

## COVID-19 and Workers' Compensation

# New Tracking Rules Challenge Employers

**S**B 1159, signed into law in September, requires that when a California employer learns that an employee has tested positive for coronavirus, it must report that positive case to its workers' compensation carrier within three business days.

There is a lot of ground to cover in these reports and the legislation was passed without much fanfare, so many employers may not even know about their obligations. And that could cost them: the fine for non-compliance is \$10,000 per incident.

The report must include a number of details that legal experts say will create a significant reporting burden for employers.

### WHAT MUST BE REPORTED

- The date the worker tested positive,
- The address of the worker's place(s) of employment during the 14 days preceding the positive test, and
- The highest number of employees who reported to work in the 45 days preceding the last day the employee worked in the workplace.

The task will be made even more difficult if an employee works at multiple worksites, and an employer could have to spend a significant amount of time doing all that detective work.

Employers will have to go through the same process for each COVID-19 case among its staff.

The law creates a presumption that workers who come down with COVID-19 between July 6 this year and Jan. 1, 2023, contracted the virus at work, which makes them eligible for workers' compensation benefits.

The presumption applies to all workers: (1) who test positive during an outbreak at work; and (2) whose employer has five or more employees.

### WHEN IT APPLIES

All of the following conditions must exist for the COVID-19 presumption to apply:

- The employee tests positive within 14 days of working at a worksite;
- The date of illness shall be the last date the employee worked at the workplace prior to the positive test.
- The positive test occurred during an outbreak at the workplace.

### What is an 'outbreak'?

An "outbreak" exists if, during a 14-day period, one of the following occurs at a worksite:

- If the employer has 100 employees or fewer at a specific place of employment, four employees test positive for COVID-19;
- If the employer has more than 100 employees at a specific place of employment, 4% of the number of employees who reported to the specific place of employment test positive for COVID-19; or
- A specific place of employment is ordered to close by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent due to a risk of infection with COVID-19.

### The takeaway

The most important thing is that you are prepared for the paperwork and detective work you'll have to engage in in case one of your workers contracts the coronavirus. You may want to put systems in place now so that gathering the information will be easier in case of a COVID-19 infection at your workplace. ❖

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# What Companies are Doing for Holiday Parties

**O**NE OF the hallmarks of the holiday season is the company Christmas party, but with the COVID-19 pandemic in hyperdrive, many companies are rethinking their plans.

A number of businesses have cancelled their parties altogether, but other managers feel that in light of this very difficult year for many people, a company Christmas party might be just what employees need to lift their spirits for a while.

On the other hand, with the Centers for Disease Control even recommending that people not get together for family celebrations like Thanksgiving and Christmas, an office party would completely go against those recommendations.

Also, you could face liability and potential legal action if you do hold an in-person party and members of your staff come down with COVID-19.

Instead of in-person events, many companies are planning Zoom teleconference “parties” and they are asking their workers to join in by getting dressed up and bringing their favorite beverages and snacks to the online do.

According to Challenger, Gray & Christmas, Inc., 55% of human resources professionals surveyed said their company is not having a holiday celebration this year, which is the highest number since the consulting firm started surveying employers about their holiday plans.

Here’s what the survey found:

- 45% of HR professionals said their company had cancelled holiday party plans due to the pandemic.
- 5.3% said cost-cutting was the reason for cancelling their party.
- 4% said they never host holiday parties.
- 23% said they were unsure of holiday plans and were awaiting state and local guidance before deciding.

“It is no surprise that many companies are forgoing the holiday party this year,” said Andrew Challenger, senior vice president of Challenger, Gray & Christmas. “It’s difficult to celebrate and implement all the

precautions needed to keep everyone safe. The last thing any employer wants is an outbreak due to their year-end party.” ❖

## PRECAUTIONS FOR AN IN-PERSON EVENT

Companies that said they would hold in-person events plan to take a number of precautions to reduce the risk, including:

- Requiring social distancing while at the party.
- Requiring all attendees to wear masks.
- Providing hand sanitizers, alcohol wipes and face masks.
- Taking temperatures of all workers when they arrive.
- Limiting the number of employees at the party.
- Holding the event in a large area where employees can socially distance from one another (venues should be well-ventilated with several doors and windows).
- Keeping hand sanitizer in various locations around the office.
- Hosting an outdoor event.
- Regularly checking the CDC’s website to be up to date on precautions and advice.
- Keeping up on state and local guidelines to get more accurate information on current case levels in their area.

## OTHER PARTY OPTIONS

Some companies have come up with other ways to celebrate and reward their employees during the holidays, including:

- Organizing virtual gift exchanges or virtual Secret Santa exchanges.
- Giving away cooking classes or gifts like Apple AirPods or other small electronics (the cost per person will often be less than if you held an actual party and paid for the facility, catering, decorations, entertainment and drinks).
- Assembling care packages with baked goods or gift certificates and delivering them to employees’ doorsteps.





## Emergency Regulations

# COVID-19 Workplace Safety Rules Take Effect

**T**HE CAL/OSHA Standards Board has approved new emergency regulations that will impose strict rules on employers to implement safeguards in order to reduce the risk of COVID-19 spreading in the workplace.

The sweeping regulations extend the reach of protections to employer-provided housing and transportation, as well as imposing new reporting requirements on employers who have workers that contract the coronavirus.

The new rules took effect Nov. 30, so employers need to ramp up immediately to comply with them.

## HIGHLIGHTS OF THE NEW REGULATIONS

- Physical distancing and mask-wearing are required unless it is not possible to wear masks on the job. If physical distancing is not possible, the employer would have to explain why.
- Employers must provide face coverings and ensure they are worn by employees over the nose and mouth.
- At fixed work locations where it is not possible to maintain physical distancing, the employer shall install cleanable partitions that effectively reduce aerosol transmission between employees.
- Employers must implement cleaning and disinfecting procedures for frequently touched surfaces and objects, such as doorknobs, elevator buttons, equipment, tools, handrails, handles, controls, bathroom surfaces and steering wheels.
- Employers will be required to have a written COVID-19 prevention program. Cal/OSHA will allow the program to be incorporated into an existing injury and illness prevention plan or be stand-alone.
- Employers must identify and evaluate COVID-19 hazards with participation from employees, and then correct those hazards.
- Employers must investigate cases among their employees. If they discover one of their staff has contracted COVID-19, they must notify all employees at a worksite who might have been exposed, within one day. Workers who may have been exposed must be offered COVID-19 testing at no cost.
- Employers must report coronavirus cases in their workplaces to local health authorities.
- Employers must maintain medical records related to COVID-19 and provide those records to the local health department, the California Department of Public Health, Cal/OSHA, and the National Institute for Occupational Safety and Health (upon request).
- Employers must implement a system of record-keeping to track all COVID-19 cases in the workplace.
- Employees with COVID-19 symptoms may not return to work until at least 10 days since symptoms first appeared, and not until after 24 hours have passed since the employee had a fever of 100.4 or higher and after all symptoms have passed.

There are even rules for disinfecting and cleaning employee housing and transportation if the company provides them.

The regs also include provisions that are beyond the scope of workplace safety regulations, such as requiring employers to maintain employees' earnings, seniority and benefits when they are off work because of COVID-19.

### Key takeaways

The new rules took effect Nov. 30, so you will need to immediately prepare. You should:

- Prepare for new record-keeping requirements,
- Write COVID-19 prevention program guidelines,
- Implement testing protocols according to the regulations, and
- Prepare policies and procedures for notifying affected staff and others of possible COVID-19 exposure. ❖

**GET THE FULL REGULATIONS HERE**

# Telecommuting and the Wage and Hour Dilemma



**W**ITH THE coronavirus pandemic forcing so many people to work remotely, and with mobile technology allowing them to work from anywhere, your employees may be working when they are off the clock.

They may feel pressured to do so or maybe they just want to get their work done, but if they are working past normal hours, it could spell trouble for your organization.

The proliferation of smartphones had already led to a rising number of lawsuits by employees claiming they were required to work uncompensated on evenings and weekends when not on the clock. Now, labor lawyers are expecting a second surge in these lawsuits as more people work from home during the pandemic.

## The class-action danger

Often it may just be as simple as an employee receiving a text message from the boss asking for something; they take a few minutes and send them what they need.

The problem for employers is that when one employee complains to the Labor Department that they are not being compensated for time working when away from work, the agency's investigators won't stop with the complaining employee. They also look at how many others are "similarly situated."

A single employee's complaint can turn in to a class action when all the other similarly situated employees are included.

Just a few minutes a day over months or years can add up if employees regularly use their phones for uncompensated work.

In the last several years, the courts have seen a flood of lawsuits in which groups of employees claim the time they spend reading and responding to e-mail should be considered work time, and therefore paid.

The danger is that when a boss sends a worker a message off-hours and asks them to read something or send an e-mail, the employee will

usually feel compelled to do as they're told, even if they don't want to.

When employees sue to claim they should be compensated for after-hours remote work, the employer typically uses the *de minimis* defense, but that's a dead end. Here's why.

*De minimis* means very little, perhaps just a minute or two. The employer maintains that the time spent is *de minimis*, but it isn't. Just five minutes a day adds up to almost a half hour a week. There are precedent-setting court decisions that have said that even 30 minutes extra a week is not *de minimis*.

Also, besides federal law, you have state laws to contend with.

Additionally, you may not even know that some employees are checking work e-mail at home whether they're told to or not.

Just because the employer doesn't require employees to stay tied to their phones, doesn't eliminate legal risk. The law defines work time as the time an employee is "suffered or permitted" to work.

So, an employer doesn't have to require employees to answer e-mail and perform other tasks off the clock to run into trouble. Merely permitting that work without counting it as compensable time, puts the employer at risk.

## What should you do?

The extension of work time made possible by technology and the pandemic's push towards more telecommuting, poses a new danger for employers.

To ensure you don't find yourself the target of a wage and hour lawsuit, you need to put in place a solid policy about non-exempt employees working from home.

You should then communicate it to your staff in a tele-conference, as well as include the policy in your employee handbook.

Once the policy has been communicated, you have to monitor and survey staff to make sure they are not breaching the rules. ❖