

Workers' Compensation

COVID-19 Prompts Rate Hike Recommendation

THE COVID-19 pandemic seems to have reversed years of falling workers' compensation rates in California, as the Workers' Compensation Insurance Rating Bureau has recommended that average benchmark rates be increased by 2.6% for 2021.

The recommendation was forwarded to the California Department of Insurance, which will schedule a hearing on the recommendation in the fall.

It should be noted that the 2.6% increase recommendation would be an average across all class codes, as the Rating Bureau plans to allocate the expected COVID-19 costs by weight across the state's overall industrial sector. Note that even low exposure classes will be surcharged.

The Bureau in its recommendation aims to apply the surcharge on a weighted basis according to each class code's share of growing COVID-19 claims costs. It is considering a tiered surcharge model based on an employer's risk as follows (for examples, see list at top right):

High risk – A 12-cent surcharge per \$100 of payroll.

Medium risk – A 6-cent surcharge per \$100 of payroll.

Low risk – A 4-cent surcharge per \$100 of payroll.

INDUSTRIAL RISK CATEGORIES FOR COVID-19

High risk

- Health care and social assistance
- Agriculture, forestry, fishing and hunting

Medium risk

- Accommodation and food services
- Transportation and warehousing
- Retail trade
- Public administration
- Utilities
- Other services (except public admin)
- Educational services
- Manufacturing

- Construction

- Wholesale trade
- Mining, quarrying, and oil and gas extraction

Low risk

- Real estate, rental and leasing
- Arts, entertainment and recreation
- Finance
- Professional, scientific and technical services
- Information
- Management of companies and enterprises.



The X-factor

The Bureau's actuarial committee noted that the pandemic does present challenges for predicting workers' compensation costs. "The 2021 policy year will still be impacted by COVID-19, but some trends may stabilize. The challenge will be projecting exposure and claims frequency (for COVID-19 claims)," the committee wrote in a report.

Actually, the overall effect of COVID-19 on rates going into 2021 was 4%, according to the Rating Bureau. Had it not included the COVID-19 surcharge, it would be asking for a 1.3% decrease in benchmark rates.

The reason is that claims costs and claims frequency have been falling and long-term claims are costing less than originally anticipated.

The Bureau also forecast that the recession caused by the pandemic will also have a profound effect on overall claims: it projects an overall 6.3% decrease in claims frequency due to slowing economic conditions.

Interestingly, COVID-19 claims are not supposed to count against employers' experience rating and loss histories, according to new rules that took effect in May. However, the claims are having an overall effect in terms of workers' comp benefit payments.

The Bureau also has to price in the uncertainty over the future of COVID-19. Will it get worse, or will it begin to wane? Will there be a vaccine and new and improved treatment regimens that reduce mortality or decrease symptoms and hospitalizations?

It is concerned that some industries in the low risk category may be getting a surcharge that is still out of proportion to their actual risk, particularly people who are working remotely. It plans to further study the issue and will likely amend the filing in September depending on the results. ❖

Courts Rule Business Interruption Claims Invalid

A SECOND COURT has ruled that an insurer does not have to pay business interruption claims by companies that saw their sales run dry due to the COVID-19 pandemic, which could make it difficult for businesses to successfully collect on such claims.

In the more recent case, a Superior Court judge in the District of Columbia in August ruled that an insurer was not obligated to pay business interruption claims of the owners of several restaurants after the mayor ordered all restaurants to close in response to the coronavirus.

The judge ruled for the business interruption claims to be valid, there must have been physical loss or damage – and that the plaintiffs failed to prove they had suffered any such losses.

The ruling comes on the heels of a Michigan state court decision in July that sided with Michigan Insurance Company in a case brought by the owner of two restaurants whose \$650,000 business interruption claim the insurer had denied.

These two cases are closely following the wording of typical business property policies, which also include business interruption coverage caused by physical damage.

The District of Columbia case

There were several plaintiffs in the D.C. case. The lead plaintiff was Rose 1 LLC, which is owned by chef Aaron Silverman and operates a number of upscale restaurants, including Rose’s Luxury, Elaine’s One, Pineapple and Pearls, and Little Pearl. Other plaintiffs included Buttercream Bakeshop, Karma Modern Indian, El Cucho, Bar Charley, La Vie and Beuchert’s Saloon.

Mayor Muriel Bowser had issued orders on banning indoor dining, for residents to shelter at home and for all non-essential businesses to close.

The restaurants filed claims on their commercial property policy with Erie Insurance Company, which included coverage for loss of

income and/or rental income from a partial or total interruption of business that results directly from loss or damage to the insured property.

After their claim was rejected by the insurer, the owners argued in court that the loss of use of their restaurants was a direct physical loss because the closures were the direct result of the mayor’s orders.

The plaintiffs argued that the losses were physical because the coronavirus is “material” and “tangible.” But, the judge pointed out that the plaintiffs had failed to show that the virus was present in their properties, and that the mayor’s orders did not materially or tangibly affect the restaurants.

Business interruption cover

Business law attorneys say business owners around the country have filed hundreds of COVID-19-related business interruption lawsuits after seeing their claims rejected. The issue mainly comes down to policy wording.

Most business property policies also cover business interruption claims, but policies usually specify that there must be physical damage to property. The policies are typically tapped to losses resulting from damage to a business caused by a natural catastrophe. Additionally, most business interruption portions of policies explicitly exclude a pandemic.

Most policies require there to be some type of direct physical loss or damage to either your premises or some part of your supply chain in order to trigger business interruption coverage. Without that trigger, insurers would likely argue that a virus in your facility is not physical loss or damage.

But these are early days on the litigation front. As more cases are decided and appealed, we should have a clearer picture of COVID-19 business interruption coverage. ❖



CDC: Avoid Confrontation with Angry Customers

AS MANY states and municipalities have issued mandatory mask orders for businesses that are open to the public, operators like retailers and restaurants have been thrust into the front lines of reducing the spread of the virus by requiring customers to wear masks when on their premises.

This has led to confrontations that sometimes result in violence – and even in the deaths of some workers.

Due to the volatility of some of these confrontations, the Centers for Disease Control and Prevention has issued a guide for limiting workplace violence associated with COVID-19. The guidance recommends:

- Offering customers options to minimize their contact with others and promote social distancing. These can include curbside pick-up; personal shoppers; home delivery for groceries, food and other services; and alternative shopping hours.
- Posting signs that let customers know about policies for wearing masks, social distancing, and the maximum number of people allowed in a business facility.
- Advertising COVID-19-related policies on your website.
- Providing employee training on threat recognition, conflict resolution, non-violent response, and on any other relevant topics related to workplace violence response.
- Putting in place steps to assess and respond to workplace violence. Response will depend on the severity of the violence and on the size and structure of the business. Possible responses may include reporting to a manager or supervisor on-duty, calling security or calling 911.
- Remaining aware of and supporting employees and customers if a threatening or violent situation occurs.
- Assigning two workers to work as a team to encourage COVID-19 prevention policies to be followed, if staffing permits.
- Installing security systems (e.g., panic buttons, cameras, alarms) and training employees on how to use them.
- Identifying a safe area for employees to go to if they feel they are in danger (e.g., a room that locks from the inside, has a second exit route, and has a phone or silent alarm).

Training on warning signs and response

Employee training on workplace violence typically covers definitions and types of violence, risk factors and warning signs for violence, prevention strategies, and ways to respond to threatening, potentially violent, or violent situations.

Warning signs – As part of training, employees often learn verbal and non-verbal cues that may be warning signs of possible violence. Verbal cues can include speaking loudly or swearing.

Non-verbal cues can include clenched fists, heavy breathing, a fixed stare and pacing. The more cues shown, the greater the risk of violence.

Response – During training, employees also learn how to appropriately respond to potentially violent or violent situations.

Responses range from paying attention to a person and maintaining non-threatening eye contact, to using supportive body language and avoiding threatening gestures, such as finger-pointing or crossed arms.

Consider implementing a “tap-out” system that allows an employee to make a signal for a supervisor or other employee to step in and the at-risk staff member to walk away. ❖

EMPLOYEE RESPONSIBILITIES

- Attend all employer-provided training on how to recognize, avoid and respond to potentially violent situations.
- Report perceived threats or acts of violence to your manager or supervisor, following any existing policies that may be in place.
- Remain aware of and support co-workers and customers if a threatening or violent situation occurs.
- Do not argue with a customer if they make threats or become violent. If needed, go to a safe area, (ideally, a room that locks from the inside, has a second exit route, and has a phone or silent alarm).
- Do not attempt to force anyone who appears upset or violent to follow COVID-19 prevention policies or other policies or practices related to COVID-19 (such as limits on the number of household or food products that can be bought).





Employment Laws

Raft of Bills Would Add New Coronavirus Rules

THE CALIFORNIA Legislature is working on a number of new measures to protect workers in the state during the COVID-19 pandemic.

The measures take aim at holes in the system that may leave employees who contract the coronavirus on the job without workers' compensation benefits, footing higher utility bills because of working at home and needing sick leave time available to them should they contract the disease.

Gov. Gavin Newsom said he would work closely with legislators to help the measures become law.

Below we look at the bills that have gained the most traction.

Workers' compensation

There are two bills (one in the Assembly and the other in the State Senate) that would make it easier for employees to receive workers' compensation benefits if they contract COVID-19.

Assemblywoman Lorena Gonzalez (D-San Diego) has introduced AB 196, which would create a presumption that essential workers who contract COVID-19 were infected while on the job and that the employer would not be able to contest the claim.

Meanwhile, Sen. Jerry Hill (D-San Mateo) has introduced SB 1159, which would require workers' compensation coverage for COVID-19-related illness or death for employees who contract the virus. The infected employee would not have to prove they had contracted the coronavirus on the job, and the bill would require the employer, if contesting the claim, to prove that it hadn't been.

The bill essentially codifies an executive order Newsom issued in May, but it does not cover new claims made on or after July 5.

Both bills are works in progress and may eventually be merged into one. Hill is talking to labor and business groups about his measure, and which industries would be covered.

Job-protected leave

Assemblyman Ash Kalra (D-San Jose) has introduced AB 3216, which would prohibit employers from refusing a request for up to 12 weeks of job-protected leave so that a worker can care for a child whose school has been forced to close due to a health emergency declared by a local, state or federal authority.

Easing meal and rest break rules

AB 1492 would allow employees more flexibility in when they can take meal and rest breaks when working from home. The measure by Assemblywoman Tasha Boerner Horvath (D-Encinitas) would also require employers to pay staff who skip those breaks for an extra hour of work.

Employers would also be required to pay for additional equipment and a portion of the workers' internet and utility bills when working from home.

This is because it has been reported that many people who have been forced to work from home are seeing higher usage bills.

Reporting workplace outbreaks

AB 685, authored by Eloise Reyes (D-Colton), would require employers to notify their employees, the Division of Occupational Safety and Health, and the State Department of Public Health of any employee exposure to COVID-19.

The notification must be made within 24 hours of when "the employer knew of or should have reasonably have known of the workplace outbreak."

If the employer fails to notify or notify within 24 hours, they can be subjected to a misdemeanor infraction carrying a \$10,000 fine. ❖