

# BENDER'S CALIFORNIA LABOR & EMPLOYMENT BULLETIN

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Deborah J. Tibbetts, Editor-in-Chief



## New COVID-19 Exposure Notification Requirements for California Employers

Chris Moores

### Introduction

A new law creates requirements for California employers to notify their employees and unions when there has been a potential COVID-19 exposure in the workplace. The law also requires employers to report a COVID-19 “outbreak” at the worksite to local health authorities. Governor Newsom signed AB 685 into law on September 17, 2020, and it goes into effect on January 1, 2021. AB 685 is codified at California Labor Code sections 6325, 6409.6, and 6432.

### What is a “Potential Exposure to COVID-19” Under the Law?

#### **Notice that a qualifying individual was on the employer’s premises**

A “potential exposure to COVID-19” boils down to notice that someone on the employer’s premises has tested positive for COVID-19, is subject to an order to isolate or quarantine, or has come into contact with someone else at the worksite who is in one of the first two categories. The requirement to provide notices under AB 685 is triggered by an employer’s receipt of notice of a potential exposure to COVID-19.<sup>1</sup> A “notice of potential exposure” means the employer has received notice that: (1) an employee was exposed to a qualifying individual at the worksite; (2) an employee is a qualifying individual; (3) an employee has failed the employer’s own COVID-19 testing protocol (e.g., temperature screenings); or (4) a qualifying individual was at the worksite.<sup>2</sup>

<sup>1</sup> CAL. LAB. CODE § 6409.6(a).

<sup>2</sup> CAL. LAB. CODE § 6409.6(d)(3).

(Continued on page 299)

### Inside This Issue

**New COVID-19 Exposure Notification  
Requirements for California Employers**  
CHRIS MOORES..... 297

**WAGE & HOUR ADVISOR: Governor Signs Bill  
Modifying AB 5, California’s Independent  
Contractor Law**  
AARON BUCKLEY ..... 303

**California Uniform Trade Secrets Act  
Displacement of Common Law Claims Based  
on the Same Facts, and the Exceptions**  
TYLER M. PAETKAU..... 306

**CASE NOTES** ..... 319  
*Absenteeism* ..... 319  
*Adverse Action* ..... 319  
*Age Discrimination* ..... 320  
*Arbitration* ..... 321  
*Disability Discrimination* ..... 322  
*FMLA* ..... 323  
*Preemption* ..... 324  
*Qualified Immunity* ..... 325  
*Rest Period* ..... 325  
*Sexual Harassment* ..... 326  
*Wage-and-Hour Class Action* ..... 327  
*Wrongful Termination* ..... 328

**CALENDAR OF EVENTS** ..... 329

**EDITORIAL BOARD AND AUTHOR  
CONTACT INFORMATION** ..... 330

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Chris Moores

*(Continued from page 297)*

Importantly, notice can be received from a licensed medical provider, a public health official, the employee, an emergency contact, or a subcontractor.<sup>3</sup>

A “qualifying individual” is anyone who has (1) a positive COVID-19 test result, (2) a positive COVID-19 diagnosis from a licensed health care provider, (3) an order to isolate or quarantine from a public health official related to COVID-19; or (4) died due to COVID-19.<sup>4</sup>

The “infectious period” is defined as the time in which a COVID-19 positive person is infectious, as defined by the State Department of Public Health.<sup>5</sup> The California Department of Public Health’s most recent guidance states that the infectious period is 10 days and therefore recommends isolating for that amount of time.<sup>6</sup>

## Who Needs to be Notified?

### **Employees at the same “worksite”**

AB 685 requires employees at the same “worksite” to be notified of the potential exposure. This means the workplace location where the potential exposure occurred, excluding buildings, floors, or other locations that the qualifying person did not enter.<sup>7</sup> Notice does not need to be given to the entire company if the potential COVID-19 exposure was limited to certain individuals or areas in the workplace.<sup>8</sup>

<sup>3</sup> CAL. LAB. CODE § 6409.6(d)(3)(D).

<sup>4</sup> CAL. LAB. CODE § 6409.6(d)(4).

<sup>5</sup> CAL. LAB. CODE § 6409.6(d)(2).

<sup>6</sup> See Cal. Dep’t of Pub. Health, *Guidance on Isolation and Quarantine for COVID-19 Contact Tracing* (July 17, 2020), available at <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-on-Isolation-and-Quarantine-for-COVID-19-Contact-Tracing.aspx>. Persons with COVID-19 who have symptoms may discontinue isolation when at least 10 days have passed since symptom onset, at least 24 hours have passed since resolution of fever, and other symptoms have improved. For asymptomatic individuals, isolation may end when at least 10 days have passed since their first positive test.

<sup>7</sup> CAL. LAB. CODE § 6409.6, (d)(5).

<sup>8</sup> CAL. LAB. CODE § 6409.6, (a)(1).

The union, if any, also needs to receive written notice of the name of employees receiving a COVID-19 potential exposure notification, their job title, the date of onset of illness, where the illness occurred, description of the illness, whether the employee died, the number of days away from work, and the duration of any transfer or restriction on the employee’s ability to work.<sup>9</sup> This is the same information as is required to be reported in a Cal/OSHA Form 300 injury and illness log. If the employer is unaware of some of the information, the employer should indicate that those particular items of information are inapplicable.

## What Needs to be in the Notice to Employees?

### **That they may have been exposed to COVID-19, benefits available to them, and disinfection plans**

The notice needs to inform individuals that they may have been exposed to COVID-19 and also must include information about the benefits employees might be entitled to under federal, state, or local law, and the employer’s plans to disinfect the worksite.<sup>10</sup> Importantly, to preserve employee privacy, **the notice should not reveal the identity of the individual who triggered the potential exposure at the worksite.**

## **What Benefits Might Employees Be Entitled to Under Federal, State, or Local Law (and Should be Included in the Notice)?**

### *California Paid Sick Leave*

Under the California Healthy Workplaces Healthy Families Act,<sup>11</sup> any employee who works in California for 30 or more days within a year is entitled to a certain amount of paid sick leave.<sup>12</sup> Employers should also include additional paid sick leave under any applicable local ordinances. Employers in the food industry should also consider whether they fall under the definition of a

<sup>9</sup> CAL. LAB. CODE § 6409.6, (c).

<sup>10</sup> CAL. LAB. CODE § 6409.6, (a)(1), (a)(3), (a)(4).

<sup>11</sup> CAL. LAB. CODE § 245 et seq.

<sup>12</sup> CAL. LAB. CODE §§ 245-249.

“food sector worker” as required for COVID-19 food sector supplemental paid sick leave.<sup>13</sup>

### ***Workers’ Compensation***

California workers’ compensation law also presumes that an employee’s COVID-19 related illness is an occupational injury and is therefore eligible for workers’ compensation benefits if specified criteria are met. This was originally the subject of California Executive Order N-62-20, but was later codified in SB 1159, becoming effective on September 17, 2020.<sup>14</sup>

### ***Federal Family and Medical Leave Act/California Family Rights Act***

Employees may be eligible for federal<sup>15</sup> or state family and medical leave for COVID-19 related reasons. In California, SB 1383 was signed by Governor Gavin Newsom on September 17, 2020 and significantly expands the number of employees entitled to family and medical leave, effective January 1, 2021. Specifically with respect to COVID-19, SB 1383 amends the California Family Rights Act (CFRA) so that employees working for employers with five or more employees are eligible for up to 12 weeks of unpaid, protected family and medical leave during any 12-month period to care for themselves or a parent, spouse, domestic partner, child, grandparent, grandchild, or sibling with a serious health condition.<sup>16</sup> Under SB 1383, CFRA only protects eligible employees with a serious health condition if they are unable to perform the functions of their position, as may be the case with COVID-19.

### ***Antiretaliation and Antidiscrimination Assurances***

Employees should also be advised that they will not be retaliated against or discriminated against as a result of having exercised their right to take sick or family and medical leave due to a potential exposure to COVID-19, disclosing a positive COVID-19 test or diagnosis, or an order to quarantine or isolate.<sup>17</sup>

<sup>13</sup> CAL. LAB. CODE § 248-249.

<sup>14</sup> Executive Order N-62-20 (May 6, 2020); SB 1159, 2019-2020 Leg. Sess. (Sept. 17, 2020) (codified at CAL. LAB. CODE §§ 77.8, 3212.86, 3212.87, 3212.88).

<sup>15</sup> See Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 et seq.

<sup>16</sup> CAL. GOV’T CODE § 12945.2 (2021).

<sup>17</sup> CAL. LAB. CODE §§ 6409.6(f), 12945.2(k)(1); 29 U.S.C. § 2615(a).

### ***Not Federal Families First Coronavirus Response Act Leave***

Some employers might have questions about whether the Federal Families First Coronavirus Response Act (FFCRA) should also be mentioned in this notice. The FFCRA requires certain employers to provide employees with paid sick leave for reasons related to COVID-19. However, the Act, as currently written, is only effective through December 31, 2020, while AB 685 does not go into effect until January 1, 2021. Thus, unless the FFCRA is extended, it does not need to be included in this notice.

### ***Employer Specific Policies***

In addition to providing information to employees about what benefits they may be eligible for under federal, state, or local laws, employers must also provide information on any benefits employees may be entitled to under company policy, such as company paid and/or unpaid sick leave, vacation, and/or other applicable policies.

### ***Inform All Employees About the Disinfection and Safety Plan the Employer Intends to Implement***

Notice of the employer’s plan to disinfect the workplace should state not only how the employer intends to disinfect the worksite, but also any plans to ensure employees are not further exposed to COVID-19 at work.<sup>18</sup> Information about the disinfection plan should be provided to all employees, and any subcontractors who may have an obligation to notify their own employees of potential exposure. (Cal/OSHA now requires employers to adopt changes to their Injury and Illness Prevention Programs (“IIPP”) that implement COVID-19 infection control measures.<sup>19</sup> This disinfection plan could be one of these control measures.)

### **When Do Employers Need to Provide Notice Under AB 685?**

#### **Within one business day**

Employers need to notify employees and their union, if applicable, within one business day of the employer

<sup>18</sup> CAL. LAB. CODE § 6409.6, (a)(4).

<sup>19</sup> See Cal. Dep’t of Indus. Relations, *Cal/OSHA Interim General Guidelines on Protecting Workers from COVID-19* (May 14, 2020), available at <https://www.dir.ca.gov/dosh/coronavirus/General-Industry.html>.

receiving notice of a potential exposure.<sup>20</sup> The requirement to give notice is triggered when the employer is put on notice of a potential COVID-19 exposure in the workplace. Importantly, the individual who tested positive for COVID-19 or is subject to an isolation order does not need to be an employee. It could be a customer, a contractor, a family member, or anyone else who was in the workplace and tested positive for COVID-19 or became subject to an order to isolate or quarantine.

### **How do Employees Need to Be Notified?**

#### **Any method likely to provide notice within one business day**

Notice should be given in the same manner the employer usually communicates employment-related information.<sup>21</sup> This can be via personal service, email, or text message, so long as it can reasonably be anticipated to be received by the employee within one business day. Notices should also be in both English and the language understood by the majority of the employees

### **Employers Need to Notify the Local Public Health Department in the Event of an “Outbreak”**

If an employer learns of three or more lab-confirmed COVID-19 cases among employees at a worksite who live in different households within two weeks, they must notify the local public health department. A workplace “outbreak” is defined by guidance set by the State Department of Public Health.<sup>22</sup> Currently the California Department of Public Health defines a workplace outbreak as three or more cases identified within two weeks in individuals of different households.<sup>23</sup> If the employer becomes aware of an outbreak in the workplace, the employer must notify the local public health department within 48 hours of (1) the number of COVID-19 cases at the worksite; and (2) the names, occupations and worksites of individuals who have tested positive or are subject to an isolation order.<sup>24</sup> Employers are also required to follow up with the local public health department if there are any subsequent confirmed cases of COVID-19, although the statute does not specify when

the requirement to report subsequent confirmed cases ends.

### **Cal/OSHA Can Also Shutdown Employers When a Worksite Exposes Workers to a Risk of Infection**

Cal/OSHA has long had the ability to shut down a worksite that constitutes an “imminent hazard” to employees by posting a notice at the worksite.<sup>25</sup> In addition to that power, AB 685 gives Cal/OSHA the ability to prohibit entry into a workplace or performance of certain activities when, “in the opinion of the division,” the worksite exposes workers to a “risk of infection” of COVID-19.<sup>26</sup> Notably, the statute does not specify how Cal/OSHA should make a determination that a workplace creates an unacceptable risk of infection of COVID-19.

AB 685 also eliminated the requirement that Cal/OSHA provide a notice of intent to the employer for alleged COVID-19 related violations, identifying the alleged violations and conditions that warrant a citation.<sup>27</sup> This means Cal/OSHA can immediately issue a citation to an employer that it believes has exposed workers to a risk of infection of COVID-19 without first issuing a notice of intent and giving the employer an opportunity to provide evidence or argument as to why a citation should not issue.

### **What Are the Penalties for Late Notice or Non-Compliance?**

Cal/OSHA can enforce the requirements to provide written notice to employees and unions of potential exposure to COVID-19 by issuing a citation and notice of civil penalty consistent with Cal/OSHA procedure under Labor Code § 6317.<sup>28</sup> It is also possible that failure to issue notices following a workplace outbreak could lead Cal/OSHA to issue a citation under Labor Code § 6432. Employees who believe they have been retaliated against for disclosing a positive COVID-19 test or diagnosis or order to quarantine also have the right to file a complaint with the Division of Labor Standards Enforcement (DLSE) in order to prompt an investigation pursuant to Labor Code § 98.6 and 98.7.<sup>29</sup>

<sup>20</sup> CAL. LAB. CODE § 6409.6(a)(1).

<sup>21</sup> CAL. LAB. CODE § 6409.6(a)(1).

<sup>22</sup> CAL. LAB. CODE § 6409.6(b).

<sup>23</sup> Cal. Dep’t of Pub. Health, *Guidance to Local Health Departments, Responding to COVID-19 in the Workplace* (June 16, 2020), available at <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Workplace-Outbreak-Guidance.aspx>.

<sup>24</sup> CAL. LAB. CODE § 6409.6(b).

<sup>25</sup> CAL. LAB. CODE § 6325 (2019).

<sup>26</sup> CAL. LAB. CODE § 6325(b).

<sup>27</sup> CAL. LAB. CODE § 6432(h).

<sup>28</sup> CAL. LAB. CODE § 6409.6(l).

<sup>29</sup> CAL. LAB. CODE § 6409.6(f).

**Employer to Do List Upon Notice of a Potential COVID-19 Exposure in the Workplace**

1. Provide written notice (personal service, email, text message, etc.) within one business day of learning of a potential exposure to employees who were at the same worksite as the potential exposure.
2. Provide written notice to the union, if any.
3. Provide employees who may have been exposed to COVID-19 and the union with infor-

mation on the COVID-19 related benefits to which they may be entitled.

4. Inform all employees about the disinfection and safety plan the employer intends to implement.

*Chris Moores is an associate at Sloan Sakai Yeung & Wong LLP, specializing in the representation of public and private employers in labor and employment matters with a focus on claims based on the California Labor Code. He can be reached at [cmoores@sloansakai.com](mailto:cmoores@sloansakai.com).*