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AB 685 and COVID-19 Workplace Exposure: New California Notice and Reporting Requirements of COVID Exposure Starting January 1, 2021

SUMMARY

Effective January 1, 2021, a new California law requires employers to notify employees about possible or known exposure to COVID-19 at the workplace. The law requires actual notification to employees within one day.

In addition, the law requires notifications to local public health authorities of a COVID-19 outbreak. The law also gives Cal/OSHA a new emergency police power to issue Orders Prohibiting Use (“OPU”), permitting Cal/OSHA to close workplaces that constitute an imminent hazard to employees due to COVID-19.

ANALYSIS AND GUIDANCE

On January 1, 2021, a new California law took effect, which will enforce stringent new mandatory protocols governing notification of employees of COVID-19 exposures in the workplace. Until now, federal agencies such as the Occupational Safety and Health Administration (“OSHA”) and state agencies such as the California Division of Occupational Safety and Health Administration (“Cal/OSHA”) have released guidance to help employers navigate employee training, workplace surveillance and temperature-taking, among many other issues, that have arisen during the COVID-19 pandemic. Beginning January 1st, the new law places mandatory notice requirements of COVID-19 contact on all public and private employers under Labor Code Section 6409.6, with two exceptions: (1) health facilities, as defined in Section 1250 of the Health and Safety Code and (2) employees whose regular duties include COVID-19 testing or screening, or who provide patient care to individuals who are known or suspected to have COVID-19.

Throughout 2020, organizations and governments around the world have been wrestling with the uncertainty and challenges created by the coronavirus pandemic. One such challenge has been determining how and when employers should communicate with their employees when individuals in the workplace test positive for COVID-19. This new law aims to clarify these notice requirements for employers to reduce confusion and establish better workplace safety protocols.

Just over four months ago, on September 17, 2020, California Governor Gavin Newsom signed Assembly Bill (“AB”) No. 685¹, expanding and improving the ability of Cal/OSHA to track COVID-19 cases in the workplace. AB 685 establishes new protocols that are triggered by two types of events: (1) a positive confirmed case and/or (2) an outbreak. AB 685 also enhances Cal/OSHA’s ability to issue citations for noncompliance with these mandatory protocols – clients, particularly construction contractors, working in California should therefore be aware of these new changes as soon as possible in order to prepare for their implementation.

¹ AB 685 amends Labor Code Sections 6325 and 6432 and adds Section 6409.6.



Notification of a Positive Confirmed Case

WHEN IS THE NOTICE REQUIREMENT TRIGGERED?

An employer is required to provide written notice when a “qualifying individual” may have exposed the workplace to COVID-19. A “qualifying individual” is any person who falls within one of the following categories: (a) a laboratory-confirmed case of COVID-19, (b) a positive COVID-19 diagnosis from a licensed health care provider, (c) a COVID-19 related isolation order issued by a public health official or (d) death due to COVID-19 as determined by the County public health department.

An employer may receive notice of a potential exposure directly from the employee, from a public health official or medical provider, from the administrators of the employer’s COVID-19 testing protocol or from the employee’s employer. In particular, notice may come from a subcontractor regarding one of its employees.

WHEN IS NOTICE REQUIRED?

An employer who receives notice of a potential exposure must provide written notice within one business day to all employees at the same worksite as the infected person who worked during the infectious period.²

WHICH EMPLOYEES MUST RECEIVE THE NOTICE?

Section 6409.6 is ambiguous as to whether it intends for the employer to notify more than one category of employee within one business day after receiving notice of a qualifying individual potentially having exposed the worksite to COVID-19. It is also unfortunate that Section 6409.6 is not clear if a company acting like a general contractor or construction manager on a construction project has a duty to notify employees of subcontractors, probably because the law was not written for the construction industry, but rather, all industries. We address our advice to general contractors and construction managers below.

The following categories of employees are referenced by the new law:

- (1) Notice must be given to all employees on-site at the same worksite during the “infectious period”, as defined by the California Department of Public Health. Section 6409.6 defines “worksite” as the “building, store, facility, agricultural field, or other location where a worker worked during the infectious period.” The term “worksite” does not apply to buildings, floors, or other locations of the employer that a qualified individual did not enter. In a multiworksite environment, the employer need only notify employees who were at the same worksite as the qualified individual.
- (2) Notice must be given to all employees who may have been exposed and to their exclusive representative. “Exclusive representative” refers to an employee’s union, if the employee is unionized. Although not explicitly stated, Section 6409.6 presumably intends this category of employees to be the same category referred to immediately above.

² The “infectious period” is defined as beginning two days before the first development of symptoms and ending after all the following have been satisfied: ten days have passed since symptoms first appeared; twenty-four hours without a fever; and other symptoms have improved. For asymptomatic individuals who tested positive, the infectious period begins two days before the specimen for their first positive COVID-19 test was taken and ends two days after the COVID-19-positive specimen was collected.



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(3) Notice must be given to all employees, their exclusive representative and employers of subcontracted employees. Section 6409.6 does not clarify whether this section means all employees or those were on-site at the same worksite during the infectious period and/or who may have been exposed (if those two categories are distinct). The employer must notify this category of employees of “the disinfection and safety plan that the employer plans to implement and complete per the guidelines” issued by the U.S. Centers for Disease Control and Prevention (“CDC”). As stated above, particularly in the context of the construction industry and the existence of general contractors, construction managers and multiple trade subcontractors, the party receiving notice of exposure should consider being over-inclusive in providing notification. For example, *in addition to notifying the subcontractor-employers of employees who are entitled to notice, it is our recommendation that general contractors and construction managers make good faith efforts to distribute their written notification of a potential exposure to all individuals on the job site during the infectious period and/or any individuals who may have been exposed to the qualified individual. That extra effort should meet the requirements of this new law.*

WHAT MUST THE NOTICE SAY?

In addition to notice of the potential exposure, the notice must be in writing, and in the manner in which the employer usually communicates with employees about employment-related information. That said, the notice must be given such that the information is “anticipated to be received by the employee within one business day.” The employer may communicate the notice by email, text message or by handing it to each employee. The notice must be in both English and the language that a majority of the workforce understands.

Notification of an Outbreak to Local Public Health Agencies

In the event of a COVID-19 outbreak³ as defined in AB 685, Section 6409.6(b) requires an employer to notify local public health agencies in the jurisdiction of the worksite within forty-eight hours after becoming aware of a such outbreak. Pursuant to the new law, the notification to the public health agencies must include the following information for the employees who tested positive for COVID-19 or for those employees under COVID-19 isolation orders: name, phone number, occupation, and worksite location. In addition to the foregoing, contractors must also report the business address and the North American Industry Classification System (“NAICS”) code of the worksite where the infected or quarantined individuals work. AB 685 categorizes outbreak notifications as an ongoing process, meaning the contractor is required to update the public health agencies of new infections.

Orders Prohibiting Use (“OPU”)

AB 685 also gives Cal/OSHA a new emergency police power to issue Orders Prohibiting Use (“OPU”). AB 685 amends Labor Code Section 6325 to permit Cal/OSHA to close workplaces that constitute an imminent hazard to employees due to COVID-19 without the normal due process requirements of a notice and a hearing if Cal/OSHA determines that the workplace poses a risk of an “imminent hazard.” The closure of a workplace must be limited to the immediate area that the “imminent hazard exists,” and Cal/OSHA cannot prohibit entry to any areas outside of the designated hazard area. In addition, Cal/OSHA must post a notice

³ The California Department of Public Health defines an “outbreak” in non-healthcare or non-residential congregate setting workplaces as three or more laboratory-confirmed cases of COVID-19 among employees who live in different households within a two-week period.



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in a conspicuous place at the place of employment upon issuance of an OPU. Entry to the workplace must still be permitted for purposes of eliminating the dangerous condition. This provision remains in effect until January 1, 2023. AB 685 authorizes Cal/OSHA to cite or fine employers for serious violations related to COVID-19 without having to provide the requisite 15-days' notice and authorizes Cal/OSHA to cite or fine employers for violations of AB 685 worker notification provisions detailed above. Since there are statutes of limitations for appealing a citation, it is advisable to retain counsel in the event a contractor receives such a citation.

PREPARING TO COMPLY WITH THE NEW LAW

Given the number of new requirements AB 685 adds on California employers, it is imperative that employers have their employee notice process in place in advance. P&A will continue to keep our clients and friends of the firm informed regarding the status of the implementation of AB 685, and prepare updates as may become necessary.

The information provided in this Client Alert does not, nor is it intended to, constitute legal advice. Readers should not take or refrain from taking any action based on any information contained in this Client Alert without first seeking legal advice.

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