Workers' Compensation: Key COVID-19 Issues

A Practical Guidance® Practice Note by
Brenna E. Hampton and Kelsey L. Paddock, Hanna Brophy LLP

Brenna E. Hampton
Hanna Brophy LLP

Kelsey L. Paddock
Hanna Brophy LLP

This practice note provides guidance on how COVID-19 affects workers' compensation claims now and in the future. Among other things, the practice note provides guidance on whether employees will be able to claim that the workers' compensation bar does not preclude their claims in court and discusses how employers can prevent workers' compensation claims during the coronavirus pandemic and after it subsides. Note that the term "employers," as often used below, should be broadly construed in most cases to include employers and their agents, third-party administrators, and insurance carriers.

In particular, this practice note addresses the following COVID-19 issues related to workers' compensation:

- Workers' Compensation Exclusive Remedy and COVID-19
- Federal, State, and Local Employee Safety Mandates during COVID-19
- COVID-19 State Executive Orders and Emergency Legislation
- How Can Employers Prevent Workers' Compensation Claims Related to COVID-19?
- Temporary Disability Indemnity – A California Perspective
- Increased Legal Spend Related to Formal Worker Safety Measures

For additional workers' compensation practice resources, including state-specific practice notes, see Workers' Compensation State Practice Notes Chart, Workers' Compensation for Private Employers, and Workers' Compensation Costs Management Checklist.

For more guidance for preparing and responding to pandemic diseases, whether the coronavirus (COVID-19) or other widespread illnesses, see Pandemic Flu/Influenza/Coronavirus (COVID-19): Key Employment Law Issues, Prevention, and Response and Pandemic Flu/Influenza/Coronavirus (COVID-19) Prevention and Response Checklist (Best Practices for Employers). For guidance on emergency planning and business continuity plans (including such planning for COVID-19), see Business Continuity and Emergency Planning. For an annotated business continuity plan, see Business Continuity Plan.

For more guidance on a wide variety of COVID-19 legal issues, see Coronavirus (COVID-19) Resource Kit. For a resource kit focused on employees returning to work and broken up by key employment law topics, see Coronavirus (COVID-19) Resource Kit: Return to Work. For tracking of key federal, state, and local COVID-19-related Labor & Employment legal developments, see Coronavirus (COVID-19) Federal and State Employment Law Tracker. Also see state and federal COVID-19 legislative, regulatory, and executive order updates from State Net, which are available here. For tracking of key federal, state, and local Labor & Employment non-coronavirus legal developments, see Labor & Employment Key Legal Development Tracker.

For articles on COVID-19 and the workplace by Castle Publications, as published on Practical Guidance, see Returning to Work during and after COVID-19, CDC Guidance and the Return to Work during COVID-19, Wage and Hour Obligations for California Employers during COVID-19, Wage and Hour Obligations for New York Employers during COVID-19, and Leaves of Absence under Federal Law before and after the Families First Coronavirus Response Act (FFCRA).

Workers' Compensation Exclusive Remedy and COVID-19

In the era of COVID-19, employers are faced with the specter of drastic increases in employee lawsuits for claims relating to the pandemic. While these lawsuits are to some extent unavoidable, employers may be shielded from some liability due to the statutory framework of the workers' compensation system.

The workers' compensation system in the United States is premised upon a bargain between employers and their employees that allows injured employees to receive benefits regardless of fault if they are injured due to their work, in exchange for employers being insulated from civil liability and the significant damages that may be awarded in the civil system.

All 50 states have statutory schemes in effect that create workers' compensation systems and provide for workers' compensation benefits as the exclusive remedy for work-related injuries, with some limitations and exceptions. Although the statutory framework may differ from state to state, the uniform role of this exclusive remedy rule is both to protect employers from potentially limitless tort liability for the industrial injuries of its employees and to expedite the delivery of benefits to injured employees while lessening their burden of proof.

For state laws on workers' compensation, see Workers' Compensation State Practice Notes Chart.

California Example

As the California Supreme Court described it, the main purposes of the workers' compensation system are

> to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society, to guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production, to spur increased industrial safety, and in return, to insulate the employer from tort liability for his employee's injuries.

S. G. Borello & Sons, Inc. v. Department of Industrial Relations, 48 Cal. 3d 341, 354 (1989).

While the exclusive remedy rule serves to bar employees from seeking damages through civil litigation for work-related injuries, there are limited exceptions that have been created both statutorily and through case law that may allow civil recovery outside the workers' compensation system. These exceptions may provide loopholes that could allow employees to seek civil remedies for damages incurred in connection with COVID-19 claims, either through individual lawsuits or class action claims.

For example, California, Labor Code Sections 3602(b), 3706, and 4558 allow injured employees or, in the case of an industrially caused death, their dependents, to seek civil damages where:

- The injury or death is caused by a willful physical assault by the employer
- The employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment
- The employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person
- The employer fails to secure the payment of compensation –or–
- The employee's injury results from the employer's knowing removal or failure to install a point-of-operation guard on a power press

Cal. Lab. Code §§ 3602(b), 3706, 4558. Further, even in cases where one of the statutory exceptions does not apply, an injured employee may have the right to sue his or her employer in civil court if the injury was caused by "intentional employer conduct which brings the employer beyond the boundaries of the compensation bargain." Fermino v. Fedco, Inc., 7 Cal. 4th 701, 714 (1994).

In such cases, application of the exclusive remedy rule will turn on whether the acts performed by the employer could be construed as a normal aspect of the employment relationship. If the answer is no, civil remedies may be available to the injured employee.

Potential Exceptions to the Exclusive Remedy Rule Involving COVID-19

In terms of injury claims due to COVID-19 that employees may make against their employers, the exclusive remedy rule will likely insulate many employers from exponentially higher liability than would otherwise be available through civil remedies. While many of the exceptions outlined above are inapplicable to cases involving COVID-19, it is possible that the exclusive remedy rule may not apply if the employer engages in conduct that serves to fraudulently conceal the existence of the injury or its connection with the employment.

Consider a hypothetical scenario where an employer becomes aware that multiple employees have tested positive for COVID-19, but those employees continue showing up to work. Assuming that the employees work in conditions that are likely to lead to transmission of COVID-19, if the employer intentionally conceals the positive test results from other employees and allows the employees who have tested positive to keep working, is the employer's conduct sufficient to rise to the level of fraudulent concealment?

It is unclear whether this conduct, which would certainly be considered intentional and even malicious, in and of itself rises to the level necessary to allow an employee to pursue civil remedies against the employer. Cases predating the COVID-19 pandemic suggest that the employee may need to show concealment of knowledge of the employee actually contracting the disease, which is more than showing concealment of mere exposure. See Rodriguez v. United Airlines, Inc. 5 F. Supp. 3d 1131, 1138–39 (N.D. Cal. 2013).

Generally, courts are wary of undermining the exclusive remedy doctrine for fear that it will open the floodgates to allow injured employees to pursue an action at law for damages for any misconduct of an employer which may be characterized as intentional. For this reason, the bar will likely be set high regarding what an employee must prove to pursue civil remedies against his or her employer for injuries involving COVID-19. These cases will likely be highly fact-specific and will turn on evidence not only of the employer's knowledge and conduct, but on the medical evidence regarding transmission of COVID-19 and the extent of aggravation of the employee's individual symptoms and disability that is caused by the employer's misconduct.

The strength of the Exclusive Remedy doctrine was tried and resulted in a finding that the minor son (via guardian ad litem) of a restaurant worker who died while driving home from work in an intoxicated state was barred from pursuing benefits outside the workers' compensation system. In granting summary judgment for the restaurant employer, the court stated in an unpublished opinion:

> The evidence, viewed in the light most favorable to G.S., shows that Contreras Curiel allowed and encouraged its servers to consume alcohol with customers during their shifts. While this conduct may have been reckless and appears to violate state alcoholic beverage regulations, it is akin to other conduct that creates or exacerbates workplace hazards. It is not the type of intentional tort or criminal act that removes an employer's conduct from the scope of workers' compensation exclusivity.

Contreras Curiel Corp. v. Superior Court, 2020 Cal. App. Unpub. LEXIS 6011, at *3 (Sept. 17, 2020).

Federal, State, and Local Employee Safety Mandates during COVID-19

Employers should also be wary of federal, state, and local mandates regarding employee safety during the COVID-19 pandemic. Many government agencies, such as Occupational Safety and Health Administration (OSHA), have posted recommendations regarding screening employees, cleaning and sanitizing the workplace, providing personal protective equipment, and otherwise protecting employees from exposure to other individuals who may or may not exhibit symptoms of the disease. Compliance with the standards of care promulgated by these regulatory agencies may serve as evidence to avoid negligence suits and otherwise keep claims confined to the workers' compensation arena.

Additionally, even where employees initiate claims in the workers' compensation system, employers should take care in their handling of those claims so as not to inadvertently open the door to civil exposure. For example, if an employer was to deny a claim on the grounds that COVID-19 generally is a condition not covered by workers' compensation, that may allow the employee to pursue civil remedies for damages sustained due to COVID-19 as an alternative to workers' compensation benefits. Employers may be better served by approaching each claim on a case-by-case basis to determine whether each employee has satisfied their burden to prove that the injury arose out of and in the course of employment, while maintaining jurisdiction at the Workers' Compensation Appeals Board.

On the whole, the workers' compensation system will likely cover the vast majority of COVID-19 claims that employees

raise relating to their employment. Nonetheless, employers should be diligent in their approach towards protecting their employees and complying with applicable rules and regulations to insulate themselves from potential liability.

For more information on OSHA and other key health and safety issues during the coronavirus pandemic, see Pandemic Flu/Influenza/Coronavirus (COVID-19): Key Employment Law Issues, Prevention, and Response and Pandemic Flu/Influenza/Coronavirus (COVID-19) Prevention and Response Checklist (Best Practices for Employers). Also see Coronavirus (COVID-19) Federal and State Employment Law Tracker.

For more guidance on key OSH Act legal issues, generally, see OSH Act Requirements, Inspections, Citations, and Defenses. For information on state laws on occupational safety and health plan laws, see Occupational Safety and Health Plan State Law Survey.

COVID-19 State Executive Orders and Emergency Legislation

Several states have executive orders in place related to COVID-19. Most governors are afforded broad powers during a state of emergency. In California, for example, California Government Code Section 8571 permits the Governor to suspend "any regulatory statute, or statute prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency . . . where the Governor determines and declared that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency." Cal. Gov't Code § 8571.

Executive orders are subject to judicial review and may be overturned if the order lacks support by statute or the Constitution. For state by state information on the power of governors to issue executive orders, see "Gubernatorial Executive Orders: Authorization, Provisions, Procedures" (Table 4.5, *The Book of the States 2019*, source: The Council of State Governments).

In addition to state-based executive orders, many states are considering emergency legislation on COVID-19 to enact permanent rules enumerating workers' rights and employer responsibilities.

The inherent philosophy underlying state executive orders and federal rules enhancing employee benefits may be indicative of a larger zeitgeist of increasing employer accountability and preemptive responsibility for the welfare of employees amid a global pandemic. Existing workers' compensation laws tend to be more reactive in nature (i.e., a person gets injured and then the employer or its insurance carrier must investigate and mitigate the damages). More recently, there has been a palpable, observable shift in public support for the executive branches of government to impose greater responsibilities along with the legal and financial privileges that accompany a corporation's "personhood." Given this shift, employers and their legal representatives may also need to shift their focus to prevention rather than reaction.

California SB 1159 (September 17, 2020)

In California, Governor Newsome signed SB 1159 into law on September 17, 2020 and it creates three presumptions. One of the three (Section 2 creating LC 3212.86) expressly codifies the May 6, 2020 Executive Order (N-62-20). This leaves no doubt that dates of injury previously covered by the Executive Order are now covered by statute. Codification of the terms of the Executive Order by the California Legislature likely render moot litigation over the constitutionality of the Executive Order. Section 3 (creating LC 3212.87) applies to certain safety officers and certain healthcare workers who have direct contact with COVID-19 patients as well as custodians at health facilities that have contact with COVID-19. Section 4 (creating LC 3212.88) is known as the "Outbreak" presumption and requires claims administrators to aggregate information reported to them (by mandate of the new law and punishable by the Labor Commissioner) by the employer to determine if an employee's claim arose due to an outbreak at the specific place of employment. This bill has teeth and the defense community had better be paying attention.

How Can Employers Prevent Workers' Compensation Claims Related to COVID-19?

The most significant potential workers' compensations issues relating to COVID-19 include injuries arising out of and in the course of employment, medical treatment, temporary disability, and in some cases death benefits. The issue of permanent disability is not likely to be a major issue, given that many individuals who have contracted COVID-19 appear to make a full recovery, but it is possible, particularly if an employee gets pneumonia as a part of contracting COVID-19 or has sustained a severe reaction while being hospitalized such as a stroke or heart attack. The injured worker's ability to seek benefits for secondary

(compensable consequence) injuries may also give rise to additional liability depending on each individual state's laws governing the ability to recover benefits for such injuries. See Workers' Compensation State Practice Notes Chart and Workers' Compensation for Private Employers.

Best Practices to Reduce Workers' Compensation Liability

Leaving aside for a moment how an employer can possibly stay on top of a moving target like COVID-19, there are measures employers can take to reduce workers' compensation liability. Preventing workers' compensation claims during a pandemic while the workforce psychology is fearful and litigious may not be entirely possible, but you should counsel employers to:

- Implement clear and current policies
- Conduct prompt investigation consistent with your state's imposed duty to investigate with due diligence
- Communicate honestly and openly with your advisors and insurance carriers –and–
- Take necessary precautions before injuries happen to mitigate exposure when employees eventually file claims

Alternative Workplace Models

At the worksite, employers should strongly consider taking practical steps to create alternative workplace models with staggered shifts or remote staff to reduce the potential for employee-to- employee spread of the virus. This may require employers to invest in more efficient communications infrastructure such as videoconference systems and improve procedures for management of and reporting from remote workers.

For practical guidance on telework, see Telecommuting Employees: Best Practices Checklist. For an annotated teleworking agreement, see Telecommuting Agreement. For information on alternative scheduling policies, see Flexible Work Schedule Policy.

Review CDC and State and Federal OSHA Guidelines

Employers should adhere to Center for Disease Control (CDC) and state and federal OSHA guidelines, as well as basic, common sense principles of cleanliness. Taking into consideration differences in generational perspectives, employers should consider delivering an overall message that encourages personal responsibility of the employees as a key way to mitigate the risk of injury in the workplace.

For guidance on CDC workplace guidelines during the coronavirus, see CDC Guidance and the Return to Work during COVID-19.

For more guidance on key OSH Act legal issues, see OSH Act Requirements, Inspections, Citations, and Defenses. For information on state laws on occupational safety and health plan laws, see Occupational Safety and Health Plan State Law Survey.

Maintain Compliance with OSHA Recordkeeping Requirements and OSHA Guidelines

From an evidentiary perspective, employers should:

- Remain OSHA-compliant
- Document all employer directives to the workforce (e.g., related to ordering employees to work remotely)
- Conduct regular safety meetings –and–
- Track all reported claims of COVID-19 among their employees and at their worksite (e.g., vendors who may travel onto the worksite)

For guidance on OSH Act recordkeeping requirements, see OSH Act Recordkeeping and Reporting Requirements Checklist. Also see OSH Act Requirements, Inspections, Citations, and Defenses.

In addition, California employers should maintain a current Injury and Illness Prevention Program (IIPP) and related compliance records. See Cal/OSH Act: Compliance Requirements and Workplace Safety and Health (CA).

Create Clear and Strict Social Distancing and Mask-Wearing Policies

With so many COVID-19 cases arising from asymptomatic individuals, employers cannot afford to take anything for granted and would be well-served to focus on preventative physical distancing measures with strict mask-wearing policies in common areas. These policies should be simple, easy to understand, and clearly communicated to employees in writing. In addition to providing evidence in case of future litigation, having a clear policy will likely increase employee confidence, leading to fewer fear-based filings and workers' compensation claims.

Temporary Disability Indemnity – A California Perspective

Once state and federal supplemental sick leave laws related to COVID-19 expire, industrially injured workers are entitled

to temporary disability indemnity benefits. The right of injured workers to receive temporary disability indemnity is codified in California, with the general provision that employees may receive two-thirds of their average weekly wage at the time of injury, subject to statutory limitations, during periods when they are unable to work due to their industrial injuries. See Cal. Lab. Code § 4653.

COVID-19 Cases

According to the CDC, the overall cumulative COVID-19 hospitalization rate is 113.6 per 100,000, with the highest rates in people aged 65 years and older (321.8 per 100,000) and 50–64 years (171.8 per 100,000). See CDC COVIDView. The majority of COVID-19 workers' compensation claims among an otherwise healthy, young population are going to result in minimal time off work. In addition, approximately 25% of COVID cases involve placement of a ventilator with indefinite periods of care required.

In COVID-19 cases, California Executive Order (N-62-20) allowed for payment of temporary disability indemnity benefits subject to certification every 15 days for the first 45 days following diagnosis. The California Executive Order makes clear that all supplemental leave available due to COVID-19 must be exhausted before temporary disability benefits or California Labor Code Section 4850 (the safety officer equivalent) benefits become due. The subsequently enacted SB 1159, addressed above in the subsection entitled California SB 1159 (September 17, 2020), maintains this provision, even while AB 1867 continues where the CARES Act left off to create ongoing rights for some employees to supplemental sick leave. However, this supplemental sick leave is generally maxed out at 80 hours for qualifying employees, with fewer hours for part-time workers. Thus, many employees who are unable to work due to COVID-19 are going to be filing claims for the basic reason that they want their time off work compensated.

SB 1159 is consistent with existing law that supports the notion that workers' compensation is not necessarily the first source of benefits. In fact, California Labor Code Section 4654 indicates that the employer's liability for temporary partial disability will be reduced by the sum of unemployment compensation benefits and extended duration benefits received by the employee during the period of temporary partial disability. If those same employees are also eligible for enhanced COVID-19 unemployment benefits, it would seem that Labor Code Section 4654 could also be applied if an employer becomes obligated to pay temporary partial disability benefits for an overlapping period at a later date.

How Do Employers and Insurers Protect Themselves?

For some employers, the easy answer is pay benefits now and seek a credit later if it turns out such benefits were not owed. For other employers—likely driven by their own financial insecurities or doubt as to the veracity of claims for a condition that science does not yet fully understand—the simplest course is to deny benefits now and address resolution and evade penalties later based on the uncertainty caused by the pandemic.

What if an employer denied one employee modified work while everyone else continued working? In that case, temporary disability indemnity is more likely owed. Was the entire business shut down due to COVID-19? In that case, there is a stronger argument to deny benefits if the shutdown is the only reason that modified duties are not available. See Manpower Temporary Services v. Workers' Comp. Appeals Bd. (Rodriguez), 71 Cal. Comp. Cases 1614 (2006); Bedoya Ashley Furniture Industries, 2018 Cal. Wrk. Comp. PD. Lexis 396 (2018); Gonzales v. Workers' Comp. Appeals Bd., 68 Cal. App. 4th 843 (1998).

The California Supreme Court has explained that the workers' compensation system was created on the philosophy that an employer's cost of doing business includes "the care and rehabilitation of workers disabled by work injuries." Department of Rehabilitation/State of California v. WCAB, Lauher, 68 Cal. Comp. Cases 831 (2003) (citations omitted). In short, it explained that employers—not the government—should bear the burden of the injuries caused by their own operations. Although the extent of that burden has been interpreted in different ways, there is consistently a logical nexus between a work injury and the resulting benefits due.

Some legal precedent indicates that if temporary disability indemnity would not be due without the pandemic, it does not become due **because** of it. Courts have held that if an injured worker cannot work due to factors that would exist despite the industrial injury, such as inclement weather or refusal to cross a picket line, workers' compensation benefits are not due. See, e.g., Hulbert v. Allied Painters and Decorators, SCIF, 10 Cal. Comp. Cases 251 (1945); Seale v. WCAB, Shell Oil Co., 39 Cal. Comp. Cases 676 (1974) (writ denied).

Similarly, COVID-19 and the effects of related preventative measures would exist absent any workplace injuries. If work is not available because of it, both formerly injured workers and their uninjured colleagues should be directed to the state's unemployment benefits. Ratto v. Amador Lumber Co., SCIF, 12 Cal. Comp. Cases 2 (1946); Bullock's Inc. v.

Ind. Acc. Comm., 16 Cal. Comp. Cases 253 (1951); Hulbert v. Allied Painters and Decorators, SCIF, 10 Cal. Comp. Cases 251 (1945); Seale v. WCAB, Shell Oil Co., 39 Cal. Comp. Cases 676 (1974) (writ denied); Cal. Lab. Code § 3202.

Temporary Disability Benefits: Corona v. Cal. Walls (September 25, 2020)

There has been a consistent trend towards liberal construction, reinforcing the notion that if an employee's disabling condition is a component in their inability to work and the employer is unable for any reason to provide modified duties, then the employer will owe temporary disability benefits. See Corona v. Cal. Walls, 2020 Cal. Wrk. Comp. P.D. LEXIS 256 (Sept. 25, 2020). See also California: Applicant Entitled to Payment of TTD Benefits During COVID-19 Stay-at-Home Orders. The California Workers' Compensation Appeals Board in Corona stated: "Here, applicant was temporarily disabled due to an industrial injury and there is no misconduct on the part of applicant to justify the termination of temporary disability benefits. Therefore, applicant is entitled to temporary disability benefits regardless of whether defendant is able to provide modified work. That defendant is not able to release itself from paying temporary disability benefits because of its inability to provide modified work is inconsequential." Corona v. Cal. Walls, 2020 Cal. Wrk. Comp. P.D. LEXIS 256, at *9–10.

The decision in *Corona* is strongly oriented towards enforcing employer liability for temporary disability when the injured worker is unable to find modified duties elsewhere. The Appeals Board specifically identified that the injured workers' "termination from employment was not for cause, or due to his own misconduct, but was due to COVID-19 shelter-in-place orders." Corona v. Cal. Walls, 2020 Cal. Wrk. Comp. P.D. LEXIS 256, at *9. The court addressed concerns of the defense, which argued in line with the *Seale* case (cited above) by noting "The fact that it was impossible for defendant to offer modified duties to applicant because of the COVID-19 orders is inconsequential." Id. It analogized to the holding in Dennis v. State of California. 85 Cal. Comp. Cases 389 (W.C.A.B. April 30, 2020), wherein the Appeals Board held *en banc* that an employer's inability to offer regular, modified, or alternative work does not release an employer from its obligation to provide a supplemental job displacement benefits voucher.

Corona is ripe for further appeal and it will be interesting to see if the defendants choose to take this important issue up on appeal. In the face of Labor Code Section 3202's liberal construction and the even more liberal political and social sentiments favoring those who have continued to work during COVID-19, the odds are stacked against them. What is clear is that when administering benefits, employers should apply similar methodologies regarding all similarly situated employees to avoid claims of discrimination. If benefits are advanced, notice should go out that such benefits are being paid under protest and all rights to a credit are reserved. Notably, defendants in California seeking to assert a credit against temporary disability overpayment must also now file a Petition for Credit and may not unilaterally take the credit. Cal. Code Regs. tit. 8, § 10555. But, as made clear in *Corona*, extraordinary facts will be necessary to overcome the need to pay temporary disability benefits even when the employer's inability to offer modified work is due to COVID-19.

Increased Legal Spend Related to Formal Worker Safety Measures

The legal industry does not exist entirely apart from the business community and is certainly impacted by economic downturns as a whole. Law firms cannot afford to deprioritize their focus on strategic business operations as the economy reels in response to COVID-19. Simultaneously, there are signs that certain sectors of the legal economy are as busy as ever. This includes workers' compensation and bankruptcy, which tend to remain stable during economic downturns. In addition to litigation-related administrative law practice areas, labor and employment practitioners are likely to find themselves very busy as employers strive to keep pace with the moving targets created by active executive and legislative efforts.

Virginia Worker Safety Law

In July 2020, Virginia became the first state to formally enact worker safety measures in response to COVID-19. See Virginia Statewide Emergency Workplace Safety Standards. Among the new regulations is a requirement that employees wear masks and that employers notify workers within 24 hours if a co-worker tests positive for the virus. Virginia's rules also provide clear instructions to employers regarding return to work—employees who test positive for COVID-19 must wait 10 days and have two negative COVID-19 tests before they will be allowed to return to work. Business owners are objecting to the regulations, which contain penalties up to $130,000 for the most egregious violations.

Employers in states with formal rules such as those adopted in Virginia are going to have to increase their legal budgets to ensure compliance. This may include:

- The need to create new policies and procedures
- Updating safety manuals
- Conducting in-house training –and–
- Directing HR towards implementation of these rules

For a resource kit focused on employees returning to work and broken up by key employment law topics, see Coronavirus (COVID-19) Resource Kit: Return to Work.

Employer Insurance Premiums and COVID-19-Related Claims

Employers in California should take heart in the fact that some of the currently pending rule changes inure to the benefit of employers. The California Department of Insurance, in response to a Special Regulatory filing by the Workers' Compensation Insurance Rating Bureau of California (WCIRB) recently adopted rules clarifying that claims directly arising from a diagnosis of COVID-19 are to be excluded from the insurance experience rating for that employer. This means employers should not see significantly increased insurance premiums from COVID-19-related claims. This trend appears to be catching on in other states as well. The impact of such a move encourages employers to report COVID-19 claims without fear of increasing the cost of future insurance.

Brenna E. Hampton, Office Managing Partner, Hanna Brophy LLP

Brenna Hampton is the managing partner of Hanna Brophpy's San Diego office and a California State Bar certified workers' compensation legal specialist. She graduated from the University of California, San Diego with a degree in political science, theory, and debate. In 2005, she was admitted to the California State Bar after obtaining her Juris Doctor from California Western School of Law in San Diego, where she earned special designation as a distinguished advocate on the client counseling and negotiation teams and where she served double-tenure as president of the law school's Women's Law Caucus.

She joined Hanna Brophy in 2006 and defends insurance carriers and self-insured employers in all areas of workers' compensation with an emphasis on creative problem-solving.

Brenna frequently lectures and speaks at continuing education classes for claims professionals at state and national companies on SB 863 and on a variety of cutting-edge topics including negotiations strategies, utilization review trends, aggressive lien handling, and intelligent use of investigation in litigation. She is a 3-time presenter at the annual PARMA conference and a speaker at CWCDAA (California Workers Compensation Defense Attorneys Conference).

Kelsey L Paddock, Partner, Hanna Brophy LLP

Kelsey joined Hanna Brophy as an associate in December 2012. She defends self-insured employers and insurance carriers in all aspects of workers' compensation litigation. She is a certified specialist in workers' compensation and has appeared at nearly all of the administrative law courts of the Workers' Compensation Appeals Board throughout California and is well acquainted with the nuances of each individual Board. Mrs. Paddock also has experience in defending public entities in CalPERS Industrial Disability Retirement disputes. Mrs. Paddock's practice focuses on in-depth analyses of complex legal issues as well as careful handling of cases through the appeals process.

Mrs. Paddock graduated from Princeton University with a degree in Philosophy in 2007. In 2012, she obtained her Juris Doctor cum laude from the University of San Diego School of Law, where she received awards for her excellence in legal writing and constitutional law. Mrs. Paddock was admitted to the California Bar in 2012 and to the Nevada Bar in 2016.

In her free time, Mrs. Paddock enjoys playing soccer, skiing, and backpacking.