Risk Management Advisory: COVID-19 California Workers' Compensation Executive Order

On May 6, 2020 the Governor of California issued Executive Order N-62-20 impacting available insurance coverage under all Workers’ Compensation Insurance policies providing coverage in California. Under current law, COVID-19 claims are eligible as a compensable illness; however, the burden of proof that any injury or contraction of illness occurred in the course of employment is on the employee. This Executive Order reverses the burden of proof to the employer for COVID-19. Specifically, any California employee is now eligible for Workers’ Compensation benefits if the:

1. Employee tests positive for or is diagnosed with COVID-19 within 14 days of their last day of labor or services.
2. Employee performed labor or services at the employer’s place of employment at the employer’s direction on or after March 19, 2020.
3. Employee’s place of employment was not their home or residence.

OTHER DIRECTIVES OF THE EXECUTIVE ORDER INCLUDE:

- Applies to all positive tests or diagnoses between the first statewide stay-at-home order through 60 days beyond the date of the Executive Order: March 19, 2020 to July 4, 2020.
- Positive test is required for compensable claim. Where diagnosis by a California physician was provided, a positive test must be confirmed within 30 days.
- Illness will be presumed compensable unless controverted by other evidence within 30 days. Beyond 30 days, any controverted evidence must be newly discovered and presented to the Workers’ Compensation Appeals Board.
- Temporary disability benefits are allowed if certified by a physician, but only after exhaustion of any paid sick leave benefits specifically available in response to COVID-19. Subsequent disability certifications must be received every 15 days thereafter, up to a maximum benefit of 45 days.
- All regular Workers’ Compensation benefits including permanent disability and death benefits will be compensable, excepting only death benefits payable to the State of California where no surviving beneficiary exists.
- The Order grants Insurance Carriers the continued authority to adjust the costs of their policies.

As a result of this Order, any Design Professional with employees working outside the home at their employers’ direction at any point from March 19, 2020 – July 4, 2020 will be impacted. Any instance of illness from COVID-19 from these employees will create a rebuttable presumption whereby the employee will be covered by the firm’s Workers’ Compensation Insurance. Prior to this Order, Workers’ Compensation Insurance provided coverage for affected employees to the extent their illness was contracted in the course of their employment. Under traditional circumstances, workplace injuries and illnesses are given a two-factor authentication:

1. Injury or Illness must happen at work.
2. Injury or Illness must arise out of job-related duties in the course of employment.
The new rebuttable presumption removes the traditional authentication process and shifts the responsibility to the employer to prove the illness was not contracted during employment and shortens the denial period of the claim from 90 to 30 days. As a result, both employers and insurers have reduced ability to address the legitimacy of the claim.

Under a previous bulletin, the California Workers’ Compensation Insurance Rating Bureau (WCIRB) outlined the elimination of COVID-19 claims from an employer’s Experience Modification Rating (EMR). While the approval of this special regulatory filing is still pending, the result may be the EMR is unaffected; however, the claims impact of COVID-19 with or without this Order will have a direct impact on the Workers’ Compensation Insurance marketplace. Existing data provided by the WCIRB shows a heavy concentration of claims already anticipated from frontline Healthcare workers, but this order will broaden the impact by expanding claims to all insurers and employers. Impacts can include premium increases, newly required underwriting protocols for employers, and possible coverage scarcity. We also anticipate an increased potential for subrogation and action-over claims to/from other project and/or jobsite participants, and increased Employer’s Liability claims outside of the ‘sole remedy’ and immunity provision of the Workers’ Compensation statutes. The ultimate risk to all parties is the suspension of business operations due to the inability to prevent and mitigate COVID-19 claims.

There are several ailing questions the Order does not answer, including how the system will address fraudulent claims, employee notification requirements, and clarification on what constitutes controvertible evidence. Further, there are pending California legislative bills AB 664 and SB 1159, which are narrower in scope, but provide additional presumptions and protections specifically to ‘frontline’ and ‘critical care’ workers. The impacts of both these bills are now in question. There is hope this Executive Order extending presumption coverage to employees will be followed by stronger liability immunity protections to employers as economies re-open. Special considerations will need to be placed to construction sites where multiple employers work together in confined spaces to reduce the potential of protracted litigation amongst all parties.

However, none of these uncertainties or forward thinking assessments should reduce an employer’s obligation to consider every Workers’ Compensation claim as legitimate and report and continue to disclose all necessary information to employees regarding their rights under Workers’ Compensation Insurance coverage. While our agency will continue to monitor developments, we are providing the following risk management guidance as a result of these orders, including general Work From Home tips for employers.

**RISK MANAGEMENT GUIDANCE:**
- ‘Place of employment’ as stated in the Executive Order should be assumed to include jobsite, client office, work conference and any associated travel thereto for applicable staff.
- Perform services remotely to the extent possible (e.g. Drone Flights and Video Calls), but do not forget to document the work accordingly.
- Suggest reviewing your contract obligations with counsel but consider deferring field work for non-essential projects until after any stay-at-home order is over. For essential work and/or field work on re-opened projects where attendance is necessary, understand the illness is now compensable, and appropriate safety precautions and training are a must.
- Follow guidelines from County, State, and Federal Health officials and jobsite-specific safety and social distancing plans. Does the Contractor have a plan? Empower your employee(s) to leave the jobsite if protocols are not being followed.
- Provide all necessary Personal Protective Equipment (PPE) and cleaning supplies for staff heading into the field. Create a travel plan that provides for separate transportation to the jobsite.
- The Executive Order will likely extend beyond existing stay-at-home orders. As such, all employers should consider staff attendance in offices as non-mandatory until at least July 5, 2020. Failure to do so would likely qualify infected office employees for compensable illness.
- For employees who are not required to be outside their homes, document their option to defer any work outside the home, and confirm they are abiding by all health and safety guidelines for any work outside the home.
- Evaluate the firm’s reopening plan and necessary measures for office staff including additional office cleaning services, cleaning supply and PPE availability, alternating attendance, reorganizing spaces, employee disclosures, and adequate signage.
Due to the stricter claims handling time frames specific to COVID-19, handle all reported illnesses promptly, including reporting potential claims and providing all requested information to your Workers’ Compensation Insurer.

Assess the firm’s ability to provide the reporting notice to all employees of their rights to report a Workers’ Compensation claim by July 4, 2020. The current extent of any regulatory notice to staff is unknown, but it should be expected all employees will need to be notified of their rights by either the Insurer, or the Employer as a result of this Executive Order.

WORK FROM HOME TIPS:

- As part of the WCIRB special regulatory filing, employers are allowed to begin tracking all payroll for:
  - Staff being paid but not working during the current shelter-in-place orders and for up to 30 days after, or until their regular duties resume. These payrolls can be excluded from underwriting.
  - Allowance for temporary reassignment of job duties to Clerical (Class Code: 8810) during all shelter-in-place orders and for up to 60 days thereafter, or until their regular duties resume. Exception applies for payroll otherwise assignable to a standard classification which includes Clerical Office. It is currently unknown if Architect and Engineering 8601 would fall under this exception, but our advice is to track this information to be available at a later date as necessary
  - Provide all Work-from-Home staff access to ergonomic resources to assess their individual at-home workstations.
  - Reiterate guidelines for breaks and lunches for all non-exempt employees.
  - Encourage personal communication and regular exercise to promote positive mental health.
  - Consider expense reimbursement for individually incurred expenses as required under the California Labor Code.


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