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NAVIGATING GOVERNOR NEWSOM'S EXECUTIVE ORDER ISSUED ON MAY 5, 2020 CREATING A TEMPORARY REBUTTABLE PRESUMPTION OF COMPENSABILITY FOR ANY COVID-19 RELATED ILLNESSES

On May 6, 2020, Governor Newsom issued Executive Order N-62-20 that became effective immediately.

1. The Order is Temporary in Nature: Unless extended by the Governor, the order only applies to dates of injuring occurring **through** 60 days of the effective date of the of his order of May 5, 2020, which would be July 4, 2020. (paragraph 2).

2. The Order has Retroactive Effect: In terms of the rebuttable presumption of compensability, there is a retroactive application of the Order back to March 19, 2020, the date Governor Newsom issued Executive Order N-33-20 commonly referred to as the "stay at home" order.(paragraph 1(b))

3. Necessary Requirements to Trigger the Rebuttable Presumption of Compensability:

In order for the rebuttable presumption of compensability for "any COVID-19 related illness of an employee to be established **all** of the following requirements set forth in subparagraphs 1(a) through 1(d) must be satisfied:

> a. The employee must either have tested positive for COVID-19 **or** have been 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.
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> b. The day referenced in subparagraph (a) 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.
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> c. The employee's place of employment referenced in subparagraph (a) and (b) was not the employee's home or residence; and
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> d. Where subparagraph (a) is satisfied through a diagnosis of COVID-19, 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 diagnosis.

COMMENT: The term "any COVID-19 related illness of an employee" as used in paragraph 1 is extremely broad and would arguably cover illnesses known to be caused by the virus but also may relate to any underlying conditions or prior injuries

that may have been aggravated or accelerated by the employee contracting COVID-19 and by any related treatment.

Reading paragraphs 1(a) and 1(b) raises the issue of whether most if not all claims that are filed will allege a cumulative trauma as opposed to a specific date of injury. While the date of a positive COVID-19 test or diagnosis may be important for statute of limitations purposes, it may be difficult medically or factually in many cases to determine a specific date or day when the employee actually contracted COVID-19.

Another issue raised by paragraphs 1(a) and 1(b) is that the rebuttable presumption of compensability may not apply to employees who voluntary **came into work as opposed to reporting to work at the employee's place of employment at the employer's direction on or after March 19, 2020, up to July 4, 2020, when the temporary order expires.**

Employees remotely working from home are not entitled to the rebuttable presumption. Subparagraph (c) indicates that employees working remotely from their home or residence and not at their regular place of employment will not be entitled to the rebuttable COVID-19 presumption of compensability.

An initial medical diagnosis of COVID-19 alone will be insufficient to trigger the presumption unless the initial medical diagnosis was not only done by a duly licensed physician and surgeon but the initial medical diagnosis must also be confirmed by a positive COVID-19 test within 30 days of the initial medical diagnosis of COVID-19.

4. The Nature of the Rebuttable Presumption and the Ability of a Defendant to Rebut or Controvert It: If the applicant meets **all** of the requirements of paragraph 1(a)-(d) hereinabove, then the rebuttable "disputable" presumption is established. Paragraph 2 indicates that the rebuttable COVID-19 presumption of compensability may be "controverted by other evidence." This clearly shifts the burden to the defendant to try and prove the employee contracted the virus outside of work such as by engaging in activities in the general community, at home, or due to social or recreational exposures. Also, the rebuttable presumption only applies to dates of injury occurring through 60 days following the effective date of Governor Newsom's order of May 6, 2020 which is July 4, 2020.

5. The Normal Labor Code 5402(b) 90 Day Period to Investigate and Determine Liability Has Been Shortened to 30 Days: Under Governor Newsom's Executive Order, paragraph 3, "notwithstanding Labor Code 5402, if the claim of any COVID-19 related illness pursuant to paragraph 1 is not rejected within 30 days after the date the **claim form is filed** under Labor Code section 5401, the illness shall be presumed compensable unless rebutted by evidence discoverable subsequent to the 30-day period."

COMMENT: Paragraph 3 of the Governor's Order expressly refers to a claim form "filed under Labor Code 5401." Labor Code 5401(a) in turn references "notice or knowledge of an injury under Section 5400 or 5402 that triggers the duty of the employer to provide a claim form. Therefore under the California Supreme Court's decision in *Honeywell v. Workers' Comp. Appeals Bd. (Wagner)* (2005) 35 Cal.4th 24, 70 Cal.Comp.Cases 97, the duty of the employer to provide a claim form **may in**

certain situations be triggered by the employer's knowledge of the injury from any source indicating the "assertion of a claim of injury...." (Labor Code § 5402(a))

In addition, there is no reason to believe existing case law related to rebuttable evidence discovered subsequent to the 90 day period will not be applicable just because the time to issue a denial has been shortened to 30 days. In that regard, the defendant would only be able to introduce evidence to rebut the COVID-19 rebuttable presumption that could not have been discovered with reasonable diligence within the 30 day period. The defendant would have to show good cause as to why they could not have discovered any rebuttable evidence by exercising reasonable diligence during the 30 day period in order for it to be admissible to rebut the presumption.

6. If the Rebuttable Presumption of Compensability is Applicable, What Workers' Compensation Benefits are Applicant's Entitled To? Under paragraph 4 of the Order, if the rebuttable presumption of compensability is applicable, the applicant would be "eligible for all benefits applicable under the workers' compensation laws of this state...." This would include full hospital, surgical, medical treatment, disability indemnity, and death benefits.

With respect to death benefits, paragraph 9, of the Governor's Order specifically provides that the Department of Industrial Relations "shall" waive the collection of any death benefit payment due pursuant to Labor Code section 4706.5 as to any claims covered by the Order. Labor Code section 4706.5 relates to payments of death benefits where there is no surviving dependent.

7. Apportionment Under Labor Code Sections 4663 and 4664: Based on the express language of paragraph 4 of the Order, any permanent disability would still be subject to apportionment under Labor Code sections 4663 and 4664 and applicable case law.

COMMENT: Based on this language, any permanent disability suffered by an applicant related to a COVID-19 related illness would be subject to potential apportionment to non-industrial contributing causal factors. For example, if an applicant had permanent disability related to respiratory disorders under the AMA Guides, there would be potential apportionment under Labor Code 4663 if there are other nonindustrial contributing causal factors whether symptomatic or not. Does the applicant have a history of smoking or vaping? Does the applicant have pre-existing respiratory conditions such as asthma or allergies that may be contributing nonindustrial causal factors of the applicant's respiratory permanent disability?

Moreover, if a COVID-19 related illness aggravates or accelerates an underlying pre-existing condition or disease process; potential non-industrial apportionment may also be applicable if supported by substantial medical evidence.

8. Temporary Disability Issues Related to Paid Sick Leave Specially Available in Response to COVID 19: This issue is addressed in paragraph 5 of the Executive Order. "Notwithstanding any applicable workers' compensation statute or regulation, 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." (emphasis added).

If the employee does not have paid COVID-19 sick leave benefits, "the employee shall be provided temporary disability benefits or Labor Code section 4850 benefits applicable from the date of disability. **In no event shall there be a waiting period for temporary disability benefits." (**emphasis added).

COMMENT: The Executive Order expressly states "sick leave benefits specifically available in response to COVID-19" must be exhausted before TTD or LC 4805 benefits are due. This relates to prior legislation entitled the Families First Coronavirus Response Act (FFCRA) which took effect April 1, 2020. FFCRA specifically provides for up to two weeks of paid sick leave based on the employees regular rate of pay, regardless of the COVID-19 being work related or not. The U.S. Department of Labor's Wage and Hour Division ("WHD') released the model notice that covered employers must post and/or electronically distribute to employees, regarding the FFCRA, which can be found at the link below.

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

Generally, the FFCRA applies to employers with fewer than 500 employees. However, there are employers that may be exempt from FFCRA including employers with fewer than 50 employees (small businesses, including religious or nonprofit organizations). Health care providers also qualify as employers that may be exempt under the FFCRA. For further clarification about whether an employer meets any of the exemptions and many other questions related to FFCRA, please refer to the Department of Labor Fact Sheet FFCRA link below.

https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

For an additional resource on the FFCRA, see the Pearlman, Brown & Wax, L.L.P., White Paper on the Families First Coronavirus Response Act at:

http://www.pbw-law.com/news.html

9. **Qualifying for Temporary Disability or Labor Code section 4850 Benefits:** This issue is covered under paragraph 6 of the Order. Medical certification is required for both TTD and Labor Code 4850 benefit payments. To qualify for TTD or Labor Code section 4850 benefits, an employee must satisfy **either** of the following:

> a. If the employee tests positive or is diagnosed with COVID-19 under paragraph 1 of the Order **on or after** the May 6, 2020, Executive Order, "the employee must be certified for temporary disability within the first 15 days after initial diagnosis, and must be recertified for temporary disability every 15 days thereafter, for the first 45 days following diagnosis: **or**
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> b. If the employee tested positive or was diagnosed under paragraph 1 **prior to** the May 6, 2020, Executive Order, the employee must obtain a disability certification within 15 days of the date of the Order (May 6, 2020)

"documenting the period for which the employee 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."

Who Can Certify the Employee for TTD? The employee can only be certified for TTD by the following:

1. A physician holding a physician and surgeon license issued by the California Medical Board.

2. The certifying physician can be a designated workers' compensation physician in an applicable Medical Provider Network or Healthcare Organization.

3. A predesignated workers' compensation physician, or a physician in the employee's group health plan.

4. 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.

10. Administrative Director's Authority to Adopt, Amend, or Repeal Any Regulations Deemed Necessary to Implement the Executive Order: Paragraph 7 of the Governor's Executive Order allows the Administrative Director to essentially bypass the Administrative Procedures Act including public hearings before new regulations are adopted, amended or repealed. All that is required under paragraph 7 is that the Administrative Director submits the regulations to the Office of Administrative Law for publication.

11. Applicability of the Executive Order: Paragraph 8 of the Governor's Executive Order reflects that the Order applies to:

1. All workers' compensation carriers writing policies that provide coverage in California;

2. Self-insured employers;

3. Any other employer carrying its own risk, including the State of California.

However, nothing in the emergency order shall be construed to limit the existing authority of insurance carriers to adjust the costs of their policies.

CAVEATS, CONCLUSIONS and FINAL NOTES

It is important to note that there are a large number of bills currently in the California Legislature related to COVID-19, including many that deal with both conclusive and rebuttable presumptions of compensability. As indicated hereinabove, the Governor's Executive Order is temporary; and only applies to dates of injury occurring through

July 4, 2020. It remains to be seen whether the Governor will extend or modify the Executive Order depending on what the legislative response is and how soon any final legislation reaches his desk.

Given the current fluid and rapidly evolving nature of the Coronavirus-COVID-19 pandemic in the United States, this memo constitutes our preliminary analysis and is provided solely as a reference tool to be used for informational purposes and is subject to change based on evolving information. Therefore it should not be construed or interpreted as providing legal advice related to any particular case or cases. Each insurance company, claims administrator and employer should seek their own independent legal advice and opinion before they determine a course of action on a specific case or cases related to the compensability of injuries in the workplace and any liability for benefits allegedly related to coronavirus exposure.