



MICHAEL SULLIVAN  
& ASSOCIATES LLP

# **Workers' Compensation Issues from COVID-19**



# Presenters

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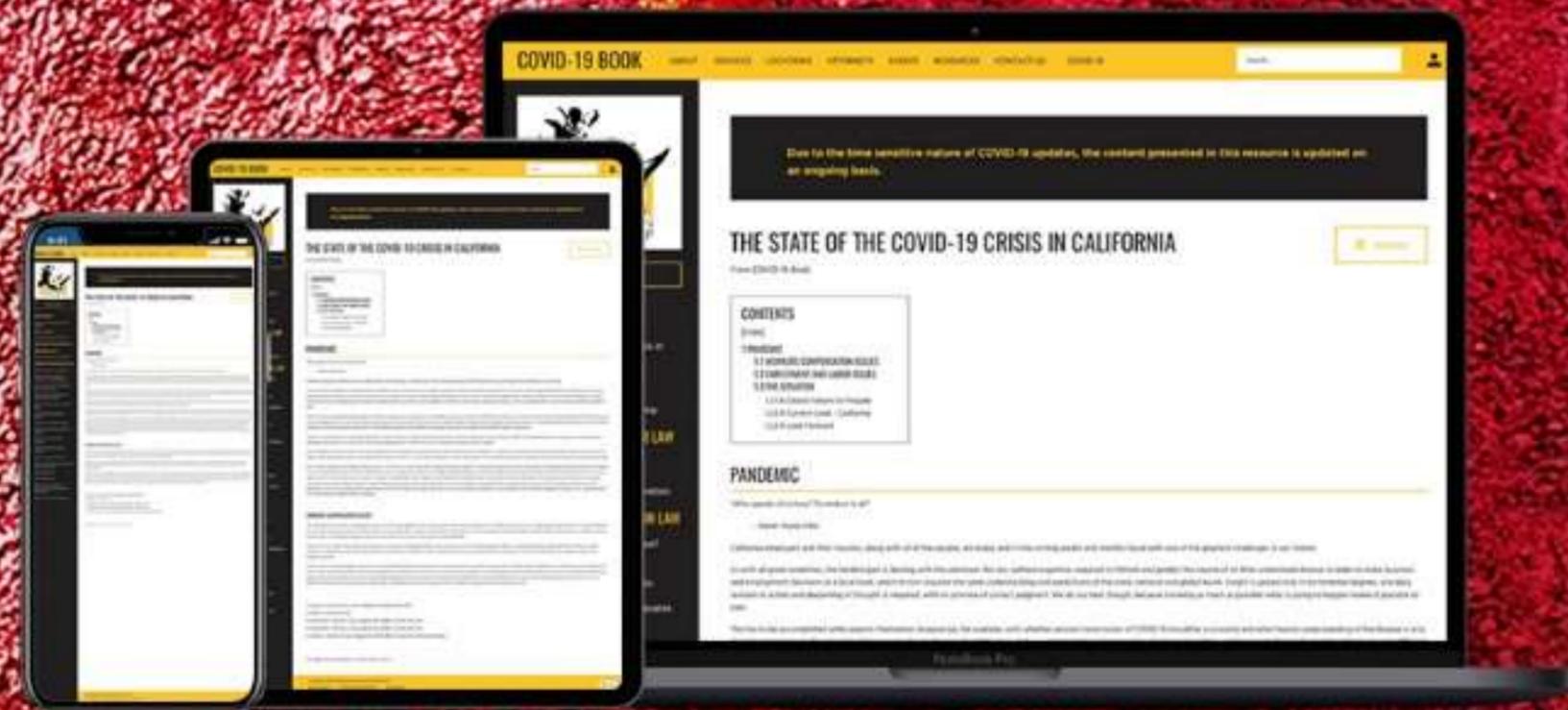


## **About** Michael Sullivan & Associates LLP

- The firm provides high-quality litigation in defense of workers' compensation claims, employment issues, immigration law and insurance litigation.
- Offices in El Segundo, Fullerton, San Diego, Westlake Village, Ontario, Fresno, Emeryville, Sacramento and San Jose.
- Author of "Sullivan on Comp," which covers the complete body of California workers' compensation law.

# Navigating COVID-19:

A Legal Guide for California Employers



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# COVID-19 Webinar Series

- Part 1: Workers' Compensation Liability & Employment Law Practices for the Coronavirus
- Part 2: The Interactive Process and Reasonable Accommodation
- Part 3: COVID-19 Update – the Burning Issues
- Part 4: COVID-19 Update – Duty to Provide a Claim Form
- Part 5: COVID-19 Update – Liability for Temporary Disability Benefits
- Part 6: COVID-19 Update – When is COVID-19 Work-Related?
- Part 7: COVID-19 Update – Interplay Between COVID-19 and Other Conditions
- Part 8: Gov. Newsom's New Executive Order re COVID-19 and What it Means Now
- Part 9: COVID-19 Update – Psychiatric Injuries
- Part 10: COVID-19 Update – Planning for Return to Work

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# Plan For This Session

- The COVID-19 Presumption under Executive Order N-62-20.
- Whether the executive order impacts the duty to provide a claim form.
- Injuries working from home.

# Executive Order N-62-20

- On May 6, 2020, Governor Newsom issued an executive order creating a temporary workers' compensation presumption for employees diagnosed with COVID-19.
- The Governor explained “employees who report to their places of employment are often exposed to an increased risk of contracting COVID-19.”
- He also explained “employees who report to work while sick increase health and safety risks for themselves, their fellow employees, and others with whom they come into contact.”
- He believed “the provision of workers’ compensation benefits related to COVID-19, when appropriate, will reduce the spread of COVID-19 and otherwise mitigate the effects of COVID-19 among all Californians, thereby promoting public health and safety.”

# Retroactive Application of the Presumption

- The presumption is retroactive to the date of the stay at home order and will stay in effect for 60 days after its effective date.
- Therefore, the presumption is effective for employees working from March 19, 2020 through July 5, 2020.
- A rebuttable presumption may be clearing the Legislature soon to supplement this order.

# Application of the Presumption

- Under the executive order, any COVID-19-related illness is presumed to be AOE/COE if all the following are satisfied:
  1. The employee tested positive for or was diagnosed with COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction;
  2. The day on which the employee performed labor or services at the employee's place of employment at the employer's direction was on or after March 19, 2020;
  3. The employee's place of employment was not the employee's home or residence; and
  4. The diagnosis was done by a physician who holds a physician and surgeon license issued by the California Medical Board and that diagnosis is confirmed by further testing within 30 days of the date of the diagnosis.



# Rebutting the Presumption

- The presumption is rebuttable, not conclusive.
- The executive order states it is rebuttable by “other evidence.”
- There is no limit on the evidence that may be used to rebut it.

# Reduced Investigation Period

- The executive order requires a decision to deny a claim for a presumptively compensable COVID-19 related illness to be made within 30 days after the date the claim form is filed.
- If a claim is not rejected within this 30-day period, then it will be presumed compensable and can be rebutted by “evidence only discovered subsequent to the 30-day period.”
- This would also likely preclude an employer rebutting the presumption with evidence that *could* have been obtained with the exercise of reasonable diligence within the 30-day period. (See ***State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (Welcher)*** (1995) 37 Cal.App.4th 675.)

# Duty to Provide a Claim Form

- Does the executive order change an employer's duty to provide a claim form?
- In *Honeywell v. Workers' Comp. Appeal Bd.* (2005) 35 Cal.4th 24, the California Supreme Court held that an employer's duty to provide a claim form arises when the employer has been notified by the injury in writing by the employee or has knowledge of the injury or claim from another source.
- The duty arises when the employer knows of an injury or claim, not when it should have known.
- Under *Honeywell*, an employer must know that an applicant is claiming the accident and injuries are work-related.

# Does the Executive Order Impact the Duty to Provide a Claim Form?

- The Governor explained that the executive order was signed to "remov[e] a burden for workers on the front lines, who risk their own health and safety to deliver critical services to our fellow Californians so that they can access benefits, and be able to focus on their recovery."
- But the presumption goes to proving a claim once filed.
- Nothing in the executive order speaks to the duty to provide a claim form.
- Knowledge that a claim if filed is presumptively compensable is not the same as knowledge that the applicant is claiming the COVID-19 diagnosis is work-related.

# Temporary Disability Benefits

- The executive order states that “where an employee has paid sick leave benefits specifically available in response to COVID-19, those benefits shall be used and exhausted before any temporary disability benefits or benefits under Labor Code section 4850 are due and payable.”
- An employer may delay providing TD benefits if the employee has “paid sick leave benefits specifically available in response to COVID-19.”
  - Families First Coronavirus Response Act
  - Executive Order N-51-20 – paid sick leave for Food Sector Workers.
- If an employer doesn’t pay any supplemental paid sick leave specifically available in response to COVID-19, TD and § 4850 should be from the start of the disability.
- Any other sick leave used by the employee should be restored.



# Temporary Disability Benefits

- Under the order, to qualify for temporary disability benefits or benefits under § 4850, an employee must satisfy either of these requirements:
  1. If the employee tests positive or is diagnosed on or after May 6, 2020, he or she must be certified for temporary disability within the first 15 days after the initial diagnosis, and must be recertified for temporary disability every 15 days thereafter, for the first 45 days following diagnosis. Or,
  2. If the employee tested positive or was diagnosed prior to May 6, 2020, the employee must obtain a certification, within 15 days of the date of the order, documenting the period for which he or she was temporarily disabled and unable to work, and must be recertified for temporary disability every 15 days thereafter, for the first 45 days following diagnosis.
- Being diagnosed with COVID-19 doesn't automatically entitle an employee to TD benefits; the TD must still be certified by a physician.

# Leave Issues

- Families First Coronavirus Relief Act (FFCRA)
  - Emergency Family Medical Leave Expansion Act (EFMLEA)
  - Emergency Paid Sick Leave Act (EPSLA)
  
- FMLA/CFRA
  
- Paid Family Leave (PFL)
  
- Paid Sick Leave
  
- Local Ordinance Leave
  
- See Chapter 3 of MSA Coronavirus Webinar Series & Ebook Guide

# Injuries Working from Home

- Because of the stay at home order, many companies are asking employees to work from home.
- Legal doctrines to be considered:
  - Personal comfort doctrine
  - Home as a second jobsite

# Personal Comfort Doctrine

- Under the personal comfort doctrine, an injury at work may be compensable even though it occurred while the employee was engaged in an activity necessary for personal comfort, convenience or welfare.
- Acts that are reasonably expected are regarded as taking place in the course of employment.
- “The rule is broad enough to include the majority of an employee's acts upon the employer's premises, such as eating lunch, getting a drink of water, smoking tobacco where not forbidden by the employer, attending to the wants of nature, changing to or from working clothes, and many others.” (***Fireman's Fund Indem. Co. v. IAC*** (1952) 39 Cal.2d 529.)



# Personal Comfort Doctrine

- In ***Santa Clara Valley Transport. Authority v. WCAB (Tidwell)*** (2017) 82 Cal.Comp.Cases 1514 (writ denied), the WCAB held that the personal comfort doctrine could be applied to an employee who was permitted to work from home.
- Injuries suffered by employees working from home during activities that are reasonable and anticipated may be compensable.
- Difficult to monitor when or what the employee was doing at the time of injury.
- Can we subrogate against the homeowners policy?



# Home as a Second Jobsite

- The going and coming rule bars injuries sustained while commuting to and from work.
- When the employer requires work to be performed in the employee's home, injuries during a commute to and from the regular work premises are not barred by the going and coming rule.
- ***Bramall v. WCAB*** (1978) 78 Cal.App.3d 151 – Court of Appeal held a legal secretary's injury in a car accident driving home from work was compensable where the employer knew she normally took depositions home for translation and approved of the practice.
- ***Santa Rosa Junior College v. WCAB (Smythe)*** (1985) 40 Cal. 3d 345 – Supreme Court held college instructor's death driving home was not compensable where evidence established working from home was a choice, not a requirement of the employer.



# Wage Hour Issues

- Telework Time Keeping
  - Off the Clock
  - Overtime
  - Meal/Rest
  
- Reimbursements
  
- Independent Contractors
  
- Exempt v. Non Exempt Classifications
  
- PAGA

# Off The Clock Issues

- General rule: Hourly employees must be paid for all hours during which they are under the “control” of the employer.
- De minimus role does not apply to claims for unpaid wages under California law.
- Classic scenarios:
  - Pre-shift meetings
  - donning/doffing
  - shift transitions
  - clock capacity issues
  - distance between clock and work station
  - security bag checks (pending before the California Supreme Court)
- New Issues
  - Home Self-Check Temperature
  - Reporting Time Pay

# Reimbursements

- General rule: Employees must be reimbursed for necessary business-related expenses.
- Common methods
  - actual expense
  - allowance/stipend
  - IRS mileage or per diem rates
- Common expenses that must be reimbursed
  - mileage
  - uniforms and uniform maintenance
  - steel-toed shoes
  - cellphones
  - home office equipment
  - business-related travel
  - Expenses incurred must be “reasonable.”
- New Considerations - e.g. thermometer for home self-check

# Disability & Discrimination Issues

In California, a person is considered disabled if she or he:

- has a physical or mental impairment that limits one or more of the major life activities;
  - has a record of an impairment;
  - is regarded as having an impairment;
  - is regarded or treated by the employer as having a condition that is not presently disabling, but might become a disability; and/or
  - has a health impairment that requires special education or related services.
- 
- Must continue to accommodate disabilities
    - Includes those with disability that makes them more susceptible to COVID-19
  - Must Engage in the interactive process
  - Cannot Discriminate with regard to protected characteristics
    - Age / Pregnancy
  - See Chapter 2 of MSA Coronavirus Webinar Series & Ebook Guide

# Guidance for Employers

Work with your leadership team to develop a comprehensive strategy for employees to return to work.

Michael Sullivan & Associates provides services that include:

- Employee handbook & personnel policy review
- Work plan guidance - a staggered approach that incorporates phased implementation
- Return to work seminars
- Customized plans of action & COVID-19 advising

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