essential businesses are putting pressure on employers and has affected employees in a negative way. Many companies were forced to cut costs through furloughs and layoffs or may face this issue in the near future.

i. Practical Considerations When Considering Layoffs/Furloughs:

- Anti-Discrimination Requirements: How will you select employees for layoffs, furloughs, or reduction in hours to avoid potential claims of discrimination (disparate treatment or impact)? Each case will be reviewed based on its own facts and merits, so no "one size fits all" approach.
- Federal and State WARN Act Requirements: The federal WARN Act requires covered employers to provide advance notice (or pay in lieu of notice) to workers impacted, unions, and government officials prior to a plant closing. In addition to the federal WARN Act, several states have their own mini-WARN Acts with similar requirements.
- Emergency Sick Leave Considerations: These laws generally do not require employers to provide paid leave to employees who have been furloughed; however, employers must be careful to ensure that any adverse employment decision (such as a furlough, reduction in hours, or layoff) is made without regard to an employee's use or anticipated use of paid leave, as such a decision would violate the anti-retaliation provisions of the laws.
- Eligibility for SBA Paycheck Protection Program: Can you qualify for a small business "paycheck protection" program loan under the CARES Act to continue paying employees instead of laying them off?
- Tax Credits: Are you eligible for federal tax credits for "qualified retention wages" because your business had to partially or completely shut down, or you had layoffs.
- Unemployment Benefits: Businesses should review individual states' unemployment rules to determine how their policies may impact an employee's ability to obtain unemployment.
- Medical Benefits: During a furlough, employees may be eligible to retain their medical benefits, depending on the terms of the employer's plans. Businesses must review their individual plan documents to determine any potential eligibility issues. Employers should also be mindful of Affordable Care Act implications of their options.

Final Thoughts

- It will be a big transition for all employees.
- Employee morale will be critical and take time to mend.
- Train management team to ensure understanding of new leave options, eligibility and retaliation concerns
- Communicate regularly with employees and explain the steps the company is taking to ensure safety.
- Remind employees of benefits offered.
- Request feedback and internalize it. Consider anonymous surveys as a low cost and effective mechanism to gauge what is working.

Current Status of COVID-19 Presumption in Workers' Compensation in California

On May 6, 2020 California Governor Newsom signed an executive order that any employee not working from home who contract coronavirus will be presumed to have done so on the job, thus automatically qualifying for workers' compensation benefits.

The presumption will apply retroactively to March 19 and stay in effect for 60 days from May 6, 2020, which is July 4, 2020.

The order also shortens the time employers have to accept claims from 90 days to 30 days, expediting the processing of benefits.

https://www.gov.ca.gov/wp-content/uploads/2020/05/5.6.20-EO-N-61-20-text.pdf

- Two bills before the state legislature, which went into recess in mid-March and resumed on May 4th. With Governor's Newsom's 5/6/2020 Executive Order, are these moot?
  - **Senate**: Senate Bill 1159 defining an injury for specified workers to include illness or death resulting from exposure to COVID-19. Would create a rebuttable presumption, as specified, that an injury that develops or manifests itself while a critical worker is employed arose out of and in the course of employment. Work in progress with various baseline standards missing: how much time the employee would need to miss work before the presumption applies, a potential "sunsetting clause" to identify the year the presumption would automatically be repealed, etc.
  - **Assembly**: AB 664 proposing a conclusive presumption that COVID-19 and other infectious diseases arises out of employment for police, firefighters and health care workers – but only if the state or local government has declared a state of emergency.

Insurer Response To Presumption

- The State Compensation Insurance Fund (SCIF) announced that essential workers suffering from COVID-19 no longer had to prove they contracted the virus on the job.
- SCIF, California's largest individual workers' compensation insurer with nearly 11 percent of market share, recently lifted the proof of compensability requirement for COVID-infected essential workers, but only workers whose employers are insured by the fund will benefit
- This decision was steps ahead of Governor Newsom's executive order and has already been used by many workers and employers as there are additional facets to SCIF's COVID-19 plan.
  - Governor Newsom's order will add non-essential employees to the rolls of SCIF's compensable claims, but only the essential workers will be entitled to the conclusive presumption allowed by SCIF.

When Should Employers Provide Claim Forms?

- PROVISION OF A CLAIM FORM AKA DWC-1 IS NOT AN ADMISSION OF LIABILITY
- WHEN TO PROVIDE
  - MUST PROVIDE IF AN EMPLOYEE ASKS FOR A CLAIM FORM
  - LABOR CODE SEC. 5401
    - Requires a claim form be provided to an employee within one working day of when the employer receives written notice or knowledge of an injury that has caused lost work time or required medical treatment beyond first aid.
    - Knowledge can be a direct report from the worker, or knowledge from another source: doctor's note, disability slip, statement/report from supervisor or co-worker, etc.
    - Knowledge that the employee is ill does not trigger the requirement, the employer must know the employee is claiming his/her COVID-19 is industrial.

Claim Form Considerations

- If you have knowledge the employee has COVID-19, what can be construed as knowledge triggering provision of the claim form?
  - Direct request from the worker;
  - Do you employ essential workers such as first responders, healthcare workers, food service or grocery store employees, workers that are part of the supply chain?
  - Did your employee work from home, or at your place of employment, jobsite, etc.?
  - Are you aware of employee's co-workers that may have tested positive?
  - Every owner/employer must look at the totality of the circumstances when assessing whether a claim form should be provided
  - If a claim form is not provided, the statute of limitations for the injured worker to file the claim (typically one year from date of injury) does not begin to run
  - Consider the claim form as protection for the worker, co-workers and your company

After the Claim Form has Been Provided

- Even if a claim form is not provided, the employer has a duty to investigate the claim once they have knowledge, so the claim form is a protection for the employer
- While provision of the claim form is not an admission of liability, it does trigger a statutory investigation period.
  - For a non-COVID-19 claim, there is a 90-day investigation period as to whether the claim is compensable.
  - For a COVID-19 claim, per Governor Newsom's 5/6/2020 Executive Order, employers/insurers have a 30-day investigation period for an individual who did not work from home
  - What about the employee working from home, which investigation period applies?
- The worker is entitled to up to $10,000 in medical treatment until the claim is either accepted or denied
  - In situations where you have workers that have no access to health care, is health care through workers' compensation an available remedy for a valuable employee?

Investigation of the COVID-19 Claim

- Develop a checklist to gather objective evidence IF an employee reports a work related exposure or positive case of COVID-19. Investigation is accelerated for COVID-19 claims.
- Include:
  - Inquiries about the employee's onset of symptoms;
  - Does the employee have the diagnostic test results, or are they just symptomatic;
  - Does the employee have the CDC contact tracing paperwork he was provided when diagnosed;
  - Potential basis for exposure;
  - Specific pre-existing conditions or co-morbidities they have (serious underlying health conditions including high blood pressure, chronic lung disease, diabetes, obesity, asthma, is their immune system compromised such as by chemotherapy for cancer and other conditions requiring such therapy);
  - Contact with others at work and outside of work;
  - Was the employee at an increased risk for exposure to the virus.

COVID-19 & TTD benefits

- Will be determined on a case by case basis.
  - If there is a compensable claim, and the injured worker applicant has been found TTD by their doctor, then TTD is likely owed
    - For COVID-19 claims, per the 5/6/2020 Executive Order, where an employee has paid sick leave benefits available, these benefits shall be exhausted before TTD benefits are due and payable
    - Per the Executive Order, TTD benefits for compensable COVID-19 claims must be certified every 15 days, which is different than for non-COVID-19 claims, among other changes to TTD regulations
  - If the injured worker has an accepted claim for injury other than COVID 19, and a non-workers' compensation doctor determines he/she is TTD due to COVID 19, solely (i.e. he/she was at work modified duty and is now ill with COVID 19) then he/she is not likely entitled to TTD.
    - If the applicant is working modified duty and the employer cannot accommodate the injured worker due to the stay-at-home order, depending on the specific facts of employment, the applicant is not likely entitled to TTD. Depending the specific circumstances they may be entitled to benefits from EDD

Workers' Compensation Proceedings

- Hearings have been proceeding at the Workers' Compensation Appeals Board telephonically.
- Mail filings may be submitted, but there are delays. Electronic filing is recommended when at all possible. Emailing documents to the WCAB allowed in very specific circumstances.
- Depositions may proceed electronically if the parties agree (via Zoom, WebEx, etc).
- The DWC Medical Unit is open and panels of Qualified Medical Evaluators continue to issue.

WC Medical-legal Evaluations

- 4/24/2020 DWC gave notice that it intends to file two emergency regulations on the medical-legal process to move cases towards resolution
- The emergency regulations will be will be filed with the California Office of Administrative Law (OAL) on May 4, 2020. The OAL has up to 10 days to consider and approve the emergency rules. On OAL approval and filing with the secretary of state, the regulations will be effective for 180 days. During that period, the DWC may readopt the emergency regulations for an additional 90 days. A notice will be posted on the DWC website when these emergency regulations become effective.
- The proposed medical-legal regulations permit electronic service of medical-legal reports, give QMEs and Agreed Medical Examiners (AMEs) options for conducting and scheduling evaluations, and suspend several rules regarding the time limits for scheduling and complete medical-legal evaluations. Review the regulations at https://www.dir.ca.gov/dwc/DWCPropRegs/2020/QME-Regulations/QME_Regs.html

Medical-legal Evaluations During The Stay-at-home Order

- The concerning aspect of the proposal is that per 8 CCR 78, the PQME or AME will have three (3) options for evaluations during the stay-at-home order:
    1. Reschedule the evaluation until after the stay-at-home order is lifted within 90 days after the date that both the statewide stay-at-home order and any similar local order where the injured worker resides or the visit will occur, if applicable, are lifted (the current rule is 30 days-60 days depending on whether the parties agree). Parties cannot use delays resulting from this provision to obtain a new panel.

2. Perform an electronic interview followed by physical evaluation after the stay-at-home order is lifted. The QME or AME may issue a record review and electronic interview summary report. The physician initially may interview the injured worker either by telephone or by any form of video conferencing and prepare a report. Once the statewide stay-at-home order and any similar local order where the visit will occur are lifted, the QME may schedule a face-to-face evaluation, provided the necessary precautions are taken. Currently, per the CA Regulations, there are prescribed time limits for face to face evaluations depending on the body parts at issue.
   - If a QME or AME chooses this option, he or she must send appropriate notice and information necessary for the injured worker to make the telephone call or initiate the videoconferencing for the appointment. On receipt of the notice of an electronic interview, the parties must provide the evaluator with records at least 10 days before the scheduled appointment.

3. Perform an evaluation entirely via telehealth under specific conditions, after agreement between the parties and the physician:
    1. The injured worker is not required to travel outside of his or her immediate household to undergo the telehealth evaluation.
    2. There is a medical issue in dispute that involves whether the injury is AOE/COE, or the physician is asked to address the termination of an injured worker's indemnity benefit payments, or address a dispute regarding work restrictions.
    3. There is agreement in writing to the telehealth evaluation by the injured worker, the carrier or employer, and the evaluator.
    4. The telehealth visit under the circumstances is consistent with appropriate and ethical medical practice, as determined by the evaluator.
    5. The evaluator attests that the evaluation does not require a physical exam.

There are additional changes regarding scheduling appointments, fees for these evaluations and time limits to complete reports.

COVID-19 & OSHA

- Is COVID-19 recordable for OSHA?
- Under federal OSHA's recordkeeping requirements, COVID-19 is a recordable illness, and employers are responsible for recording cases of COVID-19, if:
  1. The case is a confirmed case of COVID-19, as defined by Centers for Disease Control and Prevention (CDC);
  2. The case is work-related as defined by 29 CFR § 1904.5; and
  3. The case involves one or more of the general recording criteria set forth in 29 CFR § 1904.7

Cal/OSHA & COVID-19

- On April 8, 2020 the chief of Cal/OSHA provided guidance to employers regarding recording and reporting confirmed COVID-19 cases, essentially asserting that for COVID-19 cases, there has been no change in reporting requirements:
  - Cal/OSHA requirements for recording confirmed COVID-19 cases are consistent with Federal OSHA guidance.
  - Employers are required to immediately report work-related cases of serious illnesses or death to Cal/OSHA.
    - A COVID-19 case would be reportable to OSHA only if the employee is hospitalized as an in-patient (out-patient hospital care is not reportable)
    - Employers must report any work-related death within 8 hours and any serious injury within 24 hours.
    - Employers who are exempt from recordkeeping are still required to report a serious injury or death.
  - Multiple diagnoses of COVID-19 within a short period of time among employees who work closely together would likely trigger the reporting requirement.

- CAL/OSHA has also identified a series of “best practices” for various work forces as they return to work, and we suggest you look at these.
  - https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html
  - https://covid19.ca.gov/

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