

AB 685

In response to the COVID-19 pandemic and its impact on maintaining a safe workplace, AB 685 amends the Labor Code in several areas to require employers to adhere to stricter occupational health and safety rules and empowers Cal/OSHA with expanded enforcement powers to address such standards as follows – effective January 1, 2021:

A. New COVID-19 Employer Notice and Reporting Requirements

AB 685 requires employers to comply with certain reporting requirements and provide the following four notices related to potential COVID-19 exposures in the workplace within one business day of being informed of the potential exposure:

1. Potential COVID-19 Exposure Notice to Employees

If an employer or the employer's representative receives a notice of a potential exposure to COVID-19 in the workplace by a "*qualifying individual*", the employer must provide a written notice to all employees, and to the employers of subcontracted employees, who were present at the same worksite within the infectious period (as defined by the State Department of Public Health), stating that they may have been exposed to COVID-19.

For purposes of this requirement, a "*qualifying individual*" means a person who can establish any of the following requirements:

- A laboratory-confirmed case of COVID-19;
- A positive COVID-19 diagnosis from a licensed health care provider;
- A COVID-19 related isolation order issued by a public health official; or
- Death due to COVID-19 as determined by the County public health department.

The notice must be sent in a manner the employer normally uses to communicate employment-related information. This can include personal service, email, or text message so long as it can be reasonably anticipated that employees will receive the notice within the one business day requirement. The notice must be in both English and the language understood by the majority of employees.

2. Potential COVID-19 Exposure Notice to Exclusive Representative of Represented Employees

If the affected employees who are required to receive this COVID-19 exposure notice include represented employees, the employer must send the same notice to the exclusive representative of the affected bargaining unit.

3. Notice of COVID-19 Related Benefits and Employee Protections

An employer must also provide all affected employees and the exclusive representative, if any, with a notice of information regarding any COVID-19-related benefits or leave rights under federal, state, and local laws, or pursuant to employer policy, as well as the employee's protections against retaliation and discrimination.

4. Notice of Safety Plan in Response to Potential COVID-19 Exposure

Finally, the employer must notify all employees, the employers of subcontracted employees, and any exclusive representative, of the employer's plans for implementing and completing a disinfection and safety plan pursuant to guidelines issued by the federal Centers for Disease Control.

Failure to comply with these requirements may subject the employer to a civil penalty. AB 685 also prohibits employers from requiring employees to disclose medical information except as required by law, and prohibits employers from retaliating against an employee for disclosing a qualifying case of COVID-19. Employers are also required to maintain records of these four notices for at least three years.

Where employers are notified of a number of cases that meet the definition of a COVID-19 "outbreak" as defined by the California Department of Public Health ("CDPH"), the employer must also notify the applicable local public health agency **within 48 hours** of the names, number, occupation, and worksite of any "qualifying individuals" related to the "outbreak".

An "outbreak" is currently defined by CDPH as "three or more laboratory-confirmed cases of COVID-19 within a two-week period among employees who live in different households." (See CDPH's "COVID-19 Employer Playbook – Supporting a Safer Environment for Workers and Customers – available online at <https://files.covid19.ca.gov/pdf/employer-playbook-for-safe-reopening--en.pdf>)

CDPH is also required to make workplace statistics received from local health departments under this provision – other than personally identifiable employee information – available on its website, such that members of the public can track the number of cases and outbreaks by industry.

These new COVID-19 notice and reporting requirements apply to all private and public employees, with two exceptions:

- Health facilities, as defined in Section 1250 of the Health and Safety Code, are exempt from reporting an "outbreak" within 48 hours as described above;
- The notice requirements do not apply to exposures by 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, unless the "qualifying individual" is also an employee at the same worksite.

B. Cal/OSHA Will Be Authorized to Shut Down A Workplace, Operation, or Process that Creates an Imminent Hazard Due To COVID-19 Exposure Risk.

Under current law, whenever Cal/OSHA finds that a place of employment or specific equipment in the workplace creates an imminent hazard to employees, Cal/OSHA has the authority to prohibit entry into the affected part of the workplace or to prohibit the use of the dangerous equipment in the workplace.

AB 685 expands and clarifies Cal/OSHA's authority within the context of COVID-19 related issues in the workplace. Under AB 685, if Cal/OSHA finds that a workplace or operation/process within a workplace exposes employees to a risk of COVID-19 infection and thereby creates an imminent hazard to employees, Cal/OSHA now has authority to prohibit entry to the workplace or to the performance of such operation/process. If Cal/OSHA uses its authority to apply such a workplace restriction, it must then provide the employer with notice of the action and post that notice in a conspicuous place at the worksite. Any restrictions imposed by Cal/OSHA must be limited to the immediate area where the imminent hazard exists and must not prohibit any entry into or operation/process within a workplace that does not cause a risk of infection. In addition, Cal/OSHA may not impose restrictions that would materially interrupt "critical government functions" essential to ensuring public health and safety functions, or the delivery of electrical power or water.

This expanded authority sunsets on January 1, 2023, and will be repealed automatically on that date unless further extended by the Legislature.

C. Amends Cal/OSHA Procedures for Serious Violation Citations Relating to COVID-19

Currently, before Cal/OSHA can issue a citation to an employer alleging a "serious violation" of occupational safety and health statutes or regulations, it must make a reasonable attempt to determine and consider whether certain mitigating factors were taken by an employer to rebut the potential citation. Cal/OSHA satisfies this requirement by sending an employer a description of the alleged violation at least 15 days before issuing a citation, and provides the employer an opportunity to respond. Even if an employer does not provide information in response to Cal/OSHA's inquiries, an employer is still not precluded from presenting such information at a later hearing to contest the citation.

AB 685 modifies this procedure until January 1, 2023 as applied to serious violation citations Cal/OSHA issues related to COVID-19. For such COVID-19 serious violation citations, Cal/OSHA is not obligated to provide an alleged violation at least 15 days prior to issuing the citation to allow an employer the opportunity to respond and can instead issue the citation immediately. The employer would still be able to contest the citation through the existing Cal/OSHA appeal procedures.

D. Impact of AB 685 on Employers

Because AB 685 is not effective until January 1, 2021, employers have some time to prepare for its new notice and reporting requirements. Employers should review and revise their existing procedures related to notification of COVID-19 exposures in the workplace in order to ensure they are ready to comply with the new notice and reporting requirements imposed by AB 685 once it becomes effective.