

This is a general flowchart covering the provisions of SB 1159, AB 685, and AB 1867. The flowchart is not exhaustive but covers the primary practice points of the laws. This is not intended to provide legal advice about any particular case or issue. Consultation with an attorney fully conversant with the facts of the case is recommended.

**SB 1159**

- Signed into law 9/17/20, immediately effective retroactive to 7/6/2020.
- Extends the industrial presumption for peace officers, firefighters, and some medical providers, and other workers if there was an “outbreak” at their location at the time they tested positive.

**AB 685**

- Signed 9/17/20 and immediately effective.
- Provides for employee notice of potential COVID-19 exposure, shut-down of work sites by OSHA, and OSHA reporting requirements.

**AB 1867**

- Signed 9/9/20 and immediately effective.
- Establishes COVID-19 supplemental paid sick leave benefits for certain food sector employees, health care workers, and first responders.

**1. Employee tests positive**

- a. At employer’s instruction, has employee worked at the job site (which cannot be their own home or residence)?
  - i. No → no presumption, employee may attempt to bring a normal workers’ compensation claim, demonstrating industrial causation by preponderance of the evidence.
  - ii. Yes → continue to 2
- b. Did employee work outside of their home and miss work from 4/16/2020 through 12/31/20 (or, if later, the expiration of the federal Emergency Paid Sick Leave Act, part of the Families First Coronavirus Response Act)?
  - i. Does employee work in the food sector (preparation or delivery of food, from growing through presentation to customer) or a health care provider or emergency responder whose employer excluded such employees from emergency paid sick leave under the federal Families First Coronavirus Response Act?
    - \* Yes → entitled to up to two weeks (depending on how much they had been working) of COVID-19 supplemental paid sick leave benefits pursuant to LC §§ 248 and 248.1 (AB 1867).
    - \* No → may be entitled to FMLA benefits under the federal Emergency Paid Sick Leave Act.
- c. Was positive test between 9/17/20 and 1/1/23, regardless of industrial causation? Then new Cal OSHA reporting requirements pursuant to amended LC §6325 and new §6409.6 (AB 685) → go to 10

**2. When did the employee test positive?**

- a. 3/19 – 7/5/2020 → go to 3
- b. 7/6/2020 through 1/1/2023 → go to 4
- c. None of these dates → no presumption, go 9

**3. Tested positive on or after 3/19 and on or before 7/5/2020.** (Executive Order N-62-20, codified on 9/17/20 by SB 1159 as LC §3212.86.)

- a. Presumption of industrial causation if:
  - i. Positive test for or diagnosis\* of COVID-19 within 14 days after a day worked at the employer's jobsite, at employer's direction; and
    - \* Diagnoses must be by a state licensed physician (M.D. or D.O.), or a state licensed physician assistant or nurse practitioner (acting under the supervision of a physician). Diagnosis must be confirmed by testing or a COVID-19 serologic test within 30 days of the date of the diagnosis.
  - ii. Jobsite is not the employees' home or residence.
- b. Employer has 30 days from receipt of claim from to investigate.
  - i. If not denied, then presumed industrial.
  - ii. Presumption can later be rebutted by evidence only discoverable after the 30 days.
- c. Entitled to TD benefits
  - i. With no waiting period,
  - ii. but only after exhausting any other COVID-19 specific leave (e.g., COVID-19 supplemental paid sick leave pursuant to LC §§ 248 or 248.1).
  - iii. If test or diagnosis prior to 5/6 then needs certification by 5/21/20 documenting period of TD.
  - iv. If test of diagnosis after 5/6/20 then must have TD certification within 15 days of initial diagnosis.
  - v. TD recertification required every 15 days for the first 45 days of disability.
  - vi. TD Certification must be by a licensed physician or surgeon who is a member of the MPN, HCO, or Group Health Plan. If IW predesignated, then may be certified by that doctor. If none of these apply, then certifying physician may be of the employee's choosing.

**4. Tested positive on or after 7/6/2020 and before 1/1/2023**

- a. Testing requirements:
  - i. A PCR (Polymerase Chain Reaction) test approved for use or approved for emergency use by the US FDA to detect the presence of viral RNA, or any other viral culture test approved by the FDA to detect the presence of viral RNA, with the same or higher sensitivity and specificity as the PDR test.
  - ii. Cannot be serologic testing (antibody testing).
- b. If positive test → go to 5.
- c. If test does not meet the requirements → no presumption employee may attempt to bring a normal workers' compensation claim, demonstrating industrial causation by preponderance of the evidence (although without a positive proper test may not meet burden of proof of infection).

**5. Is employee:**

- a. A member of a “designated class” as defined in §3212.87:
  - a first responder (e.g., firefighter, peace officer primarily engaged in active law enforcement, register nurse, EMT, paramedic),
  - an employee at a health facility engaged in providing direct patient care,
  - a custodial employee at a health facility who comes in contact with COVID-19 patients, or
  - engaged in providing in-home health or supportive services outside of their own residence?

Then §3212.87 (SB 1159) applies → go to 6.

- b. If not a designated class pursuant to §3212.87, then does employer have 5 or more employees? If so then §3212.88 (SB 1159) applies → go to 7.

**6. §3212.87: designated class**

- a. Presumed compensable if:
  - i. Employee one of the designated classes (that’s how you got here); and
  - ii. Tested positive for COVID-19 within 14 days of performing labor or services at the employee’s place of employment at the employer’s direction. “Place of employment” does not include an employee’s home or residence. (This extends to 14 days following termination of employment.)
    - \* Test must be A PCR (Polymerase Chain Reaction) test approved for use or approved for emergency use by the US FDA to detect the presence of viral RNA, or any other viral culture test approved by the FDA to detect the presence of viral RNA, with the same or higher sensitivity and specificity as the PDR test.
    - \* Cannot be serologic testing (antibody testing).
- b. Employer has 30 days from receipt of the claim form to investigate.
  - i. If not denied, then presumed industrial.
  - ii. Presumption can later be rebutted by evidence only discoverable after the 30 days.
- c. If entitled to benefits → go to 8
- d. If no presumption → go to 9

**7. §3212.88: enough employees and an outbreak**

- a. Presumed compensable if:
  - i. Tests positive within 14 days of a day that the employer performed labor or services at the employee’s place of employment at the employer’s direction. “Place of employment” does not include an employee’s home or residence. This extends to 14 days following termination of employment. And
  - ii. Tests positive during an outbreak at the specific place of employment, which does not include the employee’s home or residence unless providing home health care services to another at the employee’s home or residence.

- \* Test must be A PCR (Polymerase Chain Reaction) test approved for use or approved for emergency use by the US FDA to detect the presence of viral RNA, or any other viral culture test approved by the FDA to detect the presence of viral RNA, with the same or higher sensitivity and specificity as the PDR test.
  - \* Cannot be serologic testing (antibody testing).
- Outbreak defined as, at a location where the employee worked within 14 days prior to a positive test, if in those 14 days:
1. 100 or fewer employees at that location, 4 employees test positive; or
  2. More than 100 employees at that location, 4% of the employees at that location test positive; or
  3. That location was ordered closed by local authorities due to a risk of infection.
- b. Employer has 45 days from receipt of the claim form to investigate.
    - i. If not denied, then presumed industrial.
    - ii. Presumption can later be rebutted by evidence only discoverable after the 45 days.
  - c. If entitled to benefits → to go 8
  - d. If no presumption → go to 9
  - e. Additional reporting requirements under §3212.88. When employer knows or reasonably should know that an employee has tested positive for COVID-19 on or after 9/17/20 – whether industrial or not – the employer shall within 3 business days report to the claims administrator in writing via e-mail or fax the following:
    - i. The fact that there is a positive test, without any personal identifying information pertaining to the employee unless the employee asserts industrial causation or has filed a 5401 claim form;
    - ii. The date of the positive test (date of specimen collection);
    - iii. Specific address(s) of the employee’s specific place(s) of employment during the 14-days preceding the positive test; and
    - iv. The highest number of employees at that specific location(s) during the prior 45 days.
    - v. Employers have until 10/17/20 to report the same information for all employees the employer knows tested positive for COVID-19 from 7/6 – 9/17/20.

## **8. Benefits under §§ 3212.87 and 3212.88**

- a. Temporary disability
  - i. no waiting period,
  - ii. but only after exhausting any other COVID-19 specific leave (e.g., COVID-19 supplemental paid sick leave pursuant to LC §§ 248 or 248.1).
- b. Full hospital, surgical, medical treatment, disability indemnity, and death benefits.
- c. §4706.5 is waived – the DIR will not collect death benefits if there is no heir or estate

**9. No Presumption:** If employee does not meet the requirements for a presumption, employee may attempt to bring a normal workers' compensation claim, demonstrating industrial causation by preponderance of the evidence.

**10. New Cal/OSHA Reporting requirements, LC §6409.6 (AB 685)**

- a. Upon notice of potential exposure to COVID-19 on-site by a qualifying individual, the employer must:
  - i. Provide written notice of potential exposure to all employees (including subcontracted employees) on the worksite as the infected individual within the infections period.
  - ii. Notice may be via personal service, email, or text – however it can be anticipated to be received within one business day.
  - iii. Notice shall be in both English and the language understood by the majority of the employees.
  - iv. Provide potentially exposed employees with information regarding COVID-19-related benefits:
    - \* Available under federal, state, or local laws, including but not limited to workers' compensation.
    - \* Additional options including COVID-19-related leave, company sick leave, state-mandated leave, supplemental sick leave, or negotiated leave provisions.
    - \* Information regarding antiretaliation and antidiscrimination protections for employees.
  - v. Advise of the intended disinfection and safety plan, pursuant to federal CDC guidelines.
  - vi. All such written notices must also be provided to the exclusive representative, if any, of the employees.
- b. Qualifying Individual means anyone who has a:
  - i. Laboratory-confirmed case of COVID-19, as defined by the State Department of Public Health;
  - ii. A positive COVID-19 diagnosis from a licensed health care provider;
  - iii. A COVID-19 related order to isolate from a public health official; or
  - iv. Died due to COVID-19, in the determination of a county public health department or per inclusion in the county COVID-19 statistics.
  - v. Does not apply to employees who, as part of their duties, conduct COVID-19 testing or screening or provide direct patient care or treatment to individuals who are known to have tested positive for COVID-19, are persons under investigation, or are in quarantine or isolation related to COVID-19, unless the qualifying individual is an employee at the same worksite.
- c. What is “notice of potential exposure?”
  - i. Notification to the employer from a public health official or licensed medical provider that an employee was exposed to a qualifying individual;
  - ii. Notification from an employee, or through an employer testing protocol, that they are a qualifying individual;

- iii. Notification from a subcontracted employer that a qualified individual was on the work site.
- d. If the employer is aware of a sufficient number of cases to meet the State Department of Public Health definition of a COVID-19 outbreak, then:
  - i. Within 48 hours must notify the local public health agency of the names, number, occupation, and worksite of the qualifying individuals, with continuing notice of any subsequent laboratory-confirmed cases of COVID-19. Must also provide the business address and NAICS code of the worksite.
  - ii. This notice shall contain the same information as in a Cal/OSHA Form 300 injury and illness log unless the information is inapplicable or unknown.
  - iii. This notification does not impact any determination of industrial causation.
  - iv. This does not apply to health facilities (Health & Safety code §1250).
  - v. The Division of Occupational Safety and Health may bar entry into the immediate area in which there is an imminent hazard of exposure to COVID-19 (other than to eliminate the dangerous condition), although this shall not be done if it would “materially interrupt the performance of critical governmental functions essential to ensuring public health and safety functions or the delivery of electrical power or water.” (LC §6325, amended by AB 685; sunsets on 1/1/23.)
- e. What’s an outbreak? For Cal/OSHA reporting requirements, not workers' compensation:
  - i. In a skilled nursing facility: at least **one** case of laboratory-confirmed COVID-19 in a resident.
  - ii. In other residential congregate settings: at least **one** case of laboratory-confirmed COVID-19 in the setting of  $\geq 2$  cases of acute illness compatible with COVID-19 in residents or staff members within a 14-day period.
  - iii. In congregate community settings: three or more laboratory-confirmed COVID-19 cases in different households in a cluster of acute illnesses compatible with COVID-19 with onset within a 14-day period.
  - iv. <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Workplace-Outbreak-Guidance.aspx>,  
<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/OutbreakDefinitionandReportingGuidance.aspx>