

## COVID-19 and Workers' Compensation Claims: A Look at the New Executive Order



**PRESENTED BY:**

Anthony P. Niccoli, Partner

Robert Fried, Partner

Jonathan S. Vick, Partner

Christopher S. Andre, Partner

**Atkinson, Andelson, Loya, Ruud & Romo**

Bruce Wick, Director of Risk Management

**CALPASC**



# Agenda

- Introduction
- Overview
- The Reasons for and Details of EO N-62-20
- Implications on Rates and Ratings
- Implications on Cal/OSHA
- Ancillary Workers' Compensation Claims
- Questions and Answers

# Meet Our Speakers...



## **Anthony P. Niccoli, Partner**

Anthony Niccoli has nearly 20 years experience representing contractors, subcontractors, material suppliers, and owners for a full range of construction issues, including licensing, contract drafting and negotiations, bid disputes, responsive and responsibility issues, change order disputes, terminations, and indemnity obligations and claims. In addition, he handles breach of contract actions such as delay, disruption, acceleration, mechanics' lien, stop payment notice, payment bond actions, including Federal claims and Miller Act Bonds, and labor issues. Mr. Niccoli is on the Los Angeles Board for the AGC and is the Legislative and Legal Chair of the Southern California Chapter of the Construction Management Association of America and is legal chair of the Engineering Contractor's Association. Mr. Niccoli is a graduate of the University of Notre Dame School of Law.



## **Robert Fried, Partner**

Robert Fried is a management defense attorney, expert witness and mediator in single employer and class action cases. He sustains an ongoing national practice in wage and hour law, federal and state prevailing wage and public works, as well as human resources, traditional labor, trade secrets in employment, false claims/product labeling litigation and OSHA.

# Meet Our Speakers...



## **Jonathan S. Vick, Partner**

Jonathan Vick is a member of the Facilities, Construction, and Property Practice Group and has more than 30 years of experience in state and federal courts and administrative agencies. He started his career working for the United States Department of Labor, Office of the Solicitor where he was responsible for enforcing the Fair Labor Standards Act, Davis Bacon and Related Acts, the Occupational Safety Health Act, the Mine Safety and Health Act, and other federal statutes. Since leaving the government, he has gained extensive experience with construction claims, mechanics liens, wage and hour, prevailing wage, OSHA, wrongful termination, catastrophic personal injury, toxic torts, and environmental cases. Mr. Vick has demonstrated an ability to expertly manage all stages of high profile, complex, multi-party litigation cases.



## **Christopher S. Andre, Partner**

Christopher Andre is a seasoned civil litigator who focuses his practice on civil litigation and advising and representing employers. Mr. Andre is an editor of and frequent contributor to the firm's Labor and Employment Law Blog, providing analysis and commentary about new developments of interest to California employers. Mr. Andre also formerly chaired the firm's Litigation Advisory Committee.



## **Bruce Wick, Director of Risk Management for CALPASC**

Mr. Wick has been very involved in a variety of workers' compensation legislative changes, and participating in several working groups set up by the state DIR. He has also presented to a variety of associations on workers' compensation issues, including an annual presentation to the AGC Safety and Health Council. Mr. Wick is also on the WCIRB Ombudsman Oversight Committee, and it's Employer Advisory Group.

# EXECUTIVE ORDER N-62-20

## *Overview*



- On May 6, 2020, Governor Newsom issued an anticipated Executive Order N-62-20 making it easier for workers to claim worker's compensation benefits arising from COVID-19.
- Any employee who performed work outside the employee's residence on or after March 19, 2020 who is diagnosed with a test-confirmed COVID-19 illness will be presumptively eligible for full workers' compensation benefits.
- The Order applies to employees diagnosed with COVID-19 related illness from March 19, 2020 to July 5, 2020.

# EXECUTIVE ORDER N-62-20

## *Reasons for the Order*

- On March 4, 2020, Governor Newsom proclaimed a State of Emergency to exist in California as a result of the threat of COVID-19.
- On March 19, 2020, Governor Newsom issued Executive Order N-33-20, directing all residents to stay home except as otherwise specified, including as needed to maintain continuity of operations of critical infrastructure sectors during the COVID-19 response.

# EXECUTIVE ORDER N-62-20

## *Reasons for the Order*

- Employees who report to their places of employment are often exposed to an increased risk of contracting COVID-19, which may require medical treatment, including hospitalization.
- Employees who report to work while sick increase health and safety risks for themselves, their fellow employees, and others with whom they come into contact.
- Prompt and efficient treatment will be realized by facilitating access to this state's workers' compensation system for medical treatment and disability benefits.

# EXECUTIVE ORDER N-62-20

## *Reasons for the Order*

- The provision of workers' compensation benefits related to COVID-19, when appropriate, will reduce the spread of COVID-19 and otherwise mitigate the effects of COVID-19 among all Californians, thereby promoting public health and safety.
- Strict compliance with various statutes and regulations specified in this Order would prevent, hinder, or delay appropriate actions to prevent and mitigate the effects of the COVID-19 pandemic.



# EXECUTIVE ORDER N-62-20

## *The Order —Creates a Presumption*

- Any COVID-19-related illness of an employee **shall be presumed to arise out of and in the course of the employment** for purposes of awarding workers' compensation benefits if four conditions are satisfied.

# EXECUTIVE ORDER N-62-20

## *Requirements to Satisfy Presumption*

- The place of employment was NOT the employee's home or residence; and
- The COVID-19 diagnosis was made by a physician who holds a physician and surgeon license issued by the California Medical Board AND the diagnosis is confirmed by further testing within 30 days of the date of the diagnosis; and
- The COVID-19 diagnosis was made within 14 days after the last day the employee worked at the employer's direction; and
- The work at the employer's location occurred on or after March 19, 2020.

# EXECUTIVE ORDER N-62-20

## *Duration of Presumption*

- The presumption applies to dates of injury occurring through 60 days following the date of this Order occurring from March 19, 2020 through the 60-day period following the Order's May 6, 2020 issuance.
- The Order applies to employees diagnosed with COVID-19 related illness from March 19, 2020 to July 5, 2020.
- Although not provided for in the Order, this time period may be extended by further Executive Order.

# EXECUTIVE ORDER N-62-20

## *Presumption is Rebuttable*

- “Rebuttable” versus a “Conclusive” Presumption.
- The presumption that any COVID-19-related illness of an employee arose out of and in the course of the employment is disputable or rebuttable and may be controverted by other evidence.
- If the employer or other entity presents no evidence to rebut the presumption, then the Order requires the Workers’ Compensation Appeals Board to find an employee’s COVID-19 related illness arose in the course and scope of employment.

# EXECUTIVE ORDER N-62-20

## *Shortened Time to Presume Injury Compensable*

- If liability for a claim of a COVID-19-related illness not rejected within 30 days [reduced from 90 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.



# EXECUTIVE ORDER N-62-20

## *Exhaustion of Sick Leave Benefits First*

- Where an employee has paid sick leave benefits specifically available in response to COVID-19, those benefits shall be used and exhausted before any temporary disability benefits or benefits under Labor Code section 4850 are due and payable.
- Where an employee does not have such sick leave benefits, the employee shall be provided temporary disability benefits or Labor Code section 4850 benefits if applicable, from the date of disability. In no event shall there be a waiting period for temporary disability benefits.

# EXECUTIVE ORDER N-62-20

## *Full Panoply of Benefits Available*

- An accepted claim for the COVID-19-related illness shall be eligible for all benefits applicable under the workers' compensation laws of this state, including
  - full hospital,
  - surgical,
  - medical treatment,
  - disability indemnity, and
  - death benefits,
  - and shall be subject to those laws including Labor Code sections 4663 and 4664, except as otherwise provided in this Order.

# EXECUTIVE ORDER N-62-20

## *Temporary Disability*

- To qualify for temporary disability or Labor Code section 4850 benefit payments under this Order, an employee must satisfy either of the following:
  - If diagnosed with COVID-19 on or **after 05/06/20** pursuant to the four part test, that they were certified for TD within 15 days of the initial diagnosis (and must continue to be certified every 15 days for the first 45 days) OR
  - If diagnosed with COVID-19 **prior to 05/06/20** pursuant to the four part test, they must obtain certification no later than 5/21/20 documenting the period they were unable to work and thereafter must continue to be certified every 15 days for the first 45 days following the diagnosis.



# EXECUTIVE ORDER N-62-20

## *Temporary Disability*

- All employees must be certified for temporary disability by a physician holding a physician and surgeon license issued by the California Medical Board.
- The certifying physician can be a designated workers' compensation physician in an applicable Medical Provider Network or Health Care Organization, a predesignated workers' compensation physician, or a physician in the employee's group health plan.
- If the employee does not have a designated workers' compensation physician or group health plan, the employee should be certified by a physician of the employee's choosing who holds a physician and surgeon license.

# IMPLEMENTATION IMPLICATIONS

- The existing temporary disability process will undergo adaptive change under the presumption process.
- How will the existing physician referral process function differently?

# EXECUTIVE ORDER N-62-20

## *Applies to All Worker's Compensation Carriers*

- This Order shall apply to all workers' compensation insurance carriers writing policies that provide coverage in California, self-insured employers, and any other employer carrying its own risk, including the State of California.
- Processing through self insured and labor agreement ADR plans



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# RATES AND RATINGS IMPLICATIONS

- Forthcoming guidance from the Workers' Compensation Insurance Ratings Bureau (WCIRB).
- Gauging economic burdens.
- Nothing in the Order shall be construed to limit the existing authority of insurance carriers to adjust the costs of their policies.
- Changes in liens and assessments including the new directive Department of Industrial Relations shall waive collection on any death benefit payment due pursuant to Labor Code section 4706.5 arising out of claims covered by this Order.

## AMENDMENTS TO WORKERS COMPENSATION USRP/ERP

- Insurance Commissioner issued an Order amending the Insurance Commissioner's regulations pertaining to the California Workers' Compensation **Uniform Statistical Reporting Plan- 1995** and the California **Workers' Compensation Experience Rating Plan- 1995**. These regulations will be **effective on July 1, 2020**.
- Recommendations from The Workers' Compensation Insurance Rating Bureau ("WCIRB"). Telephonic hearing May 18, 2020. The June 17, 2020 Order allays business owners' fears of increased premiums arising from COVID-19 claims.
- <https://www.wcirb.com/content/july-1-2020-usrp-and-erp-changes-quick-reference-guide>
- <https://www.insurance.ca.gov/0400-news/0100-press-releases/2020/upload/nr052WCRatingRules06172020.pdf>

## AMENDMENTS TO WORKERS COMPENSATION USRP/ERP

**EMR EXCLUSION:** COVID-19 claims not reflected in computation of an experience modification.

**EMPLOYEE RECLASSIFICATION:** If employees work is “exclusively clerical in nature” employers can reclassify employees working remotely as Clerical Office Employees (Classification 8810).

- The change is retroactive to March 19, 2020 and concludes 60 days after the Stay-at-Home Order is lifted. This does not apply to the payroll employees whose payroll is otherwise assignable to a standard classification that specifically includes Clerical Office.

**EXCLUSION OF PAYROLL FOR NON-WORKING EMPLOYEES:** While employee not working, excludes payments made to an employee, including emergency paid sick leave or extended family and medical leave.

- Lowers the employer’s rate by reducing the amount of payroll assessed, and the employer will not pay premiums for furloughed workers who are still being paid.
- Will apply during the statewide Stay-at-Home Order and stop 30 days after.

# Cal/OSHA Complaint Letters

- T8CCR 3203(a)(4) – **This employer is making their non-essential staff continue to come into office. Employer is not complying with social distancing. Employer is not providing their employees with face Masks/Personal Protective Equipment.**
  - 3203(a)(4) requires employers to include procedures for identifying and evaluating work place hazards including periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:
    - (A) When Program established;
    - (B) Whenever new substances, processes, procedures...present new hazards;
    - (C) Whenever the employer is made aware of a new or previously unrecognized hazard.



# Cal/OSHA Complaint Letter



- T8CCR 3203- **Employees are not wearing masks. Not practicing social distancing. No one is wearing masks at school board meetings.**

# Cal/OSHA Complaint Letters

- T8CCR 3380(f) – **Employer is not providing adequate PPE for curbside pick-up. Employees have to approach vehicles and speak with the public. Employer has not provided face shields, gloves nor aprons. Employer has only provided employees with disposable face masks.**

# Best Defense Is Good Offense

- **Title 8, California Code of Regulations, Section 3203 (IIPP)**

- **Identify** person(s) responsible for implementing the program;
- Include a **system** for ensuring the employees comply with safe work practices. Systems include recognizing employees, training and retraining and discipline;
- **Communicate** hazards to employees by training, posting, tip lines, labor/management meetings. Get employees involved in the process;
- Include a procedure to **identify and evaluate hazards** in the workplace including **periodic** inspections;
- Include a procedure to **investigate** occupational injuries/illnesses;
- Include **methods and procedures** to correct unsafe/unhealthy conditions, and;
- Provide **training** when IIPP (1) established, (2) to all new employees, (3) new job assignments, (4) new processes, procedures, equipment, (5) aware of new or previously unrecognized hazards, (6) for supervisors to familiarize them with safety & health.

# Fed/OSHA Recording Guidance for OSHA 300 Log

- Fed/OSHA requires employers to record a COVID-19 infection only if:
  1. The COVID-19 infection is confirmed by a positive laboratory test of a respiratory specimen.
  2. The case involves one or more of the general recording criteria, including days away from work for quarantine; and
  3. The case is work-related as defined by 29 CFR Section 1904.5.

Must record if it is “more likely than not” the illness was caused by an exposure in the workplace, based on reasonably available evidence, and in the absence of an alternative (non-work) explanation for the illness.

- Cases are not “presumed” to be work-related.

# Fed/OSHA Recording Guidance for OSHA 300 Log

- All employers must undertake a case-by-case work-relatedness analysis of whether it is **more likely than not that an exposure in the workplace caused the illness.**
- Employers are not expected to undertake extensive medical inquiries, given employee privacy concerns. It is sufficient in most cases for employers to:
  - Ask the employee how he believes he contracted the COVID-19 illness.
  - Discuss with employee his work and non-work related activities that may have led to the COVID-19 illness; and
  - Review the employee's work environment for potential exposures.



# Fed/OSHA Recording Guidance for OSHA 300 Log

- Fed/OSHA identifies types of evidence that may weigh in favor of work-relatedness:
  - Several cases among workers with close contact and no alternative explanation.
  - Illness contracted shortly after lengthy, close exposure to another confirmed case and no alternative explanation.
  - Job duties include frequent, close exposure to general public in area with on-going community spread and no alternative explanation.
- Fed/OSHA identifies types of evidence that a COVID-19 case likely is NOT work-related:
  - Only 1 worker in general workplace contracted illness.
  - Job duties do not include frequent contact with the public.
  - Infected employee associated closely with an infected person outside of the workplace

## 14300.5(b)(2) - Work-Relatedness Exceptions

- Are there situations where an injury or illness occurs in the work environment, but is not considered work-related and does not have to be recorded? **Yes, if an exception applies.** Here some potential exceptions:
  - *The injury or illness involves signs or symptoms that surface at work, **but result solely from a non-work-related event or exposure that occurs outside the work environment.***
  - *The injury or illness **is solely the result of an employee eating, drinking, or preparing food or drink for personal consumption** (whether bought on the employer's premises or brought in).*
  - *The illness is the common cold or flu Note: contagious diseases such as tuberculosis, brucellosis, hepatitis A, or plague are considered work-related if the employee is infected at work.*

# Cal/OSHA Recording Guidance for OSHA 300 Log

- Employers are required to record work-related fatalities, injuries and illnesses and must record a work-related COVID-19 fatality or illness like any other occupational illness. To be recordable, an illness must be work-related and result in one of the following:
  - Death.
  - Days away from work.
  - Restricted work or transfer to another job.
  - Medical treatment beyond first aid.
  - Loss of consciousness.
  - A significant injury or illness diagnosed by a physician or other licensed health care professional.

If a work-related COVID-19 case meets one of these criteria, then covered employers must record it on their 300, 300A and 301 or equivalent forms.



# Cal/OSHA Recording Guidance for OSHA 300 Log

- Cal/OSHA considers a positive test determinative for recording, however due to shortage in testing a positive is not necessary as with Fed/OSHA.
- Contrary to Fed/OSHA's "more likely than not" standard and carve out for other identifiable non-work explanations, Cal/OSHA has established a **presumption** (possibly rebuttable??) of work-relatedness if any identifiable workplace exposure can be shown:
  - *Interactions with people known to be infected with the virus;*
  - *Working in the same area where people known to have been infected have been;*
  - *Sharing tools, materials or vehicles with persons known to have been infected.*
- Unclear how Cal/OSHA will deal with an employee with an identifiable workplace exposure AND an identifiable non-work exposure that is a likely or more likely to have caused the illness.

# Cal/OSHA Recording Guidance for OSHA 300 Log

- Even with NO identifiable workplace exposure to trigger the presumption, employers must still evaluate the employee's **work duties** and **environment** to determine whether the illness is work-related using the following factors:
  - Type, extent, and duration of contact the employee had in the work environment with other people, especially the general public.
  - Physical distancing and other controls that impact likelihood of a work-related exposure.
  - Whether the employee had work-related contact with anyone who exhibited signs and symptoms of COVID-19
- Any doubts about whether an injury/illness or fatality is related to a workplace exposure must be resolved in favor of recording.
- Note: Time spent in quarantine is not “days away from work” for recording purposes if unless the employee also has a work-related illness that requires days away from work.

# Cal/OSHA Reporting COVID-19 Illnesses

- Employers must report to Cal/OSHA any serious illness, serious injury or death of an employee that occurred at work or in connection with work within 8 hours of when they knew or should have known of the illness.
- This could include a COVID-19 illness that requires in-patient hospitalization for other than medical observation or diagnostic testing.
- This is not limited to showing symptoms at work. This can include illnesses where symptoms occur outside of work but the illness was contracted “in connection with any employment.”
- Employers must make the same work-relatedness determination for “reporting” that they made for “recording.” Even if the employer cannot confirm it is work-related, if it results in in-patient hospitalization for treatment and if there is a **substantial reason** to believe it is work-related, it should be reported.

## Ancillary Workers' Compensation Claims That Are Not Insurable

**There are two ancillary workers' compensation system claims that are not covered by any workers' compensation insurance policy in California:**

- Claims for alleged “**serious and willful**” misconduct by the employer that caused the employee's illness or injury, and
- Claims for alleged **discrimination** or **retaliation** against an employee because the employee made a claim for workers' compensation benefits or stated an intention to do so.

# Ancillary Workers' Compensation Claims That Are Not Insurable

## Labor Code section 4553

The **amount of compensation** otherwise recoverable shall be **increased one-half**, together with costs and expenses not to exceed two hundred fifty dollars (\$250), where the employee is injured by reason of the **serious and willful misconduct** of any of the following:

- (a) The employer, or his managing representative.
- (b) If the employer is a partnership, on the part of one of the partners or a managing representative or general superintendent thereof.
- (c) If the employer is a corporation, on the part of an executive, managing officer, or general superintendent thereof.

# Ancillary Workers' Compensation Claims That Are Not Insurable

## What Constitutes “Serious and Willful Misconduct”?

In *Johns-Manville Sales Corp v. Workers' Comp. Appeals Bd. (Horenberger)* (1979) 96 Cal. App. 3d 923, 158 Cal. Rptr. 463, 44 Cal. Comp. Cases 878, the court stated:

“[A]n employer guilty of serious and willful misconduct must know of the dangerous condition, know that the probable consequences of its continuance will involve serious injury to an employee, and deliberately fail to take corrective action.”

The employer was charged with serious and willful misconduct by **failing to adequately light a truck yard**, which resulted in the employee's injury.

# Ancillary Workers' Compensation Claims That Are Not Insurable

## Labor Code section 132a.

(1) Any employer who **discharges**, or **threatens to discharge**, or **in any manner discriminates** against any employee because he or she has filed or made known his or her intention to file a claim for compensation with his or her employer or an application for adjudication, or because the employee has received a rating, award, or settlement, is **guilty of a misdemeanor** and the **employee's compensation shall be increased by one-half, but in no event more than ten thousand dollars (\$10,000)**, together with costs and expenses not in excess of two hundred fifty dollars (\$250). Any such employee shall also be **entitled to reinstatement and reimbursement for lost wages and work benefits** caused by the acts of the employer.

# Ancillary Workers' Compensation Claims That Are Not Insurable

## What Happens When A “Serious and Willful” and/or 132a Claim Is Made?

- The insurer will issue a **letter denying coverage** for the “serious and willful” claim and/or for the 132a claim.
- The insurer will defend the underlying workers' compensation claim but not the “serious and willful” claim or the 132a claim. This means the **employer will need to retain private counsel at its own expense** to defend against the “serious and willful” claim and/or the 132a claim.
- **The insurer will not pay any award** made to the employee for the “**serious and willful**” claim and/or for the 132a claim



# Ancillary Workers' Compensation Claims That Are Not Insurable

**Is There a Good Way to Prevent Claims for Alleged “Serious and Willful” Misconduct Related to Covid-19 or to Make Such Claims More Defensible?**

**Yes.**

- An up-to-date Injury and Illness Prevent Program (IIPP) that is followed is one of the best ways to reduce exposure to claims for alleged “serious and willful” misconduct.
- Conversely, failing to have an up-to-date IIPP may make it easier for an ill or injured employee to claim the illness or injury was the result of “serious and willful” misconduct on the part of the employer.

# Ancillary Workers' Compensation Claims That Are Not Insurable

**Is There a Good Way to Prevent Claims for Alleged 132a Violations or to Make Such Claims More Defensible?**

**Yes.**

- Terminations and other “adverse employment actions” that **take place close in time to an employee engaging in protected activity**, such as making a workers compensation claim, **can set the table** for the employee to claim discrimination and/or retaliation. I call these “high risk” actions that warrant consultation with counsel before taking action.
- **Good documentation** is a **best practice** if not an **essential practice**. Employers should document performance issues and misconduct contemporaneously.

# Question & Answer Session

# Thank You

For questions or comments, please contact:

Anthony P. Niccoli, Partner • 562.822.3789 • [aniccoli@aalrr.com](mailto:aniccoli@aalrr.com)

Ann K. Smith, Partner • 562.653.3200 • [asmith@aalrr.com](mailto:asmith@aalrr.com)

Robert Fried, Partner • 925.251.8515 • [rfried@aalrr.com](mailto:rfried@aalrr.com)

Jonathan S. Vick, Partner • 562.653.3200 • [jvick@aalrr.com](mailto:jvick@aalrr.com)

Christopher S. Andre, Partner • 562.653.3200 • [candre@aalrr.com](mailto:candre@aalrr.com)

**Atkinson, Andelson, Loya, Ruud & Romo**

Bruce Wick, Director of Risk Management • 760-535-9623 • [wick@calpasc.org](mailto:wick@calpasc.org)

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