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An Analysis of SB-1159 Adding Sections 77.8, 3212.86, 3212.87, and 3212.88 to the Labor Code that Expands, Codifies and Clarifies the Governor's prior Executive Order (§3212.86) as well as Creating two new Rebuttable Presumptions of Compensability for Determining COVID-19 Occupational Injuries (§§3212.87 and 3212.88)

Introduction: SB-1159 as an urgency statute became effective immediately when it was signed by the Governor on September 17, 2020.

NEW LABOR CODE 77.8

New Labor Code section 77.8 requires the Commission on Health and Safety and Workers' Compensation (CHSWC) to conduct a study on COVID-19 and its impact on the workers' compensation system, and to issue a preliminary report to the Legislature and a final report to the Governor no later than April 30, 2022.

NEW LABOR CODE 3212.86 (effective September 17, 2020)

Introduction: New Labor Code section 3212.86 expands, clarifies, and codifies the Governor's previous Executive Order N-62-20 issued on May 6, 2020 that created a temporary rebuttable presumption for any employee with a COVID-19 related illness if certain criteria were established for the limited period of March 19, 2020 through July 5, 2020 when it expired.

It is important to understand that new section 3212.86 does not change the applicable time frame of the Governor's Executive order that expired on July 5, 2020. New Section 3212.86 still only applies to dates of injury during the limited time period of March 19, 2020 through July 5, 2020.

Eight Key Clarifications and Changes in New Labor Code 3212.86

1. **It only applies to dates of injury on or after March 19, 2020, and on or before July 5, 2020:** It is extremely important to understand that while Labor Code 3212.26 is a "new" Labor Code section in the sense that it expanded, clarified, and codified the

Governor's previous executive order, it did not change the dates of injury the Governors' prior executive order covered.

2. **It applies to "any employee":** With respect to the Governor's expired executive order there was some initial confusion as to whether the order applied only to "essential workers" or to all employees. SB-1159 in adding Section 3212.86 to the Labor Code in subdivision (a) expressly provides that "[t]his section applies to **any employee** with a COVID-19 related illness." (3212.86(a)).

3**. It Specifically Defines the Term "injury":** Subdivision 3212.86(b) defines the term "injury" as used in this division, "includes illness or death resulting from COVID-19" so long as all the circumstances set forth in subdivisions (b)(1) through (b)(3) apply. Section 3212.86(i)(1) expressly provides that for purposes of section 3212.86, "COVID-19" means the 2019 novel coronavirus disease."

4. **It Clarifies and Specifies the "date of injury":** With respect to the definition of the date of injury related to the rebuttable presumption of compensability, section 3212.86 (b)(2) states that "[t]he date of injury shall be the last date the employee performed labor or services at the employee's place of employment at the employer's direction." This assumes the labor or services were on or after March 19, 2020 and on or before July 5, 2020.

5. **It Expands the Medical Professionals Qualified to Make a Clinical Diagnosis of COVID-19 and Related Testing Issues:** Under the expired Governor's temporary executive order, only a physician who held a physician and surgeon's license could make a clinical diagnosis of COVID-19, without a contemporaneous COVID-19 test. If the initial clinical diagnosis of COVID-19 was based solely on a clinical diagnosis then the initial clinical diagnosis was required to be confirmed by further testing within 30 days of the initial diagnosis in order to trigger the rebuttable presumption.

Under new section 3212.86(b)(3), an initial diagnosis of COVID-19 has been changed and expanded so that a diagnosis under subdivision 3212.86(b)(1) can be made by any of the following enumerated medical and health professionals:

a. A licensed physician and surgeon holding an M.D. or D.O. degree, or

b. state licensed physician assistant or nurse practitioner so long as both are acting under the review or supervision of a physician and surgeon pursuant to standardized procedures or protocols within their lawfully authorized scope of practice.

6. **Further Confirming Testing Following Initial Clinical Diagnosis:** The Governor's temporary order did not specify the type of test that was required to confirm an initial

clinical diagnosis that was made in lieu of a positive COVID-19 test and therefore could have been based solely on serological antibody test done 30 days after the clinical diagnosis in lieu of a PCR test approved by the USFDA used to detect the presence of viral RNA.

However, amended section 3212.86(b)(3) now clarifies that an initial clinical diagnosis of COVID-19 made under subdivision (b)(1) can be "confirmed by testing **or** by a COVID-19 serologic test within 30 days of the date of the diagnosis." This would seem to authorize the confirming test can be either a serological antibody test or a PCR test to detect the presence of viral RNA.

7. **New Section 3212.86 has a Sunset Provision:** Labor Code section 3212.86 shall remain in effect only until January 1, 2023 and as of that date is repealed, (3212.86(j).

8. **Limited Applicability of New Labor Code §3212.86 to Pending Claims and Matters:** Subdivision (h) states that Labor Code §3212.86 "applies to all pending matters, except as otherwise specified, including but not limited to, pending claims relying on Executive Order N-62-20. This section is not a basis to rescind, alter, amend, or reopen any final award of workers' compensation benefits."

Additional Provisions of Labor Code Section 3212.86

1. The Requirements under Labor Code 3212.86 Necessary to Trigger the Rebuttable Presumption of Compensability for Dates of Injury on or after March 19, 2020 and on or before July 5, 2020

In order for the rebuttable presumption of compensability to apply to any employee with a COVID-19 related injury which includes any illness or death resulting from COVID-19, **all** of the following "criteria" set forth in Section 3212.86, subdivisions (b)(1) through (b)(3) must be satisfied:

(1) "The employee must either have tested positive for **or** was diagnosed 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." (§3212.86(b)(1)). Also Section 3212.86(i)(2) specifies that "place of employment" does not include an employee's residence."

(2) "The day referenced in paragraph (1) 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, and on or before July 5, 2020. The date of injury shall be the last date the employee performed labor or services at the employee's place of employment at the employer's direction." (§3212.86(b)(2)).

(3) "If paragraph (1) is satisfied through a diagnosis of COVID-19, the diagnosis was done by a licensed physician and surgeon holding an M.D. or D.O. degree or state licensed physician assistant or nurse practitioner, acting under the review or supervision of a physician and surgeon pursuant to standardized procedures or protocols within their lawfully authorized scope of practice, and that diagnosis is confirmed by testing **or** by a COVID-19 serological test within 30 days of the date of the diagnosis." (3212.86(b)(3) (emphasis added).

COMMENTS: The term "any employee with a COVID-19 related illness" as used in subdivision 3212.86(a) is extremely broad and would arguably cover illnesses or deaths known to be caused by the virus, but may arguably also relate to any underlying conditions or prior injuries that may have been aggravated or accelerated by an employee contracting COVID-19 and by any related treatment. However, under existing case law if an underlying condition, or prior injury whether symptomatic or asymptomatic before the applicant contracted COVID-19 is aggravated or accelerated, defendants would still be entitled to claim potential non-industrial apportionment of any related permanent disability pursuant to Labor Code Sections 4663 and 4664.

Another issue raised by section 3212.86, subdivisions (b)(1) and (b)(2) is that the rebuttable presumption of compensability may not apply to employees who voluntarily **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, and on or before July 5, 2020.**

Employees remotely working from their residence are not entitled to the rebuttable presumption of compensability. Subdivision 3212.86(i)(2) expressly states "[p]lace of employment" does not include an employee's residence."

2. Under section 3212.86(c), if the Rebuttable Presumption of Compensability Applies, What Workers' Compensation Benefits are Applicant's Entitled To? Under subdivision 3212.86(c) if the rebuttable presumption of compensability applies, the compensation that is awarded "shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division."

3. Death Benefits: With respect to death benefits, subdivision 3212.86(g) specifically provides that the Department of Industrial Relations "shall" waive the right to collect any death benefit payment due pursuant to Section 4706.5 arising out of claims covered by this section. Labor Code section 4706.5 relates to payments of death benefits where there are no surviving dependents.

4. The Nature of the Rebuttable Presumption and the Ability of a Defendant to Rebut or Controvert It: If an applicant meets **all** of the "circumstances" set forth in §3212.86, subdivisions (b)(1) through (b)(3) hereinabove, subdivision 3212.86(e) states that "[a]n injury described in subdivision (b) is presumed to arise out of and in the course of employment. This

presumption is disputable and may be "controverted by other evidence. Unless controverted, the appeals board is bound to find in accordance with the presumption." This rebuttable presumption only applies to dates of injury occurring on or after March 19, 2020, and on or before July 5, 2020 with the caveat that "the employee has 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." (§3212.86(b)(1)).

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. Unless a defendant can controvert or rebut the presumption by other evidence "the appeals board is bound to find in accordance with the presumption." (§3212.86(e))

5. The Normal Labor Code Section 5402(b) 90 Day Period to Investigate and Determine Liability Has Been Shortened to 30 Days: Subdivision 3212.86(f) states that "[n]otwithstanding Section 5402, if liability for a claim of a COVID-19- related illness is not rejected within 30 days after the date the **claim form is filed** pursuant to Section 5401, the illness shall be presumed compensable." Subdivision (f) also states that **"[t]he presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 30-day period."**

COMMENT: Subdivision (f) expressly refers to "the claim form is filed pursuant to Labor Code 5401. In actuality a claim form being "filed" in common practice means when the claim form is returned to the employer. 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 sufficient to afford opportunity to the employer to make an investigation into the facts." (Labor Code §5402(a))

6. Temporary Disability Issues Related to Paid Sick Leave Specifically Available in Response to COVID 19: This issue is addressed in §3212.86(d)(1). "If 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 Section 4800, 4800.5, or 4850 are due and payable**." (emphasis added).

"If an employee does not have those sick leave benefits, the employee shall be provided temporary disability benefits or Section 4800, 4800.5, or 4850 benefits, if applicable, from the date of disability." **There shall not be a waiting period for temporary disability benefits." (**emphasis added).

COMMENT: Section 3212.86(d)(1) expressly states "sick leave benefits specifically available in response to COVID-19" must be used and exhausted before temporary disability or Section

4800, 4800.5, or 4850 benefits are due and payable. In essence this subdivision provides that any employee who might benefit from the rebuttable presumption of compensability must first exhaust any special COVID-19 "time off" benefits provided by federal law before the workers' compensation benefits attach.

This relates to prior legislation entitled the Families First Coronavirus Response Act (FFCRA) which took effect April 1, 2020. The 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

7. How Does an Employee Qualify for Temporary Disability or Labor Code section 4800, 4800.5, or 4850 Benefits Under Section 5212.86? This issue is covered by §3212.86 subdivisions (d)(2)(A) and (d)(2)(B). Medical certification is required for both TTD or Section 4800, 4800.5, or 4850 benefits. To qualify for TTD or section 4800, 4800.5, or 4850 benefits, an employee shall satisfy **either** of the following:

> (A) If the employee has tested positive or is diagnosed with COVID-19 on or after May 6, 2020, "the employee shall be certified for temporary disability within the first 15 days after the initial diagnosis, and shall be recertified for temporary disability every 15 days thereafter, for the first 45 days following diagnosis. (§3212.86(d)(2)(A)).
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> (B) If the employee has tested positive or was diagnosed with COVID-19 before May 6, 2020, the employee shall have obtained a certification, no later than May 21, 2020,

documenting the period for which the employee was temporarily disabled and unable to work, and shall be recertified for temporary disability every 15 days thereafter, for the first 45 days following diagnosis." (§3212.86(d)(2)(B)).

8. Who Can Certify the Employee for TTD? Based on §3212.86(d)(3), an employee shall be certified for temporary disability by the following:

1. A physician holding a physician's and surgeon's license issued pursuant Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code.

2. If the employee has a predesignated physician and is covered by a medical provider network, workers' compensation health care organization, or is covered by a group health care plan as specifically described in 3212.86(d)(3), the certifying physician shall be a physician and surgeon in that network, organization, or plan.

3. Otherwise, the certifying physician may be a physician and surgeon of the employee's choosing.

NEW LABOR CODE SECTION 3212.87 (effective September 17, 2020)

Introduction: New Labor Code Section 3212.87 creates and carves out a new rebuttable presumption of compensability related to a COVID-19 injury including illness or death resulting from COVID-19 for a number of expressly defined employees and occupations including peace officers, active firefighting members, fire and rescue coordinators, various defined medical and health care workers, and other employees of health care facilities. (see, §3212.87, subdivisions (a)(1) through (a)(11)).

Key Provisions of New Labor Code § 3212.87

1. Section 3212.87 Applies to Dates of Injury On or After July 6, 2020 and on or before January 1, 2023. (§§3212.87(b)(2) and 3212.87(j)). As urgency legislation it became effective on September 17, 2020 when approved by the Governor.

2. Section 3212.87 Only Applies to Expressly Defined Employees and Occupational Groups: As enumerated and defined in exacting detail, section 3212.87 only applies to certain specified employees and workers generally characterized as first responders such as firefighters, peace officers, as well as a variety of medical and health professionals and other defined employees of health facilities, including those who provide direct patient care for a home health agency, and providers of in-home supportive services when they provide services outside of their own home or residence as specifically defined in §3212.87(a)(1) through (a)(11).

COMMENT: The specified employees who potentially qualify for the rebuttable presumption of compensability related to a COVID-19 injury are listed in exacting detail in section 3212.87 subdivisions (a)(1) through (a)(11). These same subdivisions also define and describe various employers and any related licensing and certification requirements.

It is essential for every claims administrator and employer in each and every claim to verify whether any employee claiming the rebuttable presumption under Section 3212.87 is actually covered by the statute. This can only be done by actual reference to Section 3212.87, subdivisions (a)(1) through (a)(11) of SB-1159. For example, under section 3212.87(a)(7), employees of health care facilities as defined in that subdivision who provide direct patient care or a custodial employee in contact with COVID-19 patients would potentially fall under the presumption. However, section 3212.87(a)(10) provides that employees, of health facilities, other than those described in paragraph (7), that "[f]or these employees, the presumption shall not apply if the employer can establish that the employee did not have contact with a health facility patient within the last 14 days who tested positive for COVID-19."

If it is determined the rebuttable presumption does not apply to health care employees under paragraph 10, these claims "shall be evaluated pursuant to Sections 3202.5 and 3600". Both of these Labor Code sections would require these particular health care workers who do not qualify for the presumption have the burden to prove they contracted COVID-19 and that it is work

related by establishing their work exposed them to a special risk of contracting COVID-19 greater than that experienced by the general public.

3. It Specifically Defines the Term "injury": Subdivision 3212.87(b) defines the term "injury" as used in this division, "includes illness or death resulting from COVID-19" if **all** the circumstances set forth in subdivisions (b)(1) through (b)(2) apply. Section 3212.87(i)(1) expressly provides that for purposes of section 3212.86, "COVID-19" means the 2019 novel coronavirus disease."

COMMENT: The term "illness or death resulting from COVID-19" as used in subdivision 3212.87(b) is extremely broad and would arguably cover illnesses or deaths known to be caused by the virus, but may arguably also relate to any underlying conditions or prior injuries that may have been aggravated or accelerated by an employee contracting COVID-19 and by any related treatment. However, under existing case law if an underlying condition, or prior injury whether symptomatic or asymptomatic before the applicant contracted COVID-19 is aggravated or accelerated, defendants would still be entitled to claim potential non-industrial apportionment of any related permanent disability pursuant to Labor Code Sections 4663 and 4664.

4. There are Two Mandatory Criteria or Circumstances that must be Established by an Employee in Order to Trigger the Rebuttable Presumption of Compensability for a COVID-19 Injury Under Section 3212.87: In order for an employee to benefit from the rebuttable presumption of compensability for a COVID-19 injury, a defined employee must establish **all** of the following criteria:

> a. The employee has tested positive for COVID-19 within 14 days after a day that the employee performed labor services at the employee's place of employment at the employer's direction.
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> b. "The day referenced in paragraph (1), on which the employee performed labor or services at the employee's place of employment at the employer's direction as referenced in section 3212.87(b)(1) was on or after July 6, 2020. The date of injury shall be the last date the employee performed labor or services at the employee's place of employment at the employer's direction **prior to the positive test."** (§3212.87(b)(2)). (emphasis added).

COMMENT: It is important to note that under Section 3212.87, a positive COVID-19 test is required to establish the presumption. Unlike Section 3212.86, the rebuttable presumption cannot be established based solely on a clinical diagnosis of COVID-19 without a contemporaneous positive COVID-19 test. (§3212.87(b)(1)).

5. A COVID-19 "Test" or "Testing" is Specifically Defined: For purposes of §3212.87, unless otherwise indicated a "test" or "testing" means a PCR (Polymerase Chain Reaction) test approved by the United States Food and Drug Administration to detect the presence of viral RNA. "Test" or "Testing" may also include any other viral culture test approved for use or approved for emergency use by the United States Food and Drug Administration to detect the presence of viral RNA which as the same or higher sensitivity and specificity as the PCR test. **"[T]est' or "testing" does not include serologic testing, also known as antibody testing."** (§3212.87(i)(2), emphasis added).

6. The Date of Injury Related to the Rebuttable Presumption is Specifically Defined: The date of injury shall be the last date the employee performed labor or services at the employee's place of employment at the employer's direction prior to the positive test so long as that date was on or after July 6, 2020. (§3212.87(b)(2)).

7. There is Only a 30 day Investigative-Delay Period to Reject a Claim of a COVID-19 related Illness: The normal 90 day delay period for the employer and claims administrator to investigate and make a decision to reject or accept a claim of a COVID-19 after a claim form is filed pursuant to section 5401. If the claim form is not rejected within the 30 day time frame the illness shall be presumed compensable. "**The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 30-day period."** (§3212.87(f)).

COMMENT: Subdivision 3212.87(f) expressly refers to the claim form being filed pursuant to Labor Code 5401. In actuality a claim form being "filed" in common practice means when the claim form is returned to the employer. 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 sufficient to afford opportunity to the employer to make an investigation into the facts." (Labor Code § 5402(a))

8. The "Employee's Place of Employment" Does Not Include an Employee's Home or Residence: (3212.87(i)(3)

9. If the Rebuttable Presumption of Compensability Applies, What Workers' Compensation Benefits are Employee's Entitled To? If the rebuttable presumption of compensability applies, the compensation that is awarded "shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division." (§3212.87(c)).

10. Death Benefits: With respect to death benefits, subdivision 3212.87(g) specifically provides that the Department of Industrial Relations "shall" waive the right to collect any death benefit

payment due pursuant to Section 4706.5 arising out of claims covered by this section. Labor Code section 4706.5 relates to payments of death benefits where there are no surviving dependents.

11. The Nature of the Rebuttable Presumption and the Ability of a Defendant to Rebut or Controvert the Presumption: If an applicant meets **all** of the "circumstances" set forth in §3212.87, subdivisions (b)(1) and (b)(2) hereinabove, subdivision 3212.87(e) states that "[a]n injury described in subdivision (b) is presumed to arise out of and in the course of employment. This presumption is disputable and may be "controverted by other evidence. Unless controverted, the appeals board is bound to find in accordance with the presumption."

12. Is an Employee who has been Terminated Entitled to Claim the Presumption? The rebuttable/disputable presumption "[s]hall be extended to a person described in subdivision (a) following termination of service for a period of 14 days, commencing with the last date actually worked in the specified capacity at the employee's place of employment as described in subdivision (b)." The rebuttable presumption of compensability only applies to dates of injury occurring on or after July 6, 2020.

13. Temporary Disability Related to Paid Sick Leave Specifically Available in Response to COVID 19: This issue is addressed in §3212.87(d). "If 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 Section 4800, 4800.5, or 4850 are due and payable**." (emphasis added).

"If an employee does not have those sick leave benefits, the employee shall be provided temporary disability benefits or Section 4800, 4800.5, or 4850 benefits, if applicable, from the date of disability." **There shall not be a waiting period for temporary disability benefits." (**emphasis added).

COMMENT: Section 3212.87(d) expressly states "paid sick leave benefits specifically available in response to COVID-19" shall be used and exhausted before temporary disability or Section LC 4800, 4800.5.or 4850 benefits are due and payable. In essence this subdivision provides that any specified employee who benefits from the rebuttable presumption of compensability must first exhaust any special COVID-19 "time off" benefits provided by federal law before workers' compensation benefits attach.

This relates to prior legislation entitled the Families First Coronavirus Response Act (FFCRA) which took effect April 1, 2020. The 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

14. Section 3212.87 Applies to All Pending Matters: Section 3212.87 applies to all pending matters, unless otherwise specified in this section, but shall not be a basis to rescind, alter, amend, or reopen any final award of workers' compensation benefits. (§3212.87(h)).

15. New Section 3212.87 has a Sunset Provision: Labor Code section 3212.87 shall remain in effect only until January 1, 2023 and as of that date is repealed, (§3212.87(j).

NEW LABOR CODE SECTION 3212.88 (effective September 17, 2020)

1. Section 3212.88 Applies to Dates of Injury On or After July 6, 2020 and on or before January 1, 2023. (§§3212.88(b)(2) and 3212.88(n)). Section 3212.88 became effective on September 17, 2020, when SB-1197 was signed by the Governor. Also Labor Code section 3212.88 shall remain in effect only until January 1, 2023 and as of that date is repealed. (§3212.88(n).

2. Which Employees are Covered by Labor Code Section 3212.88? Based on section 3212.88(a), this Labor Code section **only applies to employees who are not described in Section 3212.87**, and

a. Who test positive for COVID-19 **during** an outbreak,

b. At the employee's specific place of employment on or after July 6, 2020, and

c. Whose employer has five or more employees.

There are two critical related questions. First, what is the definition of an outbreak, and second, what constitutes an employee's "specific place of employment?

3. What Constitutes an Outbreak? An "outbreak" exists if within 14 calendar days **one** of the following occurs at a specific place of employment (§3212.88(m)(4)). Those circumstances are:

a. If the employer has 100 employees or fewer at a specific place of employment, 4 test positive for COVID-19. (§3212.88(m)(4)(A)) or,

b. If the employer has more than 100 employees at a specific place of employment, 4 percent of the number of employees who reported to the specific place of employment, test positive for COVID-19. (§3212.88(m)(4)(B)) or,

c. A specific place of employment is ordered to close by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent due to a risk of infection with COVID-19. (§3212.88(m)(4)(C))

4. When is a COVID-19 Claim Not Part of an Outbreak? Pursuant to Section 3212.88(l) "[a] claim is not part of an outbreak if it occurs during a continuous 14-day period where the requisite number of positive tests under paragraph (4) of subdivision (m) **have not been met**." (emphasis added). (see, paragraph 3 above).

5. What Constitutes or Defines an Employee's "Specific Place of Employment"? Labor Code section 3212.88(m)(3)(A) states that "[a] specific place of employment" means the building, store, facility, or agricultural field where an employee performs work at the employer's

direction. This subdivision also precisely defines what is not "a specific place of employment." It "does not include the employee's home or residence, unless the employee provides home health care services to another individual at the employee's home or residence."

6. What if an Employee Performs Work at Multiple Places of Employment? "In the case of an employee who performs work at the employer's direction in multiple places of employment within 14 days of the employee's positive test, the employee's positive test shall be counted for the purpose of determining the existence of an outbreak at **each** of those places of employment, and if an outbreak exists at **any** one of those places of employment, that shall be the employee's "specific place of employment." (§3212.88(m)(3)(B)). (emphasis added).

7. A COVID-19 "Test" or "Testing" is Specifically Defined: For purposes of §3212.88, unless otherwise indicated a "test" or "testing" means a PCR (Polymerase Chain Reaction) test approved by the United States Food and Drug Administration to detect the presence of viral RNA. "Test" or "Testing" may also include any other viral culture test approved for use or approved for emergency use by the United States Food and Drug Administration to detect the presence of viral RNA which has the same or higher sensitivity and specificity as the PCR test. **"[T]est' or "testing" does not include serologic testing, also known as antibody testing."** (§3212.88(m)(2)).(emphasis added).

COMMENT: It is important to always be aware that under section 3212.88 the operative controlling date for when an employee tests positive for COVID-19, "is the date the specimen was collected for testing" and not the date the test results are reported. (see, §§ 3212.88(i)(2) and 3212.88(b)(3)).

8. What Constitutes A COVID-19 Injury Under New Section 3212.88 and What Circumstances Trigger the Rebuttable Presumption of Compensability for a COVID-19 Injury? Pursuant to section 3212.88(b) "[t]he term "injury," as used in this division, includes illness or death resulting from COVID-19 if **all** of the following circumstances apply:

> (1) The employee tests positive for 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. (§3212.88(b)(1)).
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> (2) The day referenced in paragraph (1) on which the employee performed labor or services at the employee's place of employment at the employer's direction was on or after July 6, 2020. The date of injury shall be the last date the employee performed labor or services at the employee's place of employment at the employer's direction prior to the positive test. (§3212.88(b)(2)).
>
> (3) The employee's positive test **occurred** during a period of an outbreak at the employee's specific place of employment. (§3212.88(b)(3)). (emphasis added).

COMMENT: The term "illness or death resulting from COVID-19" as used in subdivision 3212.88(b) is extremely broad and would arguably cover illnesses or deaths known to be caused by the virus, but may arguably also relate to any underlying conditions or prior injuries that may have been aggravated or accelerated by an employee contracting COVID-19 and by any related treatment. However, under existing case law if an underlying condition, or prior injury whether symptomatic or asymptomatic before the applicant contracted COVID-19 is aggravated or accelerated, defendants would still be entitled to claim potential non-industrial apportionment of any related permanent disability pursuant to Labor Code Sections 4663 and 4664.

9. If the Rebuttable Presumption of Compensability Applies, What Workers' Compensation Benefits are Employee's Entitled To? If the rebuttable presumption of compensability applies, the compensation that is awarded for injury pursuant to this section "shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division." (§3212.88(c)).

10. Death Benefits: With respect to death benefits, §3212.88(g) specifically provides that the Department of Industrial Relations "shall" waive the right to collect any death benefit payment due pursuant to Section 4706.5 arising out of claims covered by this section. Labor Code section 4706.5 relates to payments of death benefits where there are no surviving dependents.

11. The Nature of the Rebuttable/Disputable Presumption and the Ability of a Defendant to Rebut or Controvert It: Section 3212.88(e)(1) states that "[a]n injury described in subdivision (b) is presumed to arise out of and in the course of employment except as provided in this subdivision. This presumption is disputable and may be "controverted by other evidence. Unless controverted, the appeals board is bound to find in accordance with the presumption."

The presumption "[s]hall be extended to a person described in subdivision (a) following termination of service for a period of 14 days, commencing with the last date actually worked in the specified capacity at the employee's place of employment. **This section does not affect an employee's rights to compensation for an injury or illness under this division in accordance with a preponderance of evidence."**

COMMENT: It is extremely important to always be aware that even if a COVID-19 related injury or illness does not fall under any rebuttable presumption, the employee still may have a potential right to compensation for a COVID-19 related injury or illness if they are able to prove up an exception to the general rule of non-compensability for communicable diseases by proving by a preponderance of the evidence that they suffered a "special exposure" exception where their employment may have caused an "increased risk", a "materially greater risk", or when there is a "higher probability" of the employee contracting COVID-19 than the general public. In order for an employee to establish compensability without the rebuttable presumption, an employee must prove that the risk of contracting the disease by virtue of their employment is materially greater than that of the general public.

As a consequence, every claims administrator must evaluate each alleged COVID-19 claim of injury or illness under any of the three applicable presumption statutes as well as under the general rule and related case law applicable to non-occupational communicable diseases.

12. **Relevant Evidence to Controvert the Rebuttable Presumption:** Labor Code Section 3212.88 unlike sections 3212.86 and 3212.87 actually provides some examples of relevant evidence that may be used by employers and claims administrators to controvert the presumption. "Evidence relevant to controverting the presumption may include, but is not limited to, evidence of measures in place to reduce potential transmission of COVID-19 in the employee's place of employment and evidence of an employee's nonoccupational risks of COVID-19 infection." (§3212.88(e)(2)).

13. There is Only a 45 day Investigative Period to Reject a Claim of a COVID-19 related Illness: The usual 90 day delay period for the employer and claims administrator to investigate and make a decision to reject or accept a claim of a COVID-19 after a claim form is filed pursuant to section 5401 has been reduced to 45 days. "Notwithstanding Section 5402, if liability for a claim of a COVID-19 related illness is not rejected within 45 days after the date the claim form is filed pursuant to section 5401, the illness shall be presumed compensable. **The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 45-day period." (§3212.88(f)).**

COMMENT: Subdivision 3212.88(f) expressly refers to the claim form being filed pursuant to Labor Code 5401. In actuality a claim form being "filed" in common practice means when the claim form is returned to the employer. 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 sufficient to afford opportunity to the employer to make an investigation into the facts." (Labor Code § 5402(a)).

14. **Temporary Disability Issues Related to Paid Sick Leave Specifically Available in Response to COVID 19:** This issue is addressed in §3212.88(d). "If 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, benefits under Section 4800, 4800.5, or 4850 or Section 44977, 44984, 45192, 45196, 87780, 87787, 88192, or 88196 of the Education Code are due and payable**." (emphasis added).

"If an employee does not have those sick leave benefits, the employee shall be provided temporary disability benefits or Section 4850 benefits, if applicable, from the date of disability."

There shall not be a waiting period for temporary disability benefits." (§3212.88(d)). **(**emphasis added).

COMMENT: Section 3212.88(d) expressly states "paid sick leave benefits specifically available in response to COVID-19" shall be used and exhausted before any TTD or other specifically enumerated benefits under various other sections are due and payable. In essence this subdivision provides that any employee who might benefit from the rebuttable presumption of compensability must first exhaust any special COVID-19 "time off" benefits provided by federal law before the workers' compensation benefits attach.

This relates to prior legislation entitled the Families First Coronavirus Response Act (FFCRA) which took effect April 1, 2020. The 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

15. There are Mandatory Employer Reporting Requirements to Claims Administrators When an Employee Tests Positive for COVID-19: Labor Code Sections 3212.88(i) and 3212.88(k)(2) impose strict mandatory reporting requirements by employers to their claims administrators when **any** employee tests positive for COVID-19 in order for the claims administrator to determine whether there may be a COVID-19 "outbreak." There are different reporting requirements depending on whether the employee tested positive for COVID-19 after September 17, 2020, **or** on or after July 6, 2020 and prior to September 17, 2020.

The Special Mandatory Employer Reporting Requirements to Claims Administrators When an Employee Tests Positive for COVID-19 after September 17, 2020 the Effective Date of SB-1159.

For employees testing positive for COVID-19 after September 17, 2020, Labor Code Section 3212.88(i) requires that "[w]hen the employer **knows or reasonably should know** that an employee has tested positive for COVID-19, the employer shall report to their claims administrator in writing via electronic mail or facsimile within three business days **all** of the following:

> (1) An employee has tested positive. For purposes of this reporting, the employer shall not provide any personally identifiable information regarding the employee who tested positive for COVID-19 **unless** the employee asserts the infection is work related or has filed a claim form pursuant to Section 5401. (§3212.88(i)(1)). (emphasis added).
>
> (2) The date that the employee tests positive, which is the date the specimen was collected for testing. (§3212.88(i)(2)).
>
> (3) The specific address or addresses of the employee's specific place of employment during the 14-day period preceding the date of the employee's positive test. (§3212.88(i)(3)).
>
> (4) The highest number of employees who reported to work at the employee's specific place of employment in the 45-day period preceding the last day the employee worked at each specific place of employment. (§3212.88(i)(4)).

The Special Mandatory Employer Reporting Requirements to Claims Administrators When an Employee Tests Positive for COVID-19 after July 6, 2020 and Prior to September 17, 2020 the Effective Date of SB-1159 (3212.88(k)(2): Any employer who is **aware** of an employee testing positive for COVID-19 on or after July 6, 2020 and prior to September 17, 2020, the effective date of SB-1159, shall report to their claims administrator in writing via electronic mail or facsimile within 30 business days of September 17, 2020 **all** of the following:

> (1) An employee has tested positive. For purposes of this reporting, the employer shall not provide any personally identifiable information regarding the employee who tested positive for COVID-19 **unless** the employee asserts the infection is work related or has filed a claim form pursuant to Section 5401. (see §3212.88(i)(1)). (emphasis added).

(2) The date that the employee tests positive, which is the date the specimen was collected for testing. (see §3212.88(i)(2)).

(3) The specific address or addresses of the employee's specific place of employment during the 14-day period preceding the date of the employee's positive test. (see §3212.88(i)(3)).

(4) The highest number of employees who reported to work at each of the employee's specific places of employment on any given work day between July 6, 2020, and the effective date of this section. **(effective date is 9/17/20)**

COMMENT: The purpose of imposing the special mandatory reporting requirements by the employer to the claims administrator retroactively for any employer who is aware of an employee testing positive for COVID-19 on or after July 6, 2020, and prior to September 17, 2020, is for claims administrators to meet their obligation to use the information reported by employers under this paragraph to determine if an outbreak occurred from July 6, 2020, to September 17, 2020, when SB-1159 became effective, for the purpose of applying the rebuttable presumption of compensability under this section for a COVID-19 related injury.

16. The Claims Administrator's Mandatory Duty to Use the Information Provided by the Employer Pursuant to subdivision 3212.88(i) and 3212.88(k)(2) to Determine if an Outbreak has Occurred for the Purposes of Administering a Claim Pursuant to Section 3212.88: Pursuant to subdivision 3212.88(k)(1) "[t]he claims administrator shall use information reported pursuant to subdivision (i) to determine if an outbreak has occurred for the purpose of administering a claim pursuant to this section."

There are two different formulas claims administrators are required to use to calculate the number of employees at a specific place of employment to determine if an outbreak has occurred. The first formula applies to claims after September 17, 2020 the effective date of SB-1159 and up to January 1, 2023. The second formula applies to claims between July 6, 2020 and prior to September 17, 2020 the effective date of SB-1159. The two separate specific mandatory formulas to be used by claims administrators to correctly calculate the number of employees at a specific place of employment are as follows:

a. **The Formula to be used by Claims Administrators for Claims <u>after</u> September 17, 2020 the Effective Date of SB-1159:** "To calculate the number of employees at a specific place of employment, the claims administrator **shall utilize the data reported pursuant to subdivision (i) <u>for the first employee who is part of the outbreak</u>,….."** The data reported "pursuant to subdivision (i) relates to **all** four of the mandatory employer reporting requirements discussed hereinabove under paragraph 15 discussing §3212.88(i).

(1) An employee has tested positive. For purposes of this reporting, the **employer shall not provide any personally identifiable information** regarding the employee who tested positive for COVID-19 **unless** the employee asserts the infection is work related or has filed a claim form pursuant to Section 5401. (§3212.88(i)(1)). (emphasis added).

(2) The date that the employee tests positive, which is the date the specimen was collected for testing. (§3212.88(i)(2)).

(3) The specific address or addresses of the employee's specific place of employment during the 14-day period preceding the date of the employee's positive test. (§3212.88(i)(3)).

(4) The highest number of employees who reported to work at the employee's specific place of employment in the 45-day period preceding the last day the employee worked at each specific place of employment. (§3212.88(i)(4)).

b. **The Formula to be used by Claims Administrators For Claims on or after July 6, 2020 and prior to September 17, 2020 the Effective Date of SB-1159, to Determine if an Outbreak has Occurred Involves a Mandatory Retroactive Look Back Period:** For claims on or after July 6, 2020, and prior to September 17, 2020 the effective date of this section, the formula to use to calculate the number of employees at a specific place of employment is the number reported under paragraph (2)" The reference to paragraph (2) for the correct formula to use for claims between July 6, 2020, and prior to September 17, 2020 is in subdivision 3212.88(k)(2). Subdivision 3212.88(k)(2) provides as follows:

(1) An employee has tested positive. For purposes of this reporting, the employer shall not provide any personally identifiable information regarding the employee who tested positive for COVID-19 **unless** the employee asserts the infection is work related or has filed a claim form pursuant to Section 5401. (see §3212.88(i)(1)). (emphasis added).

(2) The date that the employee tests positive, which is the date the specimen was collected for testing. (see §3212.88(i)(2)).

(3) The specific address or addresses of the employee's specific place of employment during the 14-day period preceding the date of the employee's positive test. (see §3212.88(i)(3)).

(4) The highest number of employees who reported to work at each of the employee's specific places of employment on any given work day between July 6, 2020, and the effective date of this section. (**effective date is 9/17/2020**)

Determining Whether the Employee's Positive Test Occurred During a Period of an Outbreak at the Employee's Specific Place of Employment: Once you have determined an employee's valid positive COVID-19 test specimen was taken within 14 days of the last day the employee performed labor or services at the employee's specific place or places of employment at the employer's direction then the claims administrator must also determine based on all of the COVID-19 positive test data reported by the employer, whether the requisite number of employees specified below at each of the claimant's specific place or places of employment also tested positive **based on COVID-19 test specimens taken within 14 consecutive calendar days both prior to and after the claimant's positive test date in order for there to be an outbreak and whether the claimant's positive test occurred during this outbreak period.**

NOTE: It is important to understand that the formula or method of determining the outbreak period as 14 days before and 14 days after the claimant's positive COVID-19 test is the **current** prevailing opinion of the majority of defense firms, defense attorneys, and a leading insurance industry organization. There will undoubtedly be future legal challenges related to whether a claims administrator has calculated the outbreak period correctly in any given case. As litigation on this issue evolves, there will no doubt be other theories and arguments put forth as to possible alternative methods or formulas for calculating whether the employee's positive test occurred during a period of an outbreak. For example, an argument could be made that the outbreak period should be limited to 14 day calendar days before the employee's positive test as opposed to the current more expansive 14 calendar days both before and after the claimant's positive test.

Don't forget that the claimant's positive test is included in the outbreak calculation. Most importantly the claimant's positive test must occur during a period of an outbreak (currently 14 days before and 14 days after the claimant's positive test) in order for the rebuttable presumption to apply. Based on this formula, there may potentially be multiple outbreaks at each of the employee's specific places of employment if the claimant has more than one specific place of employment for the same employer.

If all of the above criteria are satisfied an outbreak exists if any **<u>one</u>** of the following occurs:

1. If the employer has 100 employees or fewer at a specific place of employment, 4 test positive for COVID-19. (§3212.88(m)(4)(A)) **or,**

2. If the employer has more than 100 employees at a specific place of employment, 4 percent of the number of employees who reported to the specific place of employment, test positive for COVID-19. (§3212.88(m)(4)(B)) **or,**

3. A specific place of employment is ordered to close by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent due to a risk of infection with COVID-19. (§3212.88(m)(4)(C))

COMMENT: In addition to the mandatory duties of claims administrator's under 3212.88(i) and 3212.88(k)(2), it is important for claims administrators to be aware that Section 3212.88(l) imposes a separate mandatory duty upon claims administrators to continually evaluate **each** COVID-19 claim for purposes of applying the rebuttable presumption of this section. "For purposes of applying the presumption in this section, the claims administrator shall continually evaluate each claim to determine whether the requisite number of positive tests have occurred during the surrounding 14 day periods." (§3212.88(l)).

17. Section 3212.88 Applies to All Pending Matters: Section 3212.88 applies to all pending matters, unless otherwise specified in this section, but shall not be a basis to rescind, alter, amend, or reopen any final award of workers' compensation benefits. (§3212.88(h)).

POTENTIAL CIVIL PENALTIES

1. There are Potential Substantial Civil Penalties If an Employer or Person Acting on Behalf of the Employer Submits Intentionally False or Misleading Information or Fails to Submit Information When Reporting Pursuant to Section 3212.88(i): By way of an overview, Labor Code section 3212.88, subdivisions (j)(1) through (j)(4) contain provisions imposing potential substantial civil penalties based on inspections or investigations and a related citation for a violation issued by the Labor Commissioner's Office. There is also a specified administrative hearing and appeals process if a citation is contested.

a. **The Required Conduct by an Employer Necessary to Trigger the Potential Substantial Civil Penalty:** "An employer or other person acting on behalf of an employer who **intentionally** submits false **or** misleading information **or fails to submit information** when reporting pursuant to subdivision (i) is subject to a civil penalty in the amount of up to ten thousand dollars ($10,000) to be assessed by the Labor Commissioner." (§3212.88(j)). (emphasis added).

b. **The Inspection/Investigation and Written Citation Process:** If after an inspection or investigation the Labor Commissioner "determines that an employer or other person has

intentionally submitted false or misleading information in violation of subdivision (i), the Labor Commissioner may issue a citation to the person in violation."

In terms service of the citation, "it may be served personally, in the same manner as provided for service of summons as described in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure, by certified mail with return receipt requested, or by registered mail in accordance with subdivision (c) of Section 11505 of the Government Code. Each citation shall be in writing and shall describe the nature of the violation, including reference to the statutory provision alleged to have been violated." (§3212.88(j)(1)).

c. **Informal Hearings to Contest Citations or the Proposed Assessment of a Civil Penalty:** Pursuant to section 3212.88, subdivision (j)(2), if a person wants to contest a citation or civil penalty they must do so within 15 business days after service of the citation notify the office of the Labor Commissioner and request an informal hearing. Within 30 days of being notified of a request for an informal hearing, the "Labor Commissioner, or their deputy or agent shall, within 30 days, hold a hearing." At the conclusion of the hearing "the citation or proposed assessment of a civil penalty shall be affirmed, modified, or dismissed."

"The decision of the Labor Commissioner shall consist of a notice of findings, findings, and order….." "It shall be served on all parties to the hearing within 15 days after the hearing by regular or first-class mail at the last known address of the party on file with the Labor Commissioner."

"Any amount found due by the Labor Commissioner as a result of the hearing shall become due and payable 45 days after notice of the findings and written findings and order have been mailed to the party assessed."

d. **The Appeals Process:** If a party wants to appeal the decision of the Labor Commissioner they can file "[a] writ of mandate to the appropriate superior court, as long as the party agrees to pay any judgment and costs ultimately rendered by the court against the party for the assessment. The writ of mandate shall be taken within 45 days of service of the notice of findings, findings, and order….." (§3212.88(j)(2)). If the party filing a writ of mandate is unsuccessful in challenging the decision of the hearing officer, the Labor Commissioner shall recover costs and attorney fees." (§3212.88(j)(4)).

e. **What happens if an Employer or Person who has been Issued a Citation Does Not Want to Contest the Citation?** In lieu of contesting a citation issued pursuant to this section an employer or person to which a citation has been issued shall, in lieu of contesting the citation……transmit to the office of the Labor Commissioner designated

on the citation the amount specified for the violation within 15 business days after issuance of the citation. (§3212.88(j)(3)).

CAVEATS and FINAL NOTES

This White Paper on SB-1159 constitutes our preliminary analysis and is provided solely as a reference tool to be used for general 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 specific 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.

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