

WHAT CHANGES HAS COVID WROUGHT?

Life with the Coronavirus in Workers' Comp

- I. Daily life for your lawyer
 - a. Litigation at the WCAB
 - 1. Conferences by telephone
 - A. Meet and confer requirement – Rule 10759
 - 2. Live in person walk throughs and trials
 - A. Remote option for trials – Rule 10816, 10817 (witnesses)
 - 3. Email address issues
 - A. Must include in Notice of Representation
 - B. Firmwide vs. personal address
 - b. Depositions – Remote option – Rules of Court 3.1010, CCP 2025.310
 - 1. Must indicate whether depo will be remote or in person in notice
 - c. Difficulty in reaching people (opposing counsel, clients, etc.) working from home
 - d. Service
 - 1. Electronic service must be accepted – Rule 10625 – show method of service on Proof of Service
- II. Rule changes – medical legal
 - a. Emergency Rule 46.2 repealed – QME can no longer extend availability by 30 days, can't extend date to produce report
 - b. Emergency Rule 46.3 – Remote evaluations allowed for cases involving injury AOE-COE, or where the doctor certifies that an in person exam is not required and all parties agree
 - 1. Can't unreasonably refuse remote exam
- III. Litigating COVID cases – 3 statutes
 - a. COVID window presumption – Labor Code section 3212.86
 - 1. Applies to any employee who tests positive for COVID within 14 days of working between 3/19/20 – 7/5/20
 - 2. 30 days to investigate and admit or deny
 - 3. Sunsets 1/1/24
 - b. Safety officers and health care workers – Labor Code section 3212.87
 - 1. Applies to firefighters, peace officers under Penal Code sections 830.1, 830.2, 830.3, 830.37, 830.5, and 830.53
 - 2. Applies to EMTs, employees who provide patient care or custodial services at a health care facility, and in-home support services workers who work outside of their own home
 - 3. Applies to employees in these classes who test positive for COVID within 14 days of working for the employer providing these services
 - 4. 30 days to investigate and admit or deny
 - 5. Sunsets 1/1/24
 - c. Other employees – Labor Code section 3212.88
 - 1. Applies to non-safety and health care employees who test positive for COVID if:

- a. The employer has 5 or more employees
- b. The employee has performed services after 7/6/20
- c. The employee tests positive within during a COVID outbreak at the employer's place of business
 - 1. An outbreak is defined as employment location with 100 or fewer employees with 4 employees testing positive within 14 days of the employee's last day worked, or
 - 2. An employment location with over 100 employees with a 4% of employees testing positive within 14 days
- d. 45 days to investigate and admit or deny
- e. Sunsets 1/1/25

IV. Litigating COVID cases – the analysis

- a. Does a presumption apply?
 - 1. Proving it doesn't apply – applicant's burden to prove it does apply, but employer will have access to the information needed to prove it does not
 - A. Need to establish date of work, date of positive test, COVID rate at workplace
 - 2. If so, how rebut it?
 - A. No limitation on evidence allowed to rebut the presumption, but burden shifts to defendant to prove the COVID not work related, but must produce some evidence
 - B. QME report alone enough to rebut presumption
- b. If presumption doesn't apply, look to law of occupational disease (Labor Code section 5500.5)
 - 1. Absent proof of specific causative exposure, in order to be compensable, claimants must show exposure to disease in excess of the general population due to specific risks of employment

V. Litigating COVID cases – practical steps

- a. Remember limited period to investigate if presumption applies
- b. Need to determine if presumption applies
 - 1. Establish date of employment, date of diagnosis, percentage of employees at work location with positive tests
 - 2. Establish if employee is one covered in 3212.87
- c. Need to rebut the presumption – production of evidence
- d. Establishing if employee has increased risk in non-presumption case.