

Updated to Address SB 1159 (HILL)

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

The presumption created by the Order was premised upon an 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 created by the Order was 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 is available, i.e., between March 19, 2020 through July 5, 2020.

The California State Legislature has since passed its own COVID-19 workers’ compensation presumption law known as Senate Bill 1159 (Hill). SB 1159, containing an urgency clause, which was signed into law by the governor on September 17, 2020 and became immediately effective.

COVID-19 Presumptions: Agency FAQs¹

1. What is a presumption?

- a. Generally speaking, it’s a legal (evidentiary) device that enables a party to prove a difficult fact – e.g., industrially-contracted COVID-19, – by proving other, related facts that are often easier to prove, e.g., working outside the home at the direction of the employer and testing positive for COVID-19.
- b. Presumptions are either conclusive or rebuttable. A conclusive presumption permits no contrary evidence to dispute the presumed fact. A rebuttable presumption permits the opposing party to dispute the presumed fact by proving it does not exist. Both the governor’s original Order and SB 1159 create rebuttable presumptions.

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

- a. No; an employee that can’t prove the underlying facts to support 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 position with a heightened risk for contracting the virus relative to the general population.

3. What does the governor’s executive order mean and how is it affected by SB 1159?

- a. The governor’s executive order created a rebuttable presumption 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 heightened risk of infection or that the infection was even acquired at work.

¹This FAQ is not intended nor should it be understood as legal advice. It’s merely intended to convey information relating to the governor’s executive order (N-62-20) and SB 1159 (Hill), and is presented in a hypothetical question-and-answer format for ease of reference.

b. SB 1159 makes no substantive changes to the Order and essentially codifies it, meaning that it is now law (and renders moot any legal challenge that the governor may have acted outside of his authority). Additionally, SB 1159 creates some new COVID-19 presumptions, which are discussed further below.

c. While the original Order relates to the period March 19, 2020 through July 5, 2020, SB 1159 encompasses a much larger timeframe, extending new presumptions until January 1, 2023.

4. Do the presumptions apply to all businesses or only “essential”/ “critical” businesses? How can I tell if my employees are covered?

a. During the period 3/19/2020 through 7/5/2020, all employees are potentially covered by the original Order, which is now codified. Please refer to No. 5, below (the triggering requirements), for specific information.

b. During the period beyond the Order from 7/6/2020 to 1/1/2023, SB 1159 creates additional, rebuttable presumptions depending upon whether an affected employee is a frontline worker or has been exposed to the disease during a recent, industrial outbreak. Please refer to No. 5, below (the triggering requirements), for specific information.

5. What are the requirements that trigger the various COVID-19 presumptions?

a. Depending on the timeframes listed below and upon whether or not the affected employee works on the COVID-19 frontlines, the presence of COVID-19 must be substantiated as follows in order for a presumption to apply:

i. 3/19/2020-7/5/2020:² the presence of COVID-19 must be confirmed by either:

1. A positive test alone, or
2. A “physician’s” diagnosis in combination with 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 “or state licensed physician assistant or nurse practitioner, acting under the review or supervision of a physician and surgeon pursuant to standardized procedures or protocols within their lawfully authorized scope of practice” (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).

ii. 7/6/2020-1/1/2023: the presence of COVID-19 must be confirmed by a positive test alone.

1. The test must be a Polymerase Chain Reaction (PCR) or another test approved by the US FDA “to detect the presence of viral RNA which has the same or higher sensitivity and specificity as the PCR Test” but does not include serologic/antibody testing.

²The governor’s original Order as codified in Section 2 of SB 1159/new Labor Code § 3212.86.

2. If the employee is not a frontline worker,³ the test must also occur “during a period of an outbreak at the employee’s specific place of employment.”
 - a. The claims administrator is responsible for continually evaluating each claim to determine whether an “outbreak” has occurred.⁴
 - i. An “outbreak” is dependent upon the closure of, or the number of employees working at, a “specific place of employment”⁵ within 14 calendar days of the subject employee’s positive test result, and is deemed to occur when:
 1. A COVID-19 order to close is issued “by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent ...[;]”

OR
 2. Four (4) employees have contracted COVID-19 where 100 or less employees work;

OR
 3. Four percent (4%) of employees have contracted COVID-19 where 101 or more employees work.
 - b. The **employer is (newly) responsible for reporting**⁶ “in writing via electronic mail or facsimile,” to the claims administrator all of the following data within the timeframes listed below:
 - I. Closure Order: The fact that a specific work location has been ordered to close due to COVID-19; and/or
 - II. Employee Infection (industrial or not):
 1. The fact that an employee(s) has tested positive;
 - a. Note that employers are prohibited from disclosing an employee’s personally identifiable information unless that employee has filed a workers’ compensation claim form or otherwise “asserts the infection is work related.”

³ Frontline workers are active firefighters, peace officers and those healthcare employees, including custodial employees, who have patient contact. For a complete list, please refer to Section 3 of SB 1159/new Labor Code § 3212.87(a).

⁴ The permitted investigative period, although reduced from 90 days, is 45 days versus the 30 days permitted under non-“outbreak” presumptions.

⁵ A “specific place of employment” is defined as “the building, store, facility, or agricultural field where an employee performs work at the employer’s direction” and “does not include the employee’s home or residence, unless the employee provides home health care services to another individual at the employee’s home or residence.”

⁶ The employer is subject to a civil penalty of up to \$10,000 imposed by the Labor Commissioner for the intentional false/misleading reporting or failure to report as required. SB 1159’s workers’ compensation reporting requirement is not the only COVID-19 reporting requirement that California employers must meet. See for example, Sec. 4 of AB 685 (Reyes)/new Labor Code § 6409.6 that imposes additional COVID-19 reporting requirements beyond workers’ compensation and Cal/OSHA requirements.

2. The date when the employee's specimen was collected for testing that produced the positive test result;
 3. All addresses of the employee's specific places of employment during the 14-day period preceding the positive test date;
 4. The highest number of total employees reporting to the same, specific place(s) of employment "in the 45-day period preceding the last day the employee worked at each specific place of employment."
- i. Timeframe of 9/17/20 to 1/1/2023: must report within three (3) business days all of the above data, including 1 through 4 when the employer "knows or reasonably should know" that an employee has tested positive for COVID-19.
 - ii. Timeframe of 7/6/2020 - 9/17/20: must report within thirty (30) business days all of the above data, including 1 through 4, except that No. 4 shall be substituted with "the highest number of employees who reported to work at each of the employee's specific places of employment on any given work day ..."
- c. Employer rebuttal evidence can include, but is not limited to, (i) employer-implemented COVID-19 protective measures to reduce transmission and (ii) an employee's nonoccupational risks of infection.
- iii. The testing and/or diagnosis referenced 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.⁷ (The 14 days excludes the last day upon which work was performed outside).
 - a. Work that is performed while telecommuting away from the employer's premises does not trigger any presumption.
 - b. 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 by the employer, does not trigger the presumption.

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

- a. The presumption originally created by the Order only applies for dates of injury occurring during the period March 19, 2020 through July 5, 2020.
- b. The additional presumptions created by the Legislature in SB 1159 pick-up where the governor's original Order left off and apply to dates of injury occurring during the period beginning July 6, 2020 and continuing until January 1, 2023.

⁷ With regard to a COVID-19 diagnosis, the diagnosis needs to be made within 14 days, while the confirmation testing must be completed within 30 days of the diagnosis.

7. What benefits is an employee with work-related COVID-19 entitled to receive? And what are the special requirements for temporary disability indemnity benefits that the original Order talks about?

- a. All benefits normally provided to an injured employee under the workers' compensation laws are made available - with two adjustments specific to temporary disability benefits ("TD") applicable to all dates of injury under the presumption law and a third adjustment applicable only to dates of injury during the period created under the original presumption Order:
 - i. 3/19/2020 - 1/1/2023: While ordinary TD remains available, if an employee also has COVID-19 specific paid sick leave benefits available, these benefits must be exhausted before TD begins. (See for example, the California Labor & Workforce Development Agency's "Benefits for Workers Impacted by COVID-19" chart located at <https://www.labor.ca.gov/coronavirus2019/#chart>.⁸)
 - ii. 3/19/2020 - 1/1/2023: Absent an exhaustion of COVID-19 paid sick leave benefits, there is no TD waiting period for COVID-19 injuries established using the presumption. TD benefits are due on the first day of disability or immediately upon the exhaustion of the paid sick leave benefits.
 - iii. 3/19/2020 - 7/5/2020: In order to receive TD under the presumption in the original Order, the physician must first certify TD by 5/21/2020 if the employee first tested positive or was diagnosed before 5/6/2020; otherwise, if the first positive test or diagnosis is 5/6/2020 or later, the certification must be made within 15 days of that date; and, in either case, the physician must recertify every 15 days thereafter for the first 45 days.
 1. The certifying "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).
 2. During this first 45-day TD (re)certification period, the certifying physician isn't limited to the MPN. The certifying physician can be any of the following types of physicians (meeting No. 1's licensing requirement) with one broad exception, explained below.
 - a. Employee-predesignated workers' compensation physician
 - b. A Medical Provider Network (MPN) physician
 - c. A Health Care Organization (HCO) physician
 - d. The employee's Group Health Plan physician
 - e. EXCEPTION: If none of the above types of physicians has been made available to the employee, the employee may self-select any physician (meeting No. 1's licensing requirement).

⁸ The chart is not exhaustive of all COVID-19 specific paid sick leave that may be available to an employee. Further, the governor's order is silent as to whether the specific paid sick leave must be provided or sponsored by a federal, state or local government or includes employer-provided benefits.

8. Do the presumptions have any effect on X-Mods?

- a. While the presumptions do not directly address experience rating, effective 7/1/2020, the California Insurance Commissioner approved a WCIRB proposal to exclude COVID-19 claims with dates of injury from 12/1/2019 from experience modification.

9. Does UR/IMR apply to treatment for COVID-19 established using a presumption?

- a. Yes; COVID-19 claims accepted under a presumption are subject to all workers' compensation laws that are not in conflict with the presumption law.

10. Does apportionment of permanent disability apply if the disability arises from a presumptive COVID-19 injury?

- a. Yes; all workers' compensation laws that are not in conflict with the presumption law remain applicable. Additionally, the apportionment laws were specifically identified in the governor's original presumption Order as remaining viable.

11. I've read the Order and/or SB 1159 creating the presumptions and some of the language appears confusing, will there be further laws interpreting them?

- a. The original Order itself directs the Administrative Director of the Division of Workers' Compensation to create regulations to facilitate its implementation. Additionally, the WCAB will begin to issue decisions interpreting the presumptions as applied to cases that come before it. But, in the near term, before such guidance is available, some of the provisions will simply remain subject to varying interpretations.

12. 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 these presumptions?

- a. The presumptions anticipate 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.

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

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

14. Where can I get additional information?

- a. We will continue to update these FAQs as information develops.