

# Ingber & Weinberg, LLP

## SB 1159

Chaptered 09/04/2020

By Corey Ingber

***Long awaited SB 1159 has now been “chaptered” meaning the Secretary of State has entered this as “new law.” It takes effect immediately. Here is my quick “take.”***

- 1) *The bill is rambling, complex and confusing*
- 2) *The term “disputable presumption” is not clearly defined*
- 3) *The denial of claim portions (Lab C 3212.87 at 30 days and Lab C 3212.88 at 45 days) appear to violate due process. How can an effective investigation and discovery take place, when it is unlikely a deposition or PQME will take place within those time frames? And what happens if an applicant adds body parts beyond COVID-19. Do those body parts permit 90 days to accept or deny? Not likely. This bill may be challenged for this reason alone*
- 4) *Too many triggering dates for employer reporting*

- 5) *Lab C 3212.87 and 3212.88 both trigger the presumption by testing alone without a diagnosis. So how do you get to “injury” with at COVID-19 diagnosis. And, how does the defense get to a PQME or even a consult, before the running of the 45-day period*
- 6) *A good practice tip is to assume that any COVID-19 case made either between 03/19/2020 to 07/05/2020 and 07/06/2020 to 09/03/2020 and all periods following 09/04/2020 will all be considered presumptively compensable unless you get good information for the employer as to the testing. The slightly different provisions for periods of 07/06/2020 to 09/03/2020 and post 09/04/2020 are really confusing and will cause confusion*
- 7) *I recommend setting up a good liaison with employers, in order to get the required information flow, in the event you are dealing with a potential outbreak scenario*

LABOR CODE	SUMMARY OF NEW LAW	TIME FRAMES AND DATES
------------	--------------------	-----------------------

<b>New</b> 77.8	Commission on Health and Safety and Workers’ Compensation (CHSWC) to prepare study on COVID-19 impacts on claims across all benefits and differences in the impact across occupational groups	Initial report: 12/31/2021  Final report: 04/30/2022
--------------------	---	--

<b>New</b> <b>3212.86</b>	<ul style="list-style-type: none"> <li>▪ This is the formal adoption of the Governors EO N-62-20</li> <li>▪ It takes effect immediately</li> <li>▪ It applies to all pending matters</li> <li>▪ Automatically repealed</li> <li>▪ Place of employment does not include employee’s residence</li> </ul>	01/01/2023
(b)	<ul style="list-style-type: none"> <li>▪ Injury now includes illness or death resulting from COVID-19</li> </ul>	

COVID-19 Injury	<ul style="list-style-type: none"> <li>▪ If two conditions are met: (1) employee tests positive for or was diagnosed with COVID-19 within 14 day-s after a day employee performed labor or services at the <i>employee’s place of employment at the employer’s direction</i>; and (2) The referenced day was on or after 03/19/2020 and on or before 07/05/2020. Date of injury is last date work or labor performed at employee’s place of employment at employer’s direction</li> <li>▪ Diagnosis done by MD, DO or state licensed physician assistant or nurse practitioner</li> <li>▪ Diagnosis must be confirmed by testing within 30 days of diagnosis</li> </ul>	<p>14 days 03/19/2020-07/05/2020</p> <p>30 days</p>
[c] Sick Pay TTD/4850	<ul style="list-style-type: none"> <li>▪ Exhaustion of paid sick leave prior to TTD or 4850</li> <li>▪ If no paid sick leave, TTD/4850 starts with no waiting period</li> <li>▪ Diagnosis/test on or after 05/06/2020: certified and re-certified</li> <li>▪ Diagnostic/test before 05/06/2020</li> <li>▪ TD must be certified by MD or pre-designated physician<sup>i</sup></li> </ul>	<p>15 days from diagnosis; re-certified every 15 days for first 45 days</p> <p>Certification no later than 05/21/2020; re-certify every 15 days for 45 days</p>
(e) Presumption of Injury	<ul style="list-style-type: none"> <li>▪ The injury presumption is entitled “disputable.” This presents an ambiguity. Is this a presumption affecting the burden of proof or a presumption simply requiring the presentation of any rebuttable evidence? <i>A burden of proof presumption requires defendant to essentially disprove the presumed injury with sufficient proof. The other presumption would only require defendant to produce some rebuttal evidence. We don’t know which one, but a good practice tip is to presume this is a rebuttable presumption affecting the burden of proof, so the defense is likely required to carry the burden to overcome the presumption of injury</i></li> </ul>	

(f) Denial of Claim	<ul style="list-style-type: none"> <li>▪ Claim must be accepted or rejected within 30 days or the claim becomes presumptively compensable. Here, we know that this presumption is one which affects the burden of proof<sup>ii</sup></li> </ul>	90 shrinks to 30 days
<b>New 3212.87 Presumption of COVID-19 injury across classes of employees</b>	<ul style="list-style-type: none"> <li>▪ It takes effect immediately</li> <li>▪ Applies for dates on or after: 07/06/2020</li> <li>▪ Automatically repealed:</li> <li>▪ Place of employment does not include employee’s residence</li> </ul>	On or after 07/06/2020  01/01/2023
(a) Covered Employees	<ul style="list-style-type: none"> <li>▪ This section applies to the following employees:</li> <li>▪ Active Firefighters, including paid, partly paid or volunteers</li> <li>▪ Fire Department of a city, county or municipal corporation</li> <li>▪ UC and Cal State fire depts</li> <li>▪ Dept of Forestry and Fire Protection</li> <li>▪ County forestry or firefighting unit</li> <li>▪ Firefighters serving Dept. of Defense</li> <li>▪ NASA</li> <li>▪ Firefighters providing service to commercial airports</li> <li>▪ Peace Officers</li> </ul>	

	<ul style="list-style-type: none"> <li>▪ Fire and Rescue</li> <li>▪ Fire and Rescue Coordinators</li> <li>▪ Health Facilities: Employee providing direct patient care</li> <li>▪ Health Facilities: Custodial employee in contact with a COVID-19 patient</li> <li>▪ Health Facilities: all other employees: presumption shall not apply if employer can establish employee did not have contact with a health care facility patient within the last 14 days</li> <li>▪ Registered Nurse</li> <li>▪ Emergency Tech I and II</li> <li>▪ EMT</li> <li>▪ Paramedic</li> <li>▪ Employee: provides direct patient care for a home health agency</li> <li>▪ Provider of in-home supportive services when they provide the services outside their own home or residence</li> </ul>	14 days
(b) Injury	<ul style="list-style-type: none"> <li>▪ Injury means testing positive for COVID-19 within 14 days after a day employee performed labor or services at the employee's place of employment at the direction of employer</li> <li>▪ Date of injury is last date employee performed labor or services</li> <li>▪ <i>Diagnosis of COVID-19 not required</i></li> </ul>	14 days This section also extends injury to 14 days following termination
(d)	<ul style="list-style-type: none"> <li>▪ Exhaustion of paid sick leave prior to TTD or 4850</li> </ul>	

Sick pay TTD/44850	<ul style="list-style-type: none"> <li>If no paid sick leave, TTD/4850 starts with no waiting period</li> </ul>	
(e) Presumption of injury	<ul style="list-style-type: none"> <li>Presumption of injury</li> <li>Disputable (rebuttable)</li> </ul>	
(f) Denial of claim	<ul style="list-style-type: none"> <li>Claim must be accepted or rejected within 30 days or the claim becomes presumptively compensable. Here, we know that this presumption is one which affects the burden of proof<sup>fiii</sup></li> </ul>	30 days to accept/reject
(h) Applies	<ul style="list-style-type: none"> <li>To all pending matters</li> </ul>	
(i) Type of Testing	<ul style="list-style-type: none"> <li>Testing triggers the presumption: The test is Polymerase Chain Reaction (PCR),<sup>iv</sup> which measures pieces of the viral DNA in the nose and throat, using a nasopharyngeal swab, drawing mucus from the back of the nasal cavity where it meets the throat. These tests the presence of the active virus. <i>The other type, Serologic testing is a blood test to detect the presence of anti-bodies. This is not to be utilized and presumably shall not trigger the presumption</i></li> </ul>	

<b>New 3212.88</b> (a) (b) <b>Presumption of COVID-19 injury for employees not covered under 3212.87</b>	<ul style="list-style-type: none"> <li>Covers employees: <i>who were not included in Lab C 3212.87</i>. Injury defined as those employees, who test positive for COVID-19, within 14 days after a day employee performed labor or services at the employer's direction, during an <i>outbreak</i> at the employee's specific place of employment</li> <li>Applies to employers with 5 or more employees</li> <li>Services or labor must have been at the employee's place of employment and at employer's direction, prior to the positive test</li> <li>Date of injury is last date of performed labor or services prior to the test</li> <li>Will be repealed as of:</li> </ul>	On or after 07/06/2020  14 days  5 or more employees  01/01/2023
(d)	<ul style="list-style-type: none"> <li>Exhaustion of paid sick leave and Education Code benefits, prior to TTD/4850</li> </ul>	

Sick Leave ED Code 4850 TTD	<ul style="list-style-type: none"> <li>If no paid sick leave, TTD/4850 starts at time of disability with no waiting period</li> </ul>	
(e) Presumption of injury Rebuttal	<ul style="list-style-type: none"> <li>Disputable (rebuttable) presumption</li> <li>Extended 14 days following termination following last day worked in specified capacity</li> <li>Rebuttal evidence may include but not limited to evidence of measures in place to reduce potential transmission of COVID-19 in workplace and evidence of an employee's non-occupational risks (how can this be done in 45 days?)</li> </ul>	Extends 14 days post-termination
(f) Denial of claim	<ul style="list-style-type: none"> <li>Claim must be accepted or rejected within 45 days or the claim becomes presumptively compensable</li> </ul>	45 days
(h)	<ul style="list-style-type: none"> <li>Applies to all pending matters</li> </ul>	
(i) (k) New Employer Duties	<ul style="list-style-type: none"> <li>EMPLOYER REPORT TO CLAIMS AD: <b>09/04/2020</b>: Employer must report by e-mail or fax to its Claims Administrator an employee testing positive for COVID-19 when they knew or should have known (<i>This represents the period of 09/04/2020 and after</i>)</li> <li>EMPLOYER REPORT TO CLAIMS AD: <b>between 07/06/2020 and 09/04/2020</b>: report in writing, fax or e-mail, all the data required in this section. <i>Reporting information expands to include highest number of employees who reported to each specific place of employment</i></li> <li>No personal information to be forthcoming, unless employee is asserting the infection is work related or a claim has been filed</li> <li>Report includes highest number of employees who reported to work in the 45 days proceeding the last day the employee worked</li> </ul>	<p>Within 3 business days Notice as of 09/04/2020</p> <p>Report within 30 business days</p> <p>Highest number in prior 45 days</p>
(l) False	<ul style="list-style-type: none"> <li>Failing to submit information or submitting false information may lead to a civil fine from Labor Commissioner up to \$10,000</li> </ul>	\$10,000

Misleading info.	<ul style="list-style-type: none"> <li>▪ Fine subject first to a citation and due process</li> <li>▪ Informal hearing held within 30 days</li> <li>▪ Citation can be dismissed, affirmed or modified by order. Notice to be served</li> <li>▪ Sums are due and payable after notice and findings</li> <li>▪ Commissioner’s final decision can be taken up by Writ of Mandate</li> <li>▪ Employer can choose not to contest and simply send in amount of fine</li> </ul> <p><i><b>Note:</b> The time frames for reporting to the Claims AD are triggered by actual notice or constructive notice and then anchored to the date of the testing. This will be very difficult to enforce because what is “should have known” and how can it be determined? I doubt fines will be common since there are so many variables, unless the employer simply sends in false information</i></p>	<p>15 business days to contest</p> <p>30 days</p> <p>15 days following hearing</p> <p>45 days</p> <p>45 days</p> <p>15 days</p>				
(k) Claims Administrator to determine whether outbreak has occurred	<ul style="list-style-type: none"> <li>▪ Claims AD to determine whether an outbreak occurred, using numbers from (i)</li> <li>▪ Claims AD to determine whether outbreak occurred from 07/06/2020 to 09/04/2020 for purposes of applying presumption</li> </ul> <table border="1" data-bbox="527 1013 1465 1230"> <tr> <td data-bbox="527 1013 995 1052">07/06/2020 – 09/03/2020</td> <td data-bbox="995 1013 1465 1052">09/04/2020 -</td> </tr> <tr> <td data-bbox="527 1052 995 1230">Claim not part of outbreak if occurring during continuous 14-day period where requisite number of tests not met (Claims AD to be notified within 30 business days)</td> <td data-bbox="995 1052 1465 1230">Claims AD gets report within 3 days as to highest number of employees reporting to work. Claims AD to use data from (i) to determine outbreak for claims administrative purposes</td> </tr> </table>	07/06/2020 – 09/03/2020	09/04/2020 -	Claim not part of outbreak if occurring during continuous 14-day period where requisite number of tests not met (Claims AD to be notified within 30 business days)	Claims AD gets report within 3 days as to highest number of employees reporting to work. Claims AD to use data from (i) to determine outbreak for claims administrative purposes	
07/06/2020 – 09/03/2020	09/04/2020 -					
Claim not part of outbreak if occurring during continuous 14-day period where requisite number of tests not met (Claims AD to be notified within 30 business days)	Claims AD gets report within 3 days as to highest number of employees reporting to work. Claims AD to use data from (i) to determine outbreak for claims administrative purposes					
(l) No outbreak	<ul style="list-style-type: none"> <li>▪ Claim not part of outbreak if occurs during a continuous 14-day period where the requisite number of positive tests under (4) may not have been met</li> </ul>	<p>14 days</p> <p>4 employees</p> <p>4%</p>				



(m) Tests and numbers to determine threshold of outbreak	<ul style="list-style-type: none"> <li>▪ Test means PCR not serologic</li> <li>▪ Specific place of employment means building, store, facility, or agricultural field, where employee performs work at employer’s direction</li> <li>▪ Test is counted for each of multiple places of employment. Outbreak at any place of employment shall be employee’s “specific place of employment”</li> <li>▪ Outbreak exists;</li> </ul>					
	<table border="1"> <thead> <tr> <th>Number of Employees</th> <th>Testing Positive</th> </tr> </thead> <tbody> <tr> <td>100 or few employees at specific place of employment</td> <td>4 employees test positive</td> </tr> </tbody> </table>	Number of Employees	Testing Positive	100 or few employees at specific place of employment	4 employees test positive	
	Number of Employees	Testing Positive				
100 or few employees at specific place of employment	4 employees test positive					
<ul style="list-style-type: none"> <li>▪ More than 100 employees</li> </ul>	4% test positive					

<sup>i</sup> This section does not include a DO or a chiropractor

<sup>ii</sup> According to the decision of the Court of Appeal in *S.C.I.F. v. W.C.A.B.; Welcher* (1995), the LC 5402 presumption is a presumption affecting the burden of proof rather than a presumption affecting the production of evidence. Thus, if not controverted, the presumption requires a finding of compensability. Also, where evidence regarding the reason for the lateness of a notice of denial is not discovered after the 90-day period (i.e., the testimony of a witness), it is not admissible. In addition, where the name of the witness is not included in the defendant’s mandatory settlement conference (MSC) statement or in the MSC summary, it is appropriate to exclude the testimony of that witness. (*Herlick, California Workers’ Compensation Handbook Sec. 8.26*)

<sup>iii</sup> According to the decision of the Court of Appeal in *S.C.I.F. v. W.C.A.B.; Welcher* (1995), the LC 5402 presumption is a presumption affecting the burden of proof rather than a presumption affecting the production of evidence. Thus, if not controverted, the presumption requires a finding of compensability. Also, where evidence regarding the reason for the lateness of a notice of denial is not discovered after the 90-day period (i.e., the testimony of a witness), it is not admissible. In addition, where the name of the witness is not included in the defendant’s mandatory settlement conference (MSC) statement or in the MSC summary, it is appropriate to exclude the testimony of that witness. (*Herlick, California Workers’ Compensation Handbook Sec. 8.26*)

<sup>iv</sup> Polymerase Chain Reaction Testing (PCR) is laboratory test to diagnose the [COVID-19](https://premierbiotech.com/innovation/pcr-and-serology-based-testing-explained/) infection based on viral DNA. The test involves a nasopharyngeal swab that looks like a long Q-tip and draws mucus from the back of the patient’s nasal cavity where it meets the throat. The swab is then inserted into a vial and is shipped to a laboratory where lab techs or machines use reagents to extract the viral RNA. An enzyme, Reverse Transcriptase is used to convert the RNA into DNA and the DNA is replicated many times to make it detectable <https://premierbiotech.com/innovation/pcr-and-serology-based-testing-explained/>