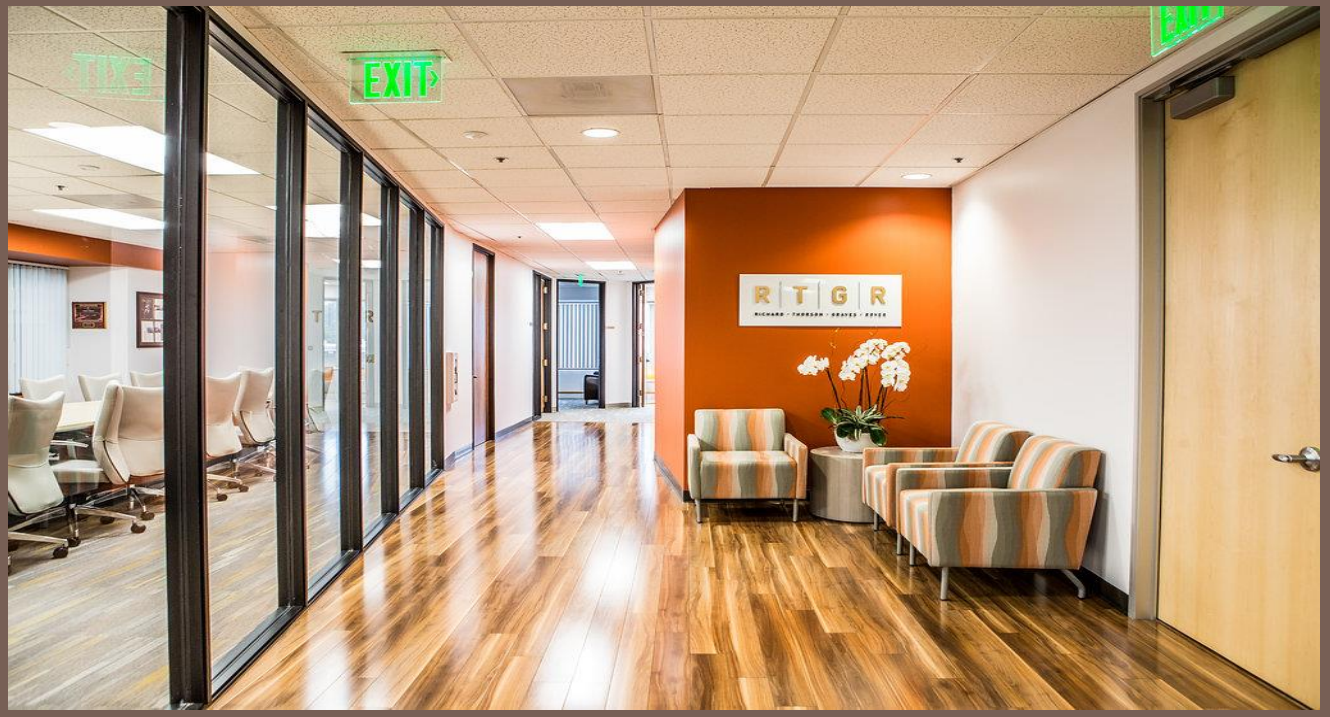

RECOGNIZING AND MANAGING COVID PRESUMPTION EXPOSURES INCUBATING IN YOUR CLAIMS"

Presented by: RTGR Law LLP

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Agenda

- The Order and its Effect
- Who is covered?
- Limited time to act
- Rebuttal Burden of Proof
- Which claims can be rebutted?
- Which claims to accept, delay or deny?
- Who pays for testing?
- Sick Leave Offset
- Indemnity & Death Benefits
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Executive Order N-62-20

- Executive Order N-62-20 was issued by the Governor on May 6, 2020. The Order creates a rebuttable presumption of COVID-19 injury under limited circumstances.
- The presumption expires on **July 5, 2020**.

What does the Order do?

- Normally, an *employee* has to prove that a claimed injury or illness is compensable by showing it arose out of employment and occurred in the course of employment, and was proximally caused by work.
- The Order relieves the employee of that burden by creating a rebuttable legal presumption that the illness caused by COVID-19 was contracted at work and is therefore the responsibility of the *employer*, if certain conditions are met.

Who is covered?

- The Executive Order applies to **any employee**, not just essential healthcare workers or first responders.
- Under the Order, COVID-19-related illnesses shall be presumed to arise out of and in the course of the employment for purposes of awarding workers' compensation benefits if **all** of the following requirements are satisfied…

Criteria

- **1. Work *Time* Proximity:** on or after **March 19, 2020,** the employee performed labor or services at the employer's direction;
- **2. Positive Test or Diagnosis:** the employee tested positive for or was diagnosed with COVID-19 by a California physician;
- **3. Diagnosis *Time* Proximity:** that diagnosis is made within 14 days after a workday;
- **4. Work *Place* Proximity:** that workday occurred at the place of employment, not the employee's home or residence.

Limited time to act

- **Only 30 days to Act:** If these conditions are met, the claims can only be denied within 30 days of the day "the claim form is filed under Labor Code section 5401," rather than 90 days allowed under Labor Code section 5402, unless rebutted by evidence only discovered subsequent to the 30-day period.
  - That would arguably include a negative test result that comes in after the 30 days.
- It makes sense for employers to act on any COVID-19 claim within 30 days if possible, even if the applicability of this presumption is in doubt. This avoids even the appearance of a late denial.

Must be Verified by Testing

- It is important to note that the Order requires a positive COVID-19 test result or COVID-19 diagnosis by a physician before the presumption applies.
- Further, if the diagnosis of COVID-19 was made without a contemporaneous positive test result to verify it, that diagnosis must be confirmed by subsequent testing within 30 days of the date of the diagnosis, presumably with an antibody test, or else the presumption does not apply.

Rebuttal Burden of Proof

- **Presumption Rebuttal:** Because the presumption is rebuttable and not conclusive, it can be rebutted and the claim denied if the employer can show:
  - the risks of workplace infection are not particular to or characteristic of the claimant's specific employment, and
  - there was a known or likely non-industrial cause, such as an infected family member or roommate.
- So long as current medical information continues to indicate that COVID-19 is a risk to the general population, not just to workers, some presumed compensable COVID-19 claims can still be denied and the presumption can be rebutted.

Are there Constitutional Issues?

- Labor Code Section 3212.1 creates a cancer presumption in our State for many Safety Members. In order for the Presumption to become operative, the worker must prove they were "exposed' to a known carcinogen.
- The Executive Order does not require any showing of exposure to Covid in the work place. The Order seems to encompass in the presumption the fact of exposure and causation, which is unlike other "exposure" laws currently in place.
- Is this constitutional?
- In addition, Article XIV, Section 4, provides as follows:
- "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party" (emphasis supplied)

High risk occupations

- Healthcare workers (e.g., doctors, nurses, dentists, paramedics, emergency medical technicians) directly caring for or otherwise exposed to known or suspected COVID-19 patients;
- Healthcare or laboratory personnel collecting or handling specimens from known or suspected COVID-19 patients;
- Medical transport workers (e.g., ambulance vehicle operators) moving known or suspected COVID-19 patients in enclosed vehicles.

Building a rebuttal

- If the facts suggest that because of the employee's particular job duties, the employee was at no more materially greater risk of contracting the disease from work than a member of the general public, the claim should be delayed because the presumption may be rebuttable in that case.
- For guidance as to the types of jobs that may pose a materially greater risk of contracting COVID-19, we should look to the categories of jobs classified as high risk or very high risk of contracting COVID-19 in OSHA's recently published "Guidance on Preparing Workplaces for COVID-19".

Which claims to accept or delay?

- In light of the Executive Order, if the presumption applies:
  - Claims should be **accepted** for employees in jobs classified as high risk or very high risk of contracting COVID-19.
  - Claims can be **delayed** and investigated in all other cases, because the risks of contracting COVID-19, just like contracting other community-wide communicable diseases, are risks of commonalty in general.

Should I Offer a Claim Form to Employees Who Become Infected?

- Generally, **yes**, if the employee appears to be covered by the presumption or is in high risk occupations, a DWC-1 claim form needs to be *offered*.
- Unless the workers suggests a work relationship, all other workers, so long as current medical information continues to indicate that COVID-19 is a risk to the general population, employers are **not** required to affirmatively offer workers who contract the disease with a DWC-1 claim form or pay workers' compensation benefits.

How do we provide the DWC1?

- POTENTIAL CONCERNS FOR PROVIDING THE CLAIM FORM

- Employee is hospitalized and on a ventilator
- Employee is quarantined with location unknown
- Does the employer defer?
- What risks occur with deferring/delaying providing the claim form?

Case Law to Consider

- *LaTourette v. WCAB* (1998) 63 CCC 253 and *Johnson v. IAC* (1958) 23 CCC 54
  - The California Supreme Court has stated that the fact that "an employee contracts a disease while employed or becomes disabled from the natural progression of a nonindustrial disease during employment *will not* establish a causal connection…"
  - Additionally, an ailment **"does not become an occupational disease simply because it is contracted on the employer's premises."**

Which presumptive claims to deny?

- Even if the presumption applies, for employees in jobs not classified as high risk or very high risk of contracting COVID-19 by OSHA, the claims can be **denied** if:
  - the employee fails to cooperate in the investigation, or
  - if the employer can prove that the workplace exposure was not the medically-probable cause of contracting the viral infection in that case, thereby rebutting the presumption.

Can we really still deny a COVID-19 claim?

- Yes. Because the presumption is rebuttable and not conclusive, it can be rebutted and the claim denied where it was more probable that the claimant contracted the disease while off duty or away from the workplace, especially if there is a known non-industrial cause, such as an already-infected household member or other community-based source of infection.
- As with any delayed Workers' Compensation claim, medical records can be reviewed and statements taken to rule out off duty contraction of the disease.

Remember: Only 30 days to Act

- If presumption applies, the claims can only be denied within 30 days.
- It makes sense for employers to act on any COVID-19 claim within 30 days if possible, even if the applicability of this presumption is in doubt.
- This avoids even the appearance of a late denial, should it be found later that the presumption applies.

What Medical Care is to be Provided?

- The Executive Order, in part, reads as follows:
- "4)An accepted claim for the COVID-19-related illness referenced in Paragraph 1 shall be eligible for all benefits applicable under the workers' compensation laws of this state, including ***full*** hospital, surgical, medical treatment..." (emphasis supplied.)
- Does the requirement to provide "full" medical care under the EO override RFA/UR and IMR requirements under the Labor Code?

Who pays for testing?

- All medical treatment for COVID-19, including testing, is subject to UR/IMR.
- If the COVID-19 claim is accepted, testing should be covered by Workers' Compensation is certified by UR.
- If the claim is delayed, testing should still be covered by Workers' Compensation up to $10,000, pursuant to Labor Code section 5402(c).

Sick Leave Offset

- Where an employer has paid sick leave benefits specifically available in response to COVID-19, presumably including Families First Coronavirus Response Act (FFCRA) paid leave, those benefits shall be used and exhausted before any TD or Labor Code section 4850 pay is due and payable.
- Where an employee does not have such sick leave benefits, the employee shall be provided TD or Labor Code section 4850 benefits if applicable, from the date of disability.

Indemnity Benefit Certification

- Temporary disability or 4850 pay must be certified by a physician, including MPN providers, a predesignated physician, or a physician in the employee's group health plan.
- If the employee does not have a designated workers' compensation physician or group health plan, the employee should be certified by a physician of the employee's choosing who holds a physician and surgeon license.

Temporary Disability (TD) Limits

- To qualify for temporary disability (TD) or Labor Code section 4850 benefit payments under the Order, the employee must be:
  - certified for TD within the first 15 days after the initial diagnosis, and
  - re-certified for TD every 15 days thereafter, for the first 45 days following diagnosis.
- However, the 3-Day waiting period for TD benefits does not apply.

More Indemnity Benefit Limits

- If the employee tested positive or was diagnosed prior to **May 6, 2020,** the employee must:
  - obtain a TD certification by **May 21, 2020,** documenting the earlier period of TD, and
  - be re-certified for TD every 15 days thereafter, for the first 45 days following diagnosis.
- If the illness causes permanent ratable impairment, Labor Code section 4663 and 4664 **apportionment** of Permanent Disability seem to apply.

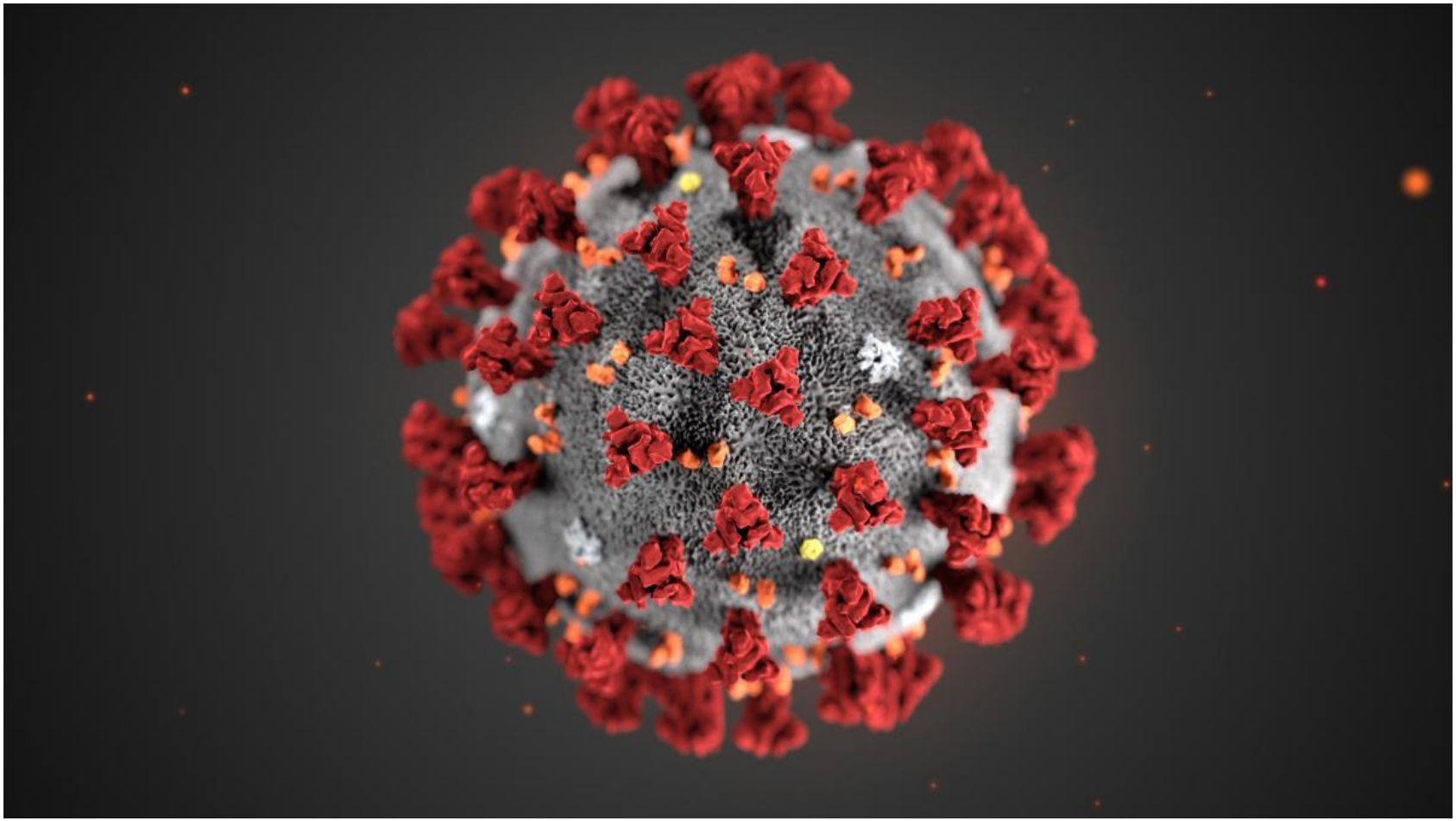
Temporary Disability and the Odd Lot Doctrine

- Separate from the Executive Order, the Emergency Declaration with business closures created a number of issues concerning temporary disability. These include:
- When an employee was being provided temporary modified work, which ended because of the Emergency Declaration, is and when is temporary disability owed?
- Temporary disability is to replace lost wages. Is TTD owed when a person on modified duty could not be working anywhere. What wages are being replaced?

Death Benefits

- Death benefits are applicable and will be due and owing if an employee dies from the consequences of a presumed compensable COVID-19 infection.
  - Up to $320,000 or more plus burial expenses, depending on the number of dependents and their ages.
- However, the death benefit payment that would otherwise be paid to the Department of Industrial Relations' Death Without Dependents Unit (Labor Code Section 4706.5) is waived under the Order.

Is the cure worse than the disease?



Negative Consequences

- This Order may give pause to some employers who were considering re-starting operations or directing staff to return to work on-premises, at least until the Order expires on July 5th.
- Re-opening businesses or facilities, and hiring people to work on-site just got a lot riskier.

The Risks to Employers

- The Order creates added Workers' Compensation exposure by shifting societal pandemic costs onto employers and the Work Comp system.
- The Order may also create possible 3rd party business liability exposure.
  - For example: If an employee who is covered by the Order then goes home and arguably exposes members of their household or community to the illness, this may create liabilities traceable back to the employer if the underlying illness is presumed to be work-related, especially if any one of those 3rd parties became seriously ill.

ADDITIONAL EMPLOYER AND EXAMINER RISKS TO APPRECIATE

- If a worker has presumed Covid illness which spreads to the family in their home, are there liability risks to family members for the employer?
- If an employer fails to adhere to the Executive Order by not giving DWC1 and Workers Compensation notices to known Covid positive workers who worked within 14 days, and the condition worsens, could there be a risk of liability outside of exclusive remedy under Section 3602 of the Labor Code?
- If a business resumes but fails to adhere to OSHA directed Covid safety regulations, is Serious & Willful misconduct a risk?
- Are there other risks outside of exclusive remedy? Privacy; quarantine for those exposed at work but not ill; discrimination based on risks factors age, heart disease, diabetes, etc.

Work-from-home implications

- What about an employee who is instructed to stay at home to work during the pandemic, and is exposed at home to a household member with COVID-19?
- Remember, they are probably not covered by the presumption if they are working from home.

Work-from-home implications

- The claim should be delayed, and probably denied within 30 days (for the reasons noted above, even though 90 days may arguably apply) because *exposure does not equal injury*.
- Employee will need substantial medical evidence to show that they were diagnosed with the disease and that the home/workplace was the medically-probable cause of the contraction *while working*, as opposed to *while living*.

What Employers Should Do?

- Employers are required to provide their employees with a place of employment that is "free from recognizable hazards that are causing or likely to cause death or serious harm to employees."
  - Section 5(a)(1) of the Occupational Safety and Health Act (OSHA) of 1970
- Keeping workplaces safe from the spread of the virus and other risks whenever possible, fully comply with shelter-in-place orders, is now more important than ever.

What Else Employers Should Do?

- Remember your EAP program.
  - Many employees (and employers) are anxious and are facing financial and child care challenges is this turbulent time.
  - EAP programs can often help.
- Offer benefits that are available, besides Workers' Compensation.
  - Employees may qualify for Families First Coronavirus Response Act (FFCRA) paid leave, short-term disability and other benefits you already offer, SDI and other government entitlements.

Questions

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