

Governor Newsom Issues Executive Order Creating Rebuttable Presumption of Workers' Compensation Compensability for COVID-19 Work-Place Related Illnesses

Insights for Employers Alert | 3 min read

May 8, 2020

On May 6, 2020, Governor Newsom issued Executive Order N-62-20, which provides that an employee's COVID-19 related illness "shall be presumed to arise out of and in the course of the employment for purposes of awarding workers' compensation benefits" so long as the following criteria applies:

- a. "The employee 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 of employment at the employer's direction;"
- b. "The day referenced in subparagraph (a) on which the employee performed labor or services at the employee's place of employment at the employer's direction was on or after March 19, 2020;"
- c. "The employee's place of employment referenced in subparagraphs (a) and (b) was not the employee's home or residence;" and
- d. "Where subparagraph (a) is satisfied through a diagnosis of COVID-19, the diagnosis was done by a physician who holds a physician and surgeon license issued by the California Medical Board and that diagnosis is confirmed by further testing within 30 days of the date of the diagnosis. Significantly, the Order also provides that if liability for a claim of a COVID-19-related claim satisfying the presumption requirements above is "not rejected within 30 days after the date the claim form is filed under Labor Code section 5401, the illness shall be presumed compensable, unless rebutted by evidence only discovered subsequent to the 30-day period." This provision substantially shortens the normal 90 day period set forth under Labor Code section 5402 (which provides, "If liability is not rejected within 90 days after the date the claim form is filed under Section 5401, the injury shall be presumed compensable under this division. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 90-day period.").

The Order was issued pursuant to the California Emergency Services Act (the “Emergency Act”), Cal. Gov’t Code sections 8550 *et seq.* Notably, the Emergency Act prescribes the limited powers that the Governor may exercise thereunder. Specifically, Section 8570 of the Government Code provides that the Governor may “in accordance with the State Emergency Plan and programs for the mitigation of the effects of an emergency in this state” take the following actions:

- a. The Order provides that the presumption can be disputed; but if it is not, the Workers’ Compensation Appeals Board is bound to find in accordance with that presumption.
- b. Ascertain the requirements of the state or its political subdivisions for food, clothing, and other necessities of life in the event of an emergency.
- c. Plan for, procure, and pre-position supplies, medicines, materials, and equipment.
- d. Use and employ any of the property, services, and resources of the state as necessary to carry out the purposes of this chapter.
- e. Provide for the approval of local emergency plans.
- f. Provide for mobile support units.
- g. Provide for use of public airports.
- h. Institute training programs and public information programs.
- i. Make surveys of the industries, resources, and facilities, both public and private, within the state, as are necessary to carry out the purposes of this chapter.
- j. Plan for the use of any private facilities, services, and property and, when necessary, and when in fact used, provide for payment for that use under the terms and conditions as may be agreed upon.
- k. Take all other preparatory steps, including the partial or full mobilization of emergency organizations in advance of an actual emergency; and order those test exercises needed to insure the furnishing of adequately trained and equipped personnel in time of need.

Given the actions described above, a significant question appears to exist as to whether the requirements imposed by the Order actually fall within the Governor’s prescribed powers under the Emergency Act. Coupled with the constitutional issues raised by the Order’s arguably retrospective changes to statutory and contractual requirements governing the determination of workers’ compensation claims, the Order’s validity will presumably be the subject of significant analysis in the coming weeks.

The Order is retroactive to March 19, 2020, and extends 60 days from the Order (i.e., July 5, 2020). Further procedural requirements are set forth in the full text of the order.

Hinshaw & Culbertson LLP is a U.S.-based law firm with offices nationwide. The firm’s national reputation spans the insurance industry, the financial services sector, professional services, and other highly regulated industries. Hinshaw provides holistic legal solutions—from litigation and dispute resolution, and business advisory and transactional services, to regulatory compliance—for clients of all sizes. Visit www.hinshawlaw.com for more information and follow @Hinshaw on LinkedIn and X.

Related People



Spencer Y. Kook

Partner in Charge of Los Angeles

 213-614-7359

Related Capabilities

Insurance

Insurance Coverage Litigation & Counseling

Labor & Employment