Originally published in California Employment Law Letter [Volume 30, Issue 14]

WORKERS' COMPENSATION

CA governor confers COVID-19 'presumption' for all who worked during shelter in place

by Jeff Sloan and Bonnie Kolesar, Sloan Sakai Yeung & Wong

On May 6, 2020, Governor Gavin Newsom issued a controversial Executive Order (EO) that added a workers' compensation dimension to the COVID-19 pandemic. Ignoring the legislature, the governor ordered that any coronavirus-related illness would be presumed to arise "out of and in the course of employment" for any employee who tested positive for or was diagnosed with the illness within 14 days of performing labor or services for a public- or private-sector employer.

The governor's broad authority in times of emergency allows an override of existing legislation, but the EO is temporary, covering the period from March 19 to July 5. Temporary or not, the rebuttable presumption concept embedded in the EO signals a radical shift in workers' comp claims management. Perhaps even more important, the order is a harbinger of a fundamental shift in responsibility for paying COVID-related medical costs: a shift from healthcare providers to employers, through COVID-related increases in workers' comp insurance costs.

Requirements

The new temporary presumption covers *any* employee working outside the home (i.e., not telecommuting) at the employer's direction during the shelter-in-place period. Important details of the EO include:

- The employee must have tested positive for or have been diagnosed with COVID-19 within 14 days of a day his employer directed him to work. If the employee received a physician's diagnosis alone, a COVID-19 test must corroborate the diagnosis within 30 days.
- If the employee tested positive or was diagnosed before the EO was issued, a licensed physician must certify him for temporary disability within 15 days of the order and every 15 days afterward for the first 45 days after the diagnosis. If the employee was diagnosed after the EO, a licensed physician must certify him for temporary disability within 15 days of the diagnosis and every 15 days afterward for the first 45 days after the diagnosis.
- The EO reduces the period for employers to deny a claim from 90 days to 30 days. Because of the shortening of the investigatory period, employers should report all COVID-19 work-related claims to their insurer or claims administrator immediately. Otherwise, insurers or claims administrators will lack sufficient time to gather evidence to respond to the claim.
- The EO covers hospital, surgical, and medical treatment; disability indemnity; and death benefits. Proposed legislation expands benefits to cover housing and living expenses, but the EO does not.
- If the employee has access to "paid sick leave benefits specifically available in response to COVID-19," he must use the paid sick leave before accessing workers' comp benefits. This precondition refers to the 80 hours of paid public health emergency leave provided for employers and employees covered by the federal Families First Corona Response Act (FFCRA) as well as similar special leave conferred by local government employers. This is a deviation from normal workers' comp coverage, which doesn't require an employee to exhaust accrued sick leave before benefits are paid—allowing for sick leave to fill the gap between the two-thirds pay the employee is entitled to under temporary disability benefits and his total salary.
- Public safety personnel already enjoy the ample protections of Labor Code Section 4850, which guarantees continuation of wages for a maximum of 12 months for a compensable injury. The EO provides that Section 4850 time starts after any special sick leave is exhausted.

A rebuttable presumption

Given the delay between COVID-19 exposure and symptoms, the genesis of an individual's exposure is difficult to identify. The EO inverts the normal standards of proof by requiring an employer that questions "industrial causation" to *disprove* that the employee's exposure occurred during her workday. This standard of proof varies little from having to prove that an employee was exposed *outside* her workday—a virtually unsurmountable challenge. For this reason, some experts have deemed the EO's technically "rebuttable" presumption a legal fiction.

Based on his experience with the statutory presumptions for heart and cancer injuries for public safety personnel, workers' comp attorney Jim Libien notes that such presumptions are virtually impossible to overcome because it's difficult to prove a negative. The presumption will virtually guarantee that employees afflicted

continued from p. 3

with COVID-19 who worked during the period covered by the EO and exhausted their FFCRA leave will qualify for workers' comp benefits. They will receive temporary disability payments consisting of two-thirds pay that can be supplemented with accrued leave and disability insurance, coverage for present and future medical care, as well as any rated permanent disability.

Follow the money

The EO will have an impact on institutional stakeholders, with winners and losers in this high-stakes game. By shifting COVID-19-related healthcare costs to the workers' comp system, the order is a boon to healthcare providers, who can now bill the workers' comp system to cover medical costs, leading ultimately to higher employer rates.

The cost to the system is unknown at this time, but estimates from the Workers' Compensation Insurance Rating Bureau range from $2.2 billion to $33.6 billion, based on one of four pending bills in the legislature. Those additional costs are bound to come at the expense of desperately needed public services during a time when governmental budgets are already deeply in the red because of revenue drops and expense increases attributable to COVID-19. They also will add to the coronavirus's devastation of the private-sector economy.

Legislative battle is looming

The EO is also the beginning of a battle over workers' comp legislation between employers, insurers, and employee advocates. The order sets favorable conditions for legislative efforts to permanently impose the rebuttable presumption—or worse, create a *conclusive* presumption urged by some advocates and policy makers. Employer advocates view the prospect of a conclusive presumption with alarm. Unlike a rebuttable presumption, a conclusive presumption cannot be disproven, regardless of the strength of supporting evidence.

As of press time, at least four bills were awaiting legislative action:

- Senate Bill (SB) 1159, which creates a rebuttable presumption for frontline workers;
- SB 893, which creates a rebuttable presumption for hospital employees with respiratory diseases;
- Assembly Bill (AB) 664, creating a conclusive presumption for firefighters, law enforcement personnel, and nurses with a projected midrange cost of more than $11 billion; and
- AB 196, which creates a conclusive presumption for essential employees as defined by the governor's initial stay-at-home order.

Some pundits have also suggested that a bill giving employers blanket immunity from personal injury lawsuits will be brought into the mix.

Bottom line

The governor's temporary EO is an unusual exercise of the state's police power in the most unique and unsettling time imaginable, presenting serious risks and policy issues to be addressed in the coming months. The best workers' comp claim is no claim. Equally important to managing a claim is taking measures to avoid exposure and illness in the first place.

You should redouble your efforts to ensure that your health and safety programs are in order and recognize the likelihood that the California Division of Occupational Safety and Health will be ramping up its inspection efforts to ensure that you are providing proper protective measures and equipment for employees, including masks and other appropriate personal protective equipment. When employees finally return to the workplace, it will be crucial to follow the Centers for Disease Control and Prevention's guidelines on social distancing, limits on the number of people in an enclosed space, physical barriers, and the like.

The authors can be reached at Sloan Sakai Yeung & Wong in San Francisco, jsloan@sloansakai.com and bkolesar@mgmt-strategies.com. ■