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Governor Issues Executive Order N-62-20 Addressing Worker's Compensation Claims Related to COVID-19

May 2020

Executive Order N-62-20 and What It Means

Recently, Governor Gavin Newsom issued Executive Order N-62-20 addressing worker's compensation claims related to COVID I9.The mandate provides "Any COVID -I9 related illness of an employee shall be presumed to arise out of and in the course of the employment for purposes of awarding worker's compensation benefits if all of the following requirements are satisfied." These are:

a. The employee tested positive for or was diagnosed with COVID-I9 within I4 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction.

b. The labor or services were performed after March I9, 2020.

c. The place of employment was not the employee's home or residence.

d. Where subparagraph a is satisfied through a diagnosis of COVID-I9, the diagnosis was done by licensed physician and that the diagnosis is confirmed by further testing within 30 days of the date of diagnosis.

As stated, the ORDER creates a rebuttable presumption that exposure to the virus occurred in the employment setting. It is important to note this ORDER appears to be limited to exposures in circumstances where the employee was required to work at the job site. Such introduces financial considerations, weighing the survivability of the business as compared with the risk of increased premiums or the possibility of third party liability claims.

The presumption that a work site exposure is a cause of disease is not well supported by science. Such relationship may be substantiated if it was known the virus existed in the workplace, as evidenced by others in that environment testing positive or having been diagnosed. However, since the presence of the virus is ubiquitous, exposure could have occurred from any social interaction. Accordingly, to overcome the presumption the employer would have to essentially track/trace the employee's daily activities to determine if contact occurred other than at work. As an aside, one must ask why testing positive permits recovery. That a person tests positive means an exposure occurred, but it does not necessarily translate into illness warranting medical intervention. Obviously, such a finding would require the person self-isolate and would require the employer to undertake further safety measures to limit the spread of disease in the workplace.

Under normal conditions, contracting a viral illness at work would not necessarily be compensable. Accordingly, the ORDER tacitly accords recognition that workplace exposure resulting in COVID I9 is compensable under the Worker's compensation system and in so advancing this policy, the burden of proof is shifted to the employer.

While work related injuries are a bar to civil suits by the employee there are exceptions to worker's compensation exclusivity, but the one that stands out as having some applicability here is the fraudulent concealment exception. This exception applies when (I) the employer concealed the existence of the injury; (2) the employer concealed the connection between the injury and employment; and (3) the injury was aggravated following the employer's concealment. (Lab. Code, § 3602, subd. (b); *Jensen v. Amgen* (2003) I05 Cal.App.4th I322, I325; see also, *Palestini v. General Dynamics Corp.* (2002) 99 Cal.App.4th 80.) Since the ORDER presumes a connection between the injury and the employment, the ORDER may make it easier to pursue the exception and bring a civil suit. The takeaway is that the executive ORDER provides another reason why it is absolutely imperative that employers not only take measures to prevent the spread of Covid-I9 in the workplace, but to also disclose any outbreaks among employees. (Such disclosures should be made without the specific identity of the sick employee or employees for privacy reasons.)

A question exists as to whether this presumption will have application in the civil litigation setting. Hypothetically speaking, assume Ms. A is working at the direction of her employer. Ms. A, who lives at home with her family, including her elderly mother subsequently tests positive for the virus or is diagnosed as having the disease. Until the date exposure is confirmed or disease manifests, Ms. A is interacting with her family. Assume, Ms. A's mother and partner develop the disease resulting in hospitalization. Can either of these individuals sue the employer, arguing the presumed workplace exposure was the vector communicating the virus into the home?

Precedent exists, it best exemplified in asbestos litigation. In those matters, a family member who was exposed to asbestos brought into the home by a relative can maintain a suit against the relative's employer. (*Kesner v. Superior Court* (2016) I Cal 5th II32 – Employers have a duty to the members of an employees' households to prevent exposure to asbestos fibers which the employees carried home on their person or clothing.)

One speculates, the Governor has considered this exigency. One would think the presumption was created as a counterweight to any mandates to be issued not allowing civil suits against the employers burdened by this ORDER.

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