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# California's recent work relatedness presumption for coronavirus (COVID-19) workers' compensation benefits appears not applicable to Cal/OSHA

**By Maritza Martin, Jeffrey Tanenbaum, Rachel Conn, and Benjamin Kim**

Earlier this month, California Governor Gavin Newsom issued Executive Order N-62-20 ("Executive Order") creating a time-limited, rebuttable presumption for employees seeking workers' compensation benefits, but that presumption does not appear to apply to the state's occupational safety and health ("Cal/OSHA") regulations.

## Rebuttable presumption of COVID-19 work relatedness under workers' compensation law

The new Executive Order implements a rebuttable presumption that any coronavirus-related illness of an employee arose out of and in the course of employment for purposes of awarding workers' compensation benefits if: (1) the employee tested positive for COVID-19 or was diagnosed with COVID-19 within 14 days of performing work for their employer; (2) the employee performed such work after the governor's stay-at-home order was issued on March 19, 2020 (Executive Order N-33-20); and (3) the employee's place of employment must not be their home or residence. Any COVID-19 diagnosis must be made by a physician who holds a physician and surgeon license issued by the California Medical Board, and the diagnosis must be confirmed by further testing within 30 days of the date of the diagnosis.

Employers can rebut the presumption "by other evidence." The Executive Order does not define "other evidence," but it may require reliable evidence that the employee was infected elsewhere (i.e., evidence that the employee had sustained contact with a family member or other person with a confirmed COVID-19 diagnosis away from work).

If an employer does not submit evidence to rebut the presumption and liability for a claim is not rejected 30 days after the claim is filed under Labor Code section 5401, the COVID-19 diagnosis is presumed compensable under Workers Compensation.

The presumption, however, will only apply to dates of injury occurring from March 19, 2020 (the initiation of the California stay-at-home order) through 60 days after the date of the May 6, 2020 order, unless extended by a future order.

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## The new presumption should have no effect on Cal/OSHA recordkeeping and reporting requirements

On its face, the Executive Order presumption only applies for purposes of workers' compensation benefits. Executive Order Section 1. Moreover, states are not permitted to have different rules than federal occupational safety and health regulations in determining which injuries and illnesses are recordable, to ensure a consistent national recordkeeping program. *See* 29 CFR 1904.37(b)(1)&(2), and currently, the U.S. Occupational Safety and Health Administration ("Fed/OSHA") has not adopted any such presumption. While states can have more stringent rules for reporting of injuries and illnesses, a state must obtain Fed/OSHA approval, and California has not sought or obtained such approval.

Please note Fed/OSHA has issued its own guidance for determining whether an exposure is work-related for OSHA coronavirus recordkeeping.[1]

Although both workers' compensation and OSHA have rules concerning work-relatedness determinations, the rules are different for each and can create complications in practice. Employers should consult with counsel if they are unclear regarding their obligations under these different laws.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:


- Maritza Martin, 415-984-8350, **mmartin@nixonpeabody.com**
- Jeffrey Tanenbaum, 415-984-8450, **jtanenbaum@nixonpeabody.com**
- Rachel Conn, 415-984-8216, **rconn@nixonpeabody.com**
- Benjamin Kim, 213-629-6090, **bkim@nixonpeabody.com**
- Daniel Sovocool, 415-984-8286, **dsovocool@nixonpeabody.com**


[1] See our prior alert, "OSHA issues recordkeeping guidance for COVID-19," April 14, 2020.