Policyholders FAQs for California Executive Order N-62-20 as of 5.8.2020

Summary: The governor's May 6, 2020 executive order (known as "N-62-20") creates a rebuttable presumption in California that COVID-19 is a work-related injury when certain requirements are met. This means that an injured worker can prove an industrial injury in a COVID-19 claim without having to show that the employment exposed the worker to a unique risk of infection or that the infection was even acquired at work.

The presumption created by the Order is premised upon the underlying public policy of promoting the public health and safety by reducing the spread, and mitigating the effects, of the COVID-19 pandemic.

The presumption is unlimited in terms of the businesses and employees that it covers, meaning that it's irrelevant whether an employee is working as a first responder or in an "essential"/"critical" business or not. All that matters is that an employee sustains a COVID-19 injury – supported by a diagnosis and/or positive test result – within the limited timeframe that the presumption will be available, i.e., between March 19, 2020 through July 5, 2020.

California Gov. Newsom's May 6, 2020 Order Creating a COVID-19 Presumption: Policyholder FAQs[1]

Q1. What does the governor's executive order mean?

A1. The governor's executive order (known as "N-62-20") creates a rebuttable presumption – basically an easier way to prove a fact that is difficult of proving – that COVID-19 is a work-related injury when certain requirements are met. This means that an injured worker can prove an industrial injury in a COVID-19 claim without having to show that the employment exposed the worker to a unique risk of infection or that the infection was even acquired at work.

Q2. Does the presumption apply to all businesses or only "essential"/"critical" businesses? How can I tell if my employees are covered?

A2. All employees are potentially covered. Please refer to No. 5, below (the triggering requirements), for specific information.

Q3. Does an employee need a presumption to prove COVID-19 was contracted on the job?

A3. No; an employee that can't prove the underlying facts to support a presumption or who doesn't otherwise qualify to take advantage of a presumption may still pursue a claim for industrial COVID-19 by attempting to prove that they were actually exposed to the virus in the employment environment or their employment environment placed them in a unique position with a heightened risk for contracting the virus relative to the general population.

[1] These FAQs are not intended nor should they be understood as legal advice. They are merely intended to convey information relating to the governor's executive order (N-62-20) and are presented in a hypothetical question-and-answer format for ease of reference.

Q4. What are the requirements that trigger the new presumption?

A4. All of the following must exist for the presumption to apply:

i. The presence of COVID-19 confirmed by either:

1. A positive test alone, or
2. A "physician's" diagnosis in combination with No. 1 (i.e., a positive test) occurring within 30 days of that diagnosis.

a. The "physician" cannot be a chiropractor, acupuncturist or etc. but must be a physician and surgeon licensed by the California Medical Board. (See for example, the Medical Board of California's "Physician and Surgeon Licensing Types and Descriptions" page located at https://www.mbc.ca.gov/Licensees/Physicians_and_Surgeons/License_Types.aspx).

b. The confirming test must occur after the diagnosis and within 30 days of it.

ii. Both Nos. 1 and 2, immediately above, must occur within 14 days of the employee performing employer-directed work that required the employee to physically work outside of the employee's home/residence.[2] (The 14 days excludes the last day upon which work was performed outside).

1. Work that is performed while telecommuting away from the employer's premises does not trigger this presumption.
2. Work that an employee performs outside of the employee's home/residence at the employer's place of business and that is performed there merely for the convenience of the employee, i.e., voluntarily and not directed to be performed there by the employer, does not trigger the presumption.

iii. Both Nos. 1 and 2, immediately above, must occur during the period between March 19, 2020 through July 5, 2020.[2]

Q5. Does the presumption apply to all dates of injury?

A5. The order states that it applies only for dates of injury occurring during the period March 19, 2020 through July 5, 2020.

Q6. Do I have to continue to pay sick time if a doctor has placed an employee on temporary disability status due to COVID-19 under this presumption?

A6. The presumption anticipates that any paid sick leave benefits that are "specifically available in response to COVID-19" will be used up/paid to exhaustion before any temporary disability payments are commenced.

[2] Only the diagnosis needs to be made within 14 days; the confirmation testing must be done within 30 days.

Q7. Does the presumption have any effect on X-Mods?

A7. No; meaning that insurers are permitted to include COVID-19 claims in experience rating; however, the Department of Insurance is presently considering a WCIRB special regulatory filing that includes a proposal to exclude COVID-19 claims from experience rating.

Q8. Are there other COVID-19 presumptions in addition to the one created by the governor's executive order?

A8. Not yet; but as of the date of the governor's order, May 6, 2020, there is similar presumption language in pending legislation that is likely to become law.

Q9. After July 5, 2020, when the Order's presumptive window closes, can employees still file claims for COVID-19?

A9. Yes; but the presumption will not be available to assist the employee to prove the exposure to COVID-19 occurred occurred at work. Absent another order or extension, or a new legislative presumption, the employee will have to prove they were actually exposed to the virus in the employment environment or their employment environment placed them in a unique position with a heightened risk for contracting the virus relative to the general population.

Q10. Do presumption claims have to be accepted without being investigated?

A10. No; we investigate all claims of injury before making any compensability determination.

Q11. Does the presumption have any impact on AB5 (the *Dynamex* case – "ABC" Test)?

A11. For workers' compensation reporting purposes, AB5 requires employers in the state of California – that haven't been exempted – to properly classify their employees according to the "ABC" Test by not later than July 1, 2020. Given that the COVID-19 presumption window remains open through July 5, 2020, there may be reclassified employees that become subject to it.

Q12. Where can I get additional information?

A12. We will update these FAQs as information develops.

