

New Bill Expands Cal/OSHA Enforcement Rules Over COVID-19 Related Illnesses For All Employers

Key Points

- Under Assembly Bill 685, Cal/OSHA can shut down a worksite if the worksite exposes employees to a COVID-19 related imminent hazard.
- AB 685 subjects employers to increased notification requirements that must be met within one business day of a potential exposure to COVID-19.
- Employers must notify local public health agencies of all workplace COVID-19 outbreaks amongst employees.
- Cal/OSHA can now issue serious citations more quickly.

On Sept. 17, 2020, Governor Newsom signed Assembly Bill (AB) 685, which imposes significant new obligations on employers. Employers have some time to get up to speed on its requirements as AB 685 is effective Jan. 1, 2021, and remains in effect until Jan. 1, 2023.

Orders Prohibiting Use for Imminent Hazards Related to COVID-19

Under existing law, if Cal/OSHA finds that a place of employment, machine, device, apparatus, or piece of equipment constitutes an imminent hazard ¹ to employees, it may prohibit entry or use by posting an Order Prohibiting Use (OPU).

AB 685 expands Cal/OSHA's authority to issue OPUs relating to COVID-19 hazards. Cal/OSHA may now issue an OPU when a place of employment, operation, or process exposes workers to the risk of infection with COVID-19 so as to constitute an imminent hazard to employees. ² Cal/OSHA will not lift the OPU until the employer has taken affirmative action to mitigate the risk of exposure.

AB 685 does not specify which actions an employer must take in order to satisfy Cal/OSHA such that it will lift its OPU. That determination will be made specific to the employers' operations and the purported hazard involved.

New Notice and Reporting Requirements

Currently, California law requires employers to report "serious"³



by Amanda M. Osowski & Diane Marie O'Malley



occupational injuries and illnesses to Cal/OSHA within 8 hours after the employer knows or should have known of the qualifying illness or injury. This means that employers must report work-related⁴ COVID-19 cases that result in an in-patient hospitalization for any reason other than medical observation or diagnostic testing or the death of an employee.

In addition to currently existing reporting requirements, AB 685 now also requires employers with notice of a potential COVID-19 exposure to take the following actions within **one business day** of the notice of potential exposure:

1. Notify (a) employees and subcontractor employees *who were at the worksite* when a potentially infected individual was there and may have been exposed to COVID-19 as a result; and (b) the employees' exclusive representative, if applicable. Worksite "does not apply to buildings, floors, or other locations of the employer that a qualified individual did not enter." **In a multi-worksite environment, the employer need only notify employees who were at the same worksite as the qualified individual.**
2. Provide all employees *who may have been exposed* and the exclusive representative, if any, with information regarding COVID-19 related benefits to which the employee may be entitled under applicable federal, state, or local laws including workers' compensation benefits, COVID-19 leave, paid sick leave, and the company's anti-discrimination, anti-harassment, and anti-retaliation policies; and
3. Notify *all* employees, the employers of subcontracted employees, and the exclusive representative, if any, of the disinfection and safety plan that the employer plans to implement and complete per the guidelines of the federal Centers for Disease Control.

Written notice may be effected via personal service, e-mail, or text message if it can reasonably be anticipated to be received by the employee within one business day of sending. The notice must be in both English and the language understood by the majority of the employees.

AB 1865 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."

In addition, AB 685 mandates that an employer that has an "outbreak"⁵ of COVID-19 cases report certain information to the local public health agency in the jurisdiction of the worksite within 48 hours of learning of the outbreak. There is an exception: the written notice requirement does not apply to a "health facility" as defined in section 1250 of the Health and Safety Code.

Included in the notice, the employer must report the business address and North American Industry Classification System (NAICS) code of the worksite where the COVID-19 positive employee worked. The employer must continue to provide notice to the local health department of any subsequent laboratory-confirmed cases of COVID-19 at the worksite.

To ensure compliance with AB 685, employers must have an effective mechanism for employees to report potential exposures to COVID-19, positive COVID-19 test results, or the existence of COVID-19 symptoms.

Interestingly, AB 685 specifically addresses employee privacy interests, noting "the need to protect the privacy of employees from the public disclosure of their personally identifiable information outweighs the interest in public disclosure of that information." The information is not, however, subject to "a California

Public Records Act request or similar request."

Change to Serious Citation Procedure

Cal/OSHA inspections may result in citations, which are classified based on the severity of the hazard as either regulatory, general, or serious.⁶

Prior to AB 685, Cal/OSHA was required to provide at least 15 days' notice to the employer of its intent to issue a serious citation by providing a "1BY" notice, which includes the specific safety orders allegedly violated and allegations supporting the citation. Employers would then have 15 days to submit evidence to support their defense, which Cal/OSHA could take into consideration in making a final determination whether to issue a serious citation.

AB 685 has removed the 15 days' notice requirement. Now, employers will not have the opportunity to present mitigating evidence to Cal/OSHA prior to the issuance of a serious citation. If the employer disputes the citation, it must do so through a formal appeals process.

Conclusion

Employers have until Jan. 1, 2021, to prepare for the increased notice and reporting requirements. In anticipation, employers should also plan to carefully review their existing COVID-19 policies, procedures, and protocols to ensure they comply with all current legal requirements and gauge their effectiveness.

As always, if Cal/OSHA contacts an employer, or if a Cal/OSHA inspector shows up to the worksite, the employer should contact counsel.

¹ An imminent hazard is defined as any condition or practice which poses a hazard to employees, which could reasonably be expected to cause death or serious physical harm immediately, or before the imminence of such hazard can be eliminated through normal enforcement procedures.

² AB 685 provides the vague limitation that it will "be issued in a manner so as not to materially interrupt the performance of critical governmental functions essential to ensuring public health and safety functions or the delivery of electrical power or water."

³ A serious illness includes, among other things, any illness occurring in a place of employment or in connection with any employment that requires in-patient hospitalization for other than medical observation or diagnostic testing.

⁴ AB 685's notice requirements do not change the existing work-relatedness analysis for COVID-19 cases under Cal/OSHA. But, note that Governor Newsom also signed SB 1159 creating a rebuttable presumption under Worker's Compensation that an employee's illness related to coronavirus is an occupational injury if certain conditions are met.

⁵ AB 685 looks to the State Department of Public Health for the definition of "outbreak." See <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/OutbreakDefinitionandReportingGuidance.aspx>. The definition varies depending upon the employer and whether the cases are suspected or laboratory confirmed. For example, in a non-healthcare or non-residential congregate setting, an outbreak is three or

more laboratory-confirmed cases of COVID-19 among workers who live in different households within a two-week period. However, in skilled nursing facilities, an outbreak is defined as "at least one case of laboratory-confirmed COVID-19 in a resident." In residential congregate settings, outbreak is defined as "at least one case of laboratory-confirmed COVID-19 in the setting of 2 cases of acute illness compatible with COVID-19 in residents or staff members within a 14 day period."

⁶ Citations are classified as serious when Cal/OSHA demonstrates there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.

For more information, please contact:

Amanda M. Osowski, Associate
415-995-5862
aosowski@hansonbridgett.com

Diane Marie O'Malley, Partner
415-995-5045
domalley@hansonbridgett.com