

# **Navigating the Employment Relationship During a Pandemic: Employer Liability to Employees Who Contract COVID-19 During Employment**

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## **INTRODUCTION**

In early 2020, the coronavirus (COVID-19) pandemic began spreading rapidly across California. Currently in California there are more than 420,000 cases and over 8,000 deaths.<sup>1</sup> Initially, there was a statewide shut down that left many people either without work, or working from the safety of their homes, remotely. In the following months, many industries have started to open, and many workers are returning to work. This poses several questions, such as who would be held liable if an employee contracts COVID-19 while at work? The answer on the surface may be simple, but there can be rising, troublesome complications that follow.

On May 6, 2020 Governor Gavin Newsom enacted executive order N-62-20, to establish a rebuttable presumption that employees who contract COVID-19 while at work were to be eligible for workers' compensation benefits.<sup>2</sup> Accordingly, we can simply answer the question outlined above. Although, this may not apply when delving into deeper questions, such as what happens if an employer intentionally and willfully creates working environments where employees are more likely to contract COVID-19 by intentionally failing to take proper precautions or to adhere to the state or local guidelines to protect employees from contracting the virus? This article will: (1) explore the extent of workers' compensation coverage for employees who contract COVID-19; and (2) situations in which an employer would be liable to an employee for claims beyond workers' compensation benefits.

## I. EMPLOYERS' LIABILITY UNDER EXECUTIVE ORDER N-62-20

California Governor Gavin Newsom, issued an executive order that "...creates a time-limited rebuttable presumption for accessing workers' compensation benefits applicable to Californians who must work outside of their homes during the stay at home order."<sup>3</sup> This Executive Order mandated that any employee who contracts COVID-19 shall be automatically presumed to have caught the virus during work so long as they have worked at the location in the past fourteen days.<sup>4</sup> As for the "rebuttal" to this presumption, an employer can attempt to prove that the injury or illness did not occur at the business's physical location.<sup>5</sup> However, in theory, such proof seems impossible to establish. For example, even if an employee posts pictures of his/her attendance at a large social gathering on a day off, this does not mean that the employee did not contract the virus while at work the day before. This also means that under N-62-20, employees who are working remotely from home will not be eligible for workers' compensation benefits. Finally, there is also a requirement that the employee must be diagnosed with COVID-19 by a medical doctor with a confirmation of a positive test for COVID-19.<sup>6</sup>

Executive Order N-62-20 was enacted on May 6, 2020 and was only set to be in effect from March 19 to July 5, 2020. As of writing this article, the date has not been extended. However, this date could possibly be extended due to the recent spikes of COVID-19 cases in the State of California. In the event it is not extended, this automatic presumption will be no longer in effect, making it harder for employees to receive workers' compensation benefits due to contracting COVID-19 from the workplace. Given the Executive Order however, most cases of employees contracting COVID-19 during that period of time will be met with the presumption under the executive order, but what does that mean in particular? In order to get a better

understanding of what employees are likely to receive, this article will take a further look into what workers' compensation entails.

## II. EMPLOYEES' DAMAGES UNDER WORKERS' COMPENSATION

Traditionally, before the workers' compensation system was created to shift liability from employer's directly, employers were able to protect themselves against liability in civil actions by asserting common law defenses. These defenses were, "the employee's contributory negligence, the employee's assumption of the risk, and the fault of a fellow employee, etc.." <sup>7</sup> This changed with the implementation of the Workers' Compensation Act which, "eliminates those defenses, and gives employees the certainty of financial and other benefits whenever conditions of compensation are established. In exchange, employers are exempted from civil actions for damages." <sup>8</sup> In short, this means that prior to workers' compensation, employees were able to sue their employer in civil suits and recover damages based on the negligence of the employer; however, employers had three defenses that protected them from liability. Now, employers waive those defenses and allow employees to recover based on workers' compensation benefits, but the employer is exempt from civil actions, in most cases. <sup>9</sup>

This shift from employers being liable for civil suits for employees injured while at work, to workers' compensation benefits is based on a theory that common law remedy for work injuries involved delay and economic waste. <sup>10</sup> Therefore, the workers' compensation system is a no-fault system: the employee does not need to prove the employer is at fault, thus expediting his/her relief without a costly court battle. The downside to this "no-fault" system is that the employee cannot recover greater damages in civil court as their damages are limited to wage losses, medical bills, and diminished earning capacity. <sup>11</sup> Consequently, if an employee

contracted COVID-19 and was out of work for two weeks, under the Executive Order, he/she could only recover the wages lost, medical bills (if any), and any diminished earning capacity. The earning capacity being diminished is extremely unlikely, as most COVID-19 patients will recover without any major issues.

Many employees might be disappointed to hear that their damages for contracting a pandemic virus is fairly limited, but the process has many benefits. They will not need to spend potentially thousands of dollars to litigate a case that could take years to finalize but instead will be able to file a claim for workers' compensation and quickly receive benefits. By limiting employer liability and exempting them from civil suit, damages will inevitably be smaller, but the time to relief will be improved. However, there are situations in which an employee could receive above the workers' compensation limitation on damages, such as if an employer were to willfully and intentionally cause harm to an employee. It could be possible to sue an employer for tort in civil court as well.

### III. EMPLOYERS' LIABILITY UNDER CALIFORNIA LABOR CODE 4553

One situation in which an employer might find themselves liable for more than the loss of wages, medical bills, or lost earning capacity under workers' compensation is if an employee can establish serious and willful conduct by the employer.<sup>12</sup> In situations where this serious and willful conduct occurs, "the amount of compensation otherwise recoverable shall be increased by one-half."<sup>13</sup> This can be quite a substantial amount if the medical bills related to the injury are high as well. In applying this to our COVID-19 scenario, what if an employer fails to keep the workplace safe and clean as outlined by COVID-19 health and safety guidelines? The employer could potentially be liable for more than typical damages under workers' compensation. It is important, however, that this be a serious, willful and deliberate action taken that would likely

result in the injury of the employee. For example, if an employer refuses to acknowledge the potential dangers of COVID-19, and consciously refuses to provide any personal protective equipment (PPE) to the employees out of disdain for the “fake” pandemic scare, any employee who contracts COVID-19 at that workplace would likely be able to recover an additional half of their damages.

The difficulty in getting this expanded recovery amount is that the employee needs to prove the employer’s conduct was “serious and willful.” An employer not providing adequate PPE or keeping the workspace clean and safe is only one factor, it is another to be able to prove the employer *intentionally* failed to provide adequate PPE. The court in *Johns-Manville Sales Corp v. Workers’ Comp. Appeals Bd.* tackled this issue and gave a clear rule on deciding whether an employer’s conduct was serious and willful. The employer in that case failed to provide adequate lighting in a truck yard, which resulted in a slip and fall accident. The court found that because the condition was not known to the employer, that it was no more than mere negligence. The court explained, “that an employer guilty of serious and willful misconduct must know of the dangerous condition, know that the probable consequences of its continuance will involve serious injury to an employee, and deliberately fail to take corrective action.”<sup>14</sup> *Johns-Manville Sales Corp.* in this instance did not exhibit any malice, recklessness or indifference to human safety sufficient to prove serious and willful conduct.<sup>15</sup> To prove the requisite knowledge, and that the conduct was serious and willful for a COVID-19 situation, would likely be quite difficult, and even if successful the recovery is only a fifty percent increase of their already limited damages based on workers’ compensation. On the other hand, there are certain occasions where an employee can bypass the workers’ compensation system and sue their employer directly for damages they sustained.

#### IV. EMPLOYERS' LIABILITY UNDER FAIR EMPLOYMENT AND HOUSING ACT (FEHA)

The Fair Employment and Housing Act (FEHA) protects individuals from illegal discrimination based on characteristics such as race, religion, age, sex/gender, sexual orientation, disabilities, and more.<sup>16</sup> When dealing with those with disabilities, employers should be wary of denying reasonable accommodations to those employees who request such accommodations due to COVID-19 related issues, as damages recoverable under FEHA are substantially higher than workers' compensation. For example, employees can recover lost earnings, future lost earnings, out of pocket expenses, damages for emotional distress, punitive damages, and attorneys' fees.<sup>17</sup> Thus, employers should analyze each claim for reasonable accommodations with a high level of care in order to avoid liability. If an employee requests to work from home, and is able to work from home, because of a pre-existing condition that would be exacerbated if they contracted COVID-19, and is denied, this would likely be a violation of federal and state disability accommodation laws. They would have a strong case for damages if they were to contract COVID-19 specifically after requesting a reasonable accommodation by their employer.<sup>18</sup>

Some employers may argue that a COVID-19 infection might not constitute a disability under the FEHA as the illness only impairs its victims for a short amount of time, similar to a cold or flu in that it should be taken care of by sick leave, but the effects of a COVID-19 infection may be more long-lasting or create severe impairment for some individuals, especially if they were to already have a pre-existing condition that is covered by the FEHA.<sup>19</sup> Overall, because FEHA violations open employers to more liability in terms of recoverable damages, employees who are concerned for their health in regard to COVID-19 should seek to have all of their paperwork in order before bringing any claims. If they have a pre-existing condition, they

should have such in writing from a medical doctor, as an employer who has no knowledge of an employee's disability will not be liable for violating the FEHA, as knowledge is required.<sup>20</sup>

## CONCLUSION

The COVID-19 pandemic has opened a sea of potential litigation for both employers and individuals alike, and while this article has covered the basics there are potentially many more ways for liability to spring up. Under the California Executive Order, N-62-20, which has yet to be extended, most cases will likely result in a workers' compensation payout, but there are cases similar to the exceptions outlined above where an employer may be liable for more than typical workers' compensation damages. While this may seem like employers will have no incentive to care for their employees, it is quite the opposite; they could have to pay premiums for the employees' workers' compensation insurance. Liability outside of workers' compensation will be narrow and uncommon. While an employee may recover an additional half in damages under the "Serious and Willful" Doctrine from an employer's intentional conduct, situations where that happens may be limited. Many creative arguments by skilled plaintiff's attorneys could and should be made. In the end, claims under the Fair Employment and Housing Act (FEHA) will provide significantly higher damages than workers' compensation, but may be hard to prove. Ultimately, employees should breathe easy knowing that if they are to contract COVID-19 while at work, they should be able to at least recover lost wages and medical bills.

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<sup>1</sup> Los Angeles Times Staff, *Tracking the coronavirus in California*, Los Angeles Times (July 14, 2020, 9:51 AM PST), <https://latimes.com/projects/california-coronavirus-cases-tracking-outbreak/>.

<sup>2</sup> State of California, *Governor Newsome Announces Workers' Compensation Benefits for Workers who Contract COVID-19 During Stay at Home Order*, Office of Governor Gavin Newsom (May 6, 2020), <https://www.gov.ca.gov/2020/05/06/governor-newsome-announces-workers-compensation-benefits-for-workers-who-contract-covid-19-during-stay-at-home-order/>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> State of California, *Questions and Answers on Executive Order N-62-20*, Department of Industrial Relations (May 2020), <https://www.dir.ca.gov/dwc/Covid-19/FAQs.html>.

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<sup>6</sup> *Id.*

<sup>7</sup> § 1:1.Purpose and policy of workers' compensation laws, Cal. Civ. Prac. Workers' Compensation § 1:1

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Shouse Law Group, *Injured on the job in California. Can I sue my employer?*, Shouse California Law Group (July 1, 2020), <https://www.shouselaw.com/ca/personal-injury/work-injury-lawsuit/>.

<sup>12</sup> Cal. Lab. Code Ann. § 4553

<sup>13</sup> *Id.*

<sup>14</sup> *John-Manville Sales Corp. v. Workers' Comp. Appeals Bd.*, 96 Cal. App 3d 923, 933 (1979)

<sup>15</sup> *Id.*

<sup>16</sup> State of California, *Who is Protected*, California Department of Fair Employment and Housing (2020), <https://www.dfeh.ca.gov/employment/#whoBody>.

<sup>17</sup> State of California, *Available Remedies for Employment Discrimination*, California Department of Fair Employment and Housing (2020), <https://www.dfeh.ca.gov/employment/#remediesBody>.

<sup>18</sup> Brendan Begley, Weintraub Tobin, *Inoculating Against the Coming Spread of Employee Lawsuits Related to COVID-19*, JDSUPRA (May 29, 2020), <https://www.jdsupra.com/legalnews/inoculating-against-the-coming-spread-14081/>.

<sup>19</sup> *Id.*

<sup>20</sup> *Brundage v. Hahn*, 57 Cal. App. 4th 228 (2nd Cir. 1997)