CARLTON FIELDS

California's COVID-19 Exposure Notification Law May Spread to Other States

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Since January 1, California businesses have been subject to ramped-up COVID-19 notification and reporting requirements under amendments to California's Occupational Safety and Health Act, which are designed principally to combat the spread of COVID-19 at work and to reduce the overall rate of infection in the state, as well as to hold employers responsible for monitoring the health and safety of their employees. The new law is temporary and is set to expire in two years, on January 1, 2023.

Although California is now the epicenter of new COVID-19 infections in the United States, numerous other states have experienced alarming upticks in deaths and new infections — which may have them eyeing emergency notification requirements like California's. At least two other states have already implemented temporary notification guidelines specifying when, how, what, and to whom information about potential on-the-job exposure to COVID-19 must be provided to workers and reported to health authorities.

Key Requirements of California's COVID-19 Exposure Notification Law

A.B. 685 amends California's Occupational Safety and Health Act specifically to prohibit employers from exposing their workers to imminent hazard due to workplace exposure to COVID-19, and to authorize Cal/OSHA to investigate and penalize noncompliance. It imposes specific notification requirements on employers that receive information about potential COVID-19 workplace exposure.

What triggers the notification requirement?

The notification requirement is triggered upon an employer's receipt of "notice of potential exposure" to COVID-19 from any one of the following sources:

- A public health official or licensed medical provider that an employee was exposed to a "qualifying individual," defined as anyone (1) with a lab-confirmed case of COVID-19; (2) with a positive COVID-19 diagnosis from a licensed health care provider; (3) subject to a COVID-19-related order to isolate; or (4) who has died due to COVID-19;
- A qualifying person or his or her personal representative ("emergency contact");
- Notification via an employer's "testing protocol" that a worker is a qualifying individual; or
- Notification from a subcontractor that one of its employees is a qualifying individual and was present on the employer's work site.

What is an employer's obligation upon receipt of notice of potential exposure?

A.B. 685 specifies that an employer must do **all** of the following within one business day of receiving notice of potential exposure:

1. Provide written notice to all employees and contract workers who were on-site with a qualifying individual during the infectious period that they may have been exposed;
2. Provide written notice to the union representatives, if any, of the affected employees;
3. Provide employees and their union representative with information about any COVID-19 benefits to which employees may be entitled by law, regulation, or company policy, including (but not limited to) workers' compensation benefits and federal, state, and/or local sick leave entitlements, as well as information about their EEO rights and retaliation protections; and
4. Notify all employees, union representatives, and subcontractors of the "disinfection and safety plan" the employer plans to implement and complete, consistent with applicable federal Centers for Disease Control and Prevention guidance.

In the case of a confirmed COVID-19 workplace outbreak, within 48 hours, employers must provide local health authorities with the names, number, occupation, and work site of all employees who are qualifying individuals, as well as the address and NAICS code of the establishment where the employees work. An "outbreak" for these purposes is defined as "three or more laboratory-confirmed cases of COVID-19 among employees who live in different households within a two-week period."

Finally, A.B. 685 prohibits retaliation against any worker for "disclosing a positive COVID-19 test or diagnosis or order to quarantine or isolate."

We May Soon See Similar Action by Other States

As noted, several states have implemented interim emergency procedures outlining specific steps employers are expected to take in protecting workers from safety and health risks stemming from COVID-19. In July, for instance, the Virginia Occupational Safety and Health Program issued an emergency COVID-19 temporary standard imposing a 24-hour worker notification requirement, as well as obligations to report positive cases to both the Virginia Department of Health and the Department of Labor and Industry The state has set up an online COVID-19 exposure reporting portal for this purpose.

Likewise, Oregon's OSHA temporary COVID-19 rule, which took effect on November 16, 2020, contains a 24-hour employee exposure notification requirement; the agency has published a model policy that employers may use for notifying employees of cases of confirmed COVID-19 infection at their work site. Oregon's temporary rule is poised to sunset on May 4, 2021, although it could be extended in the future. Of note, Virginia's measure was set to expire this month, but on January 13, 2021, Virginia's Safety and Health Codes Board voted to make the COVID-19 protections permanent. If and when approved by the governor's office, it will be the first permanent COVID-19 workplace rule in the nation.

Early into the pandemic, Cal/OSHA implemented emergency COVID-19 rules like those described above and published a model policy (among other resources) that contains an employee exposure notification checklist. The state effectively expanded upon and codified those requirements with the enactment of A.B. 685 in September, which went into effect on January 1.

To the extent that other state legislatures may be contemplating the enactment of stricter laws aimed to increase employer reporting requirements — and penalties for noncompliance — California's may serve as a ready roadmap and also provides employers with a heads-up as to what may be coming down the pike.

Tips for Staying Ahead of Rapidly Changing State and Local COVID-19 Requirements

Information about COVID-19 infection and the availability and efficacy of vaccines continues to evolve rapidly, as do efforts by federal, state, and local authorities to control and contain its health and economic impacts. It may be that other states soon follow California's lead in imposing strict reporting and notification requirements on employers, for which failure to comply can result in stiff monetary and non-monetary penalties and consequences.

So, how can employers position themselves now to avoid potential COVID-19 compliance challenges in the future?

- **Ensure you are aware of any existing COVID-19-related temporary orders issued by safety and health authorities that may apply to your business.** Many state and local health agencies have made extensive information available on their websites, and it is wise to check regularly for updates.

- **Train managers and supervisors on the business's obligations under any worker notification and reporting rule, including the timing, required content, and reporting mechanism.** For example, A.B. 685 specifies that notice may be provided using the employer's ordinary means of communicating with employees — such as by "personal service," text, or email — provided the notice reasonably can be expected to reach the affected employees within one business day. The California law also requires that the notice be provided in English, *as well as* the language "understood by the majority of the employees."

- **Monitor for updates, developments, and new requirements.** Most states have taken a multi-pronged approach to combat COVID-19 — which may mean rapid-fire guidance from several different agencies and authorities. For example, on November 30, 2020 — after A.B. 685 was signed into law — Cal/OSHA imposed on virtually all California employers additional obligations for identifying, evaluating, and significantly reducing COVID-19 occupational safety risks at their work sites. Of note, Cal/OSHA published new FAQ on the emergency temporary standard on January 8, 2021.

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