CopperPoint
Insurance Companies

Agency FAQs for California Executive Order N-62-20 as of 5.8.2020

Summary: The governor's May 6, 2020 executive order (known as "N-62-20") creates a rebuttable presumption in California 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 unique risk of infection or that the infection was even acquired at work.

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

California Gov. Newsom's May 6, 2020 Order Creating a COVID-19 Presumption: Agency FAQs[1]

Q1. What is a presumption?

A1. 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. The governor's Order creates a rebuttable presumption.

Q2. Does an employee need a presumption to prove COVID-19 was contracted on the job?

A2. No; an employee that can't prove the underlying facts to support a presumption or who doesn't otherwise qualify to take advantage of 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 unique position with a heightened risk for contracting the virus relative to the general population.

Q3. What does the governor's executive order mean?

A3. The governor's executive order (known as "N-62-20") creates 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 unique risk of infection or that the infection was even acquired at work.

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[1] These FAQs are not intended nor should they be understood as legal advice. They are merely intended to convey information relating to the governor's executive order (N-62-20) and are presented in a hypothetical question-and-answer format for ease of reference.

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Q4. Does the presumption apply to all businesses or only "essential"/ "critical" businesses? How can I tell if my employees are covered?

A4. All employees are potentially covered. Please refer to No. 5, below (the triggering requirements), for specific information.

Q5. What are the requirements that trigger the new presumption?

A5. All of the following must exist for the presumption to apply:

i. The presence of COVID-19 confirmed by either:

1. A positive test alone, or
2. A "physician's" diagnosis in combination with No. 1 (i.e., 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. (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).
   b. The confirming test must occur after the diagnosis and within 30 days of it.

ii. Both Nos. 1 and 2, 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.[2] (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 this 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 to be performed there by the employer, does not trigger the presumption.

iii. Both Nos. 1 and 2, immediately above, must occur during the period between March 19, 2020 through July 5, 2020.[2]

Q6. Does the presumption apply to all dates of injury?

A6. The Order states that it applies only for dates of injury occurring during the period March 19, 2020 through July 5, 2020.

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[2] Only the diagnosis needs to be made within 14 days; the confirmation testing must done within 30 days.

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Q7. 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 Order talks about?

A7. All benefits normally provided to an injured employee under the workers' compensation laws are made available – with three adjustments specific to temporary disability benefits ("TD"):

i. 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.[3])

ii. (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. In order to receive TD under the presumption, the physician must first certify TD within 15 days of May 6, 2020 or the date of the initial COVID-19 diagnosis, *whichever is later*, and 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).

Q8. Does the presumption have any effect on X-Mods?

A8. No; meaning that insurers are permitted to include COVID-19 claims in experience rating; however, the Department of Insurance is presently considering a WCIRB special regulatory filing that includes a proposal to exclude COVID-19 claims from experience rating.

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[3] 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.

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Q9. Are there other COVID-19 presumptions in addition to the one created by the governor's executive order?

A9. Not yet; but as of the date of the governor's order, May 6, 2020, there is similar presumption language in pending legislation that is likely to become law.

Q10. Does UR/IMR apply to treatment for COVID-19 established using this presumption?

A10. Yes; COVID-19 claims accepted under this presumption are subject to all workers' compensation laws unless in conflict with the Order creating the presumption.

Q11. Does apportionment of permanent disability apply if the disability arises from a presumptive COVID-19 injury?

A11. Yes; all workers' compensation laws that are not in conflict with the Order creating the presumption remain applicable, with the apportionment laws being specifically identified in the Order as remaining viable.

Q12. I've read the Order creating the presumption and some of the language appears confusing, will there be further laws interpreting the presumption?

A12. The 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 Order's presumption 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.

Q13. 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 this presumption?

A13. The presumption anticipates 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.

Q14. After July 5, 2020, when the Order's presumptive window closes, can employees still file claims for COVID-19?

A14. Yes; but the presumption will not be available to assist the employee to prove the exposure to COVID-19 occurred occurred at work. Absent another order or extension, or a new legislative presumption, the employee will have to prove they were actually exposed to the virus in the employment environment or their employment environment placed them in a unique position with a heightened risk for contracting the virus relative to the general population.

Q15. Do presumption claims have to be accepted without being investigated?

A15. No; we investigate all claims of injury before making any compensability determination.

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Q16. Does the presumption have any impact on AB5 (the *Dynamex* case – "ABC" Test)?

A16. For workers' compensation reporting purposes, AB5 requires employers in the state of California – that haven't been exempted – to properly classify their employees according to the "ABC" Test by not later than July 1, 2020. Given that the COVID-19 presumption window remains open through July 5, 2020, there may be reclassified employees that become subject to it.

Q17. Where can I get additional information?

A17. We will update these FAQs as information develops.

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