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The Workers' Compensation Newsletter

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NOTICE AND REPORTING REQUIREMENTS FOR EMPLOYERS UNDER AB 685

By Nathan Yannone, LFLM Concord

After 12 months of executive orders and emergency regulations aimed at tackling the challenges created by COVID-19 in the workplace, it is clear the California Legislature has prioritized safety and reporting in order to help curb the pandemic. Specifically, the Legislature passed a suite of laws enforcing newer and more strict reporting standards regarding COVID-19 for employers statewide. Assembly Bill (AB) 685 took effect January 1, 2021 and imposes **new notice and reporting requirements** on employers when an employee tests positive for COVID-19. Additionally, Cal/OSHA has expanded enforcement authority to issue serious violation citations as well as shutdown workplaces that are an imminent hazard related to COVID-19.

Under **the new statute** (codified as Labor Code §§6325, 6432, and 6409.6) when an employer receives notice of potential exposure to COVID-19, the employer must: (1) provide notice to employees and others at work (new LC 6409.6), and (2) report the positive test to local health authorities. It is important to remember that AB 685's requirements apply regardless of whether COVID-19 is contracted in the workplace. However, AB 685 does not apply to employees who "as part of their duties" conduct COVID-19 testing, screening or provide direct patient care or treatment to individuals who are known to have tested positive for COVID-19. The new laws' requirements are strict, and the penalties for failing to follow them can be stiff, and we recommend reviewing not only our guide below, but the full text of the bill to ensure compliance.

When Is An Employer Required To Issue A Notice?

Under AB 685, when the employer "receives notice of potential exposure to COVID-19, "the employer must provide 'prescribed notice' to all employees as well as the employers of subcontracted employees." Section 6409.6 covers both notice of exposure, as well as the notice that must be sent to employees. Notice to the employer of potential exposure can come from: (1) a public health official or a licensed medical provider that an employee was exposed to a "qualifying individual" at the worksite; (2) an employee or their emergency contact that the employee is a "qualifying individual"; (3) "Through the testing protocol of the employer that the employee is qualify-

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COVID-19 CASE FINDS TRACTION IN FEDERAL COURT

By Trina Dresden, LFLM San Francisco & Robert Cutbirth, Freeman Mathis & Gary LLP

California employers are subject to important safety standards intended to help avoid employee exposures to COVID-19. Cases of actual or alleged exposure may implicate employers' workers' compensation coverage, with one Court now reaffirming that an employer's knowing or intentional violation of those standards can trigger serious civil exposure as well.

On January 6, 2021, the San Diego Federal District Court issued an opinion in *Arnold v. Corecivic of Tennessee LLC* (Case No.: 20-CV-00809 W; 2021 U.S. Dist. LEXIS 2868*; 2021 WL 63109) confirming that an employee can circumvent the workers' compensation exclusive remedy when he can plead facts showing that his employer knowingly failed to implement required safety protections in a manner placing employees at direct risk of exposure to the virus.

Summary of the Case

Plaintiff Arnold was a detention officer at Corecivic's Otay Mesa Detention Center, one of many correctional and detention facilities it operates throughout the country. By March 2020, the Mesa facility was faced with over 200 known cases.

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Mr. Arnold contends Corecivic failed to take protective measures to limit the spread of the disease (including a failure to provide masks, gloves, and sanitizers, and ensure social distancing), with Corecivic also preventing detention officers from wearing face coverings inside the housing units and while in close proximity with detainees. Mr. Arnold's civil Complaint contained causes of action for constructive wrongful termination (Mr. Arnold felt compelled to resign due to his health conditions) and violations of safety laws, negligent supervision, and intentional infliction of emotional distress.

The Exclusive Remedy Rule Did Not Apply to the Constructive Wrongful Termination Claims

The Exclusive Remedy Rule generally precludes employees from suing their employers in civil court, making the workers' compensation system the exclusive forum for job related injuries and illnesses. Exceptions to the rule generally involve showings that an employer fraudulently concealed risks of harm, or the employer knowingly or intentionally caused harm to an employee (or ratified such knowing or intentional misconduct by an employee), taking the matter outside of the normal risks engendered in the particular employer-employee relationship.

Plaintiff Arnold alleges that Corecivic acted in an intentionally wrongful manner by forcing him to work in a knowingly unsafe environment (prevented from wearing masks) and without adequate protective equipment (which California law requires an employer to provide to its employees). The Court agreed that these factual allegations took the claim outside the scope of the workers' compensation exclusive remedy. Moreover, the Court agreed that the working conditions reached levels supporting the claim for a constructive wrongful termination in violation of California's public policy of providing a safe working environment.

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COVID-19 CASE FINDS TRACTION IN FEDERAL COURT

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The Workers' Compensation System was the Proper Venue for the Negligent Supervision and Intentional Infliction of Emotional Distress Claims

The Court dismissed Plaintiff Arnold's negligent supervision and intentional infliction of emotional distress claims, finding them subsumed solely within the workers' compensation exclusive remedy rule. The court was not convinced that these types of injuries were beyond the employer/employee bargaining agreement, even if the underlying facts might give rise to obligations for extra compensation under Labor Code Section 4553.

The Takeaway

Arnold makes clear that if an employee can factually assert what appear to be knowing failures to provide safety equipment, or to direct employees to engage in unsafe actions leading to increased exposures, civil claims can be filed that cannot be summarily dismissed or made subject to "exclusive remedy" issues. Once in the civil realm, employers will then face not only claims for compensatory and special damages, but also claims for attorneys' fees and potentially even punitive damages. Arnold therefore becomes an important reminder for employers to help ensure their employees receive proper equipment, are properly trained in safety protocols and standards, and they receive all required notifications of safety issues as required by law or local health departments. ⌘

https://www.lflm.com/news-knowledge/mitigating-civil-liability-for-california-covid-19-work-exposures/

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ing individual"; (4) from a subcontracted employer that a "qualifying individual" was on the worksite of the employer.

A "qualifying individual" as defined in the statute can be someone who has: (1) a laboratory confirmed case of COVID-19; or (2) a positive COVID-19 diagnosis from a licensed health care provider; or (3) a COVID-19-related order to isolate provided by a public health official; or (4) died due to COVID-19. Any of these four types of individuals would constitute a qualifying individual pursuant to Labor Code section 6409.6(d)(4). Therefore, if an employee is exposed, or potentially exposed, to a qualifying individual, the employee must be notified.

Once the employer is required to issue a notice, the employer must send the written notice to the employee within **one business day** notifying them of a positive confirmed case of COVID-19.

Who Must Receive Notice?

There are three categories of people who must receive notice under AB 685: (1) employees, (2) the exclusive representative of the employees (union representatives), (3) employers of subcontracted employees.

Therefore, if an employer is a general contractor and hires a subcontractor, under AB 685, that employer must send the notice to the subcontractor's employer as well. Also, a worksite is defined as the "building, store, facility, agricultural field or other location where a worker worked during the infectious period." It does not apply to buildings, floors or other locations of the employer that a qualifying individual did not enter. This means that if an employer has multiple worksite locations, the

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employer should only notify employees who were at the same worksite location as the qualifying individual.

What Is Required In The Notice?

The employer must provide **written notice** to all affected employees per the above that they may have been exposed to COVID-19, and notice of the disinfection and safety plan that the employer plans to implement and complete per the guidelines of the federal Centers for Disease Control. Therefore, if the employer already has a disinfection and safety plan in place, employers can simply attach it to the notice. If they do not have a disinfection and safety plan in place, they should incorporate it into the notice as one document.
The employer must also provide all employees who may have been potentially exposed additional information regarding COVID-19 related benefits which the employee may be entitled under applicable federal, state, or local laws, including but not limited to, workers' compensation, and options for exposed employees, including COVID-19 related leave, company sick leave, state-mandated leave, supplemental sick leave, or negotiated leave provisions, as well as anti-retaliation and antidiscrimination protections of the employee.

How Should An Employer Notify Their Employees?

Under AB 685, the method of notice is to be done in a manner the employer normally uses to communicate employment related information. The notice needs to be done in English and in the language understood by the majority of the employees. Written notice, includes, but is not limited to, personal service, email, or text message if it can reasonably be anticipated to be received by the employee within one business day of sending.

Furthermore, §6409.6(k) requires the employer to keep a record of these written notices given to employees for three years. Keeping track of notices given to employees is likely going to prove critically important when communicating with Cal/OSHA under AB 685. Employers are therefore encouraged to have their AB 685 notices be either signed or acknowledged by employees in some form (perhaps in a return email acknowledging receipt) to avoid citations and penalties by Cal/OSHA.

When And What Is An Employer Required To Report To Local Health Agencies?

If an employer is notified that they have enough cases of COVID-19 to qualify as an "outbreak," the employer is required to notify within 48 hours the local public health agency in the jurisdiction of the worksite the names, number, occupation, and worksite of the employees who meet the definition

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of a qualifying individual. Although the California Legislature did not define "outbreak", Cal/OSHA will presumably use the definition of the Department of Public Health, which is three or more laboratory confirmed cases of COVID-19 within a two-week period among workers who live in different households. Note that this is a different standard for an outbreak than as defined in SB 1159 which passed in September 2020.

It is important to distinguish here, that when issuing notices as discussed above, employers should make every effort to not disclose the infected or potentially infected employee's personal information. However, when reporting to local public health agencies, employers are required to disclose the names of potentially infected employees. This is the only place aside from a claim form filed where personal information is required or even allowed. Presumably, disclosure of employee's information to local public health agencies is required for preventative measures such as contact tracing. Remember, reporting an outbreak to a local public health agency is not required for a "health facility" under Health and Safety Code Section 1250.

What Are The Reporting Requirements For COVID-19 To Cal/OSHA?

Generally, an employer is required to report any serious illness, serious injury, or death to Cal/OSHA. This usually includes most inpatient hospitalizations. However, the illness must be work related and meet specific recording criteria. So what about COVID-19?

Employers must report cases of COVID-19 to Cal/OSHA only if: (1) there is at least one confirmed case of COVID-19; (2) It is work related (that there is a known exposure at work); and (3) it involves one or more of the general reporting criteria (meaning treatment beyond first aid, or days away from work). Bear in mind that the COVID-19 case does not have to be confirmed through laboratory testing before an employer is required to report to Cal/OSHA. The COVID-19 case must be reported if it meets the definition of "serious injury or illness" irrespective of when a possible exposure occurred. Reporting to Cal/OSHA is not an admission of work-relatedness.

Prior to AB 685, an employer's duty to report injuries to Cal/OSHA only arose when the employer knew of a work-related injury or the employee asked to file a claim form. However, under AB 685, in order to determine if a case needs to be reported, the employer must evaluate the employee's work duties and environment to determine the work relatedness. While this ambiguity will hopefully be clarified soon in the regulations, it is clear at this time that an employer is obligated to do their own investigation to determine whether the exposure is work related. In this regard, the employer should err on the side of caution and report all COVID-19 "cases" and related exposure that occur in the work place.

Takeaway

At this juncture, the full extent of Cal/OSHA's enforcement of AB 685's notice and reporting requirements remains to be seen. However, considering the Legislature has prioritized tracking and tracing workplace exposure to COVID-19, Cal/OSHA is expected to strictly enforce AB 685's notice and reporting requirements. Given that employee notices in particular must be circulated within one business day, it is imperative that employers have an effective and swift notice process in place. Employers are encouraged to consult with experienced employment counsel to ensure they are fully compliant with AB 685 in order to avoid substantial Cal/OSHA fines and workplace shut downs. ⌘

LFLM'S COMMITMENT TO DIVERSITY
Now certified as a majority owned Women/Minority Business Enterprise

By Erin Walker, Partner, LFLM Oakland

Laughlin, Falbo, Levy and Moresi is proud to announce we have been granted Women and Minority Business Enterprise (WMBE) certification by the Supplier Clearinghouse for the California Public Utilities Commission (CPUC.) The Supplier Clearinghouse is a commission-supervised entity that certifies firms meeting an established criteria of at least 51% women and minority ownership. The WMBE certification includes a meticulous vetting process emphasizing the responsibility of utilities to work with firms that go beyond just talking about diversity – WMBE certification requires actual results.

Our firm has long been recognized as a leader in the California legal industry based on our percentage of women and minority partners. We continue our commitment to diversity, and to the communities in which we live and work, as evidenced by the WMBE certification.

This esteemed certification is a welcome addition to our pledge to promote diversity and inclusion within our partnership and throughout our firm. Over the past 10 years, our Diversity Committee has provided sponsorships and support for various law school diversity events including the Santa Clara School of Law Diversity Gala & Inclusion Summit, the Jeffrey Poilé Memorial Scholarship at University of the Pacific McGeorge School of Law, the UC Hastings Black Law Students Graduation and more. We are a regular participant in Diversity Career Fairs to recruit diverse law clerks as well as providing over a dozen diversity book-scholarships at law schools across California. We also encourage attorney participation in diversity Bar Association events statewide including: the Minority Bar Coalition in Northern California, Orange County Hispanic Bar Association, Lesbian and Gay Lawyers Association of Los Angeles and African American Workers' Compensation Professionals.

LFLM remains committed to enhancing diversity, equity, and inclusion. We will continue to expand our efforts toward retention and recruitment of diverse attorneys, and improve our cultural competency with respect to the values embodied by our diverse group of attorneys. Please visit our website for more information about our firm: or contact our Director of Marketing, Caryn Rinaldini – Email: crinaldini@lflm.com

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