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Senate Bill No. 1159

CHAPTER 85

An act to add Section 77.8 to, and to add and repeal Sections 3212.86, 3212.87, and 3212.88 of, the Labor Code, relating to workers' compensation, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 17, 2020. Filed with Secretary of State September 17, 2020.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1159, Hill. Workers' compensation: COVID-19: critical workers.

Existing law establishes a workers' compensation system, administered by the Administrative Director of the Division of Workers' Compensation, to compensate an employee, as defined, for injuries sustained in the course of employment. Existing law creates a disputable presumption that specified injuries sustained in the course of employment of a specified member of law enforcement or a specified first responder arose out of and in the course of the employment. Existing law governs the procedures for filing a claim for workers' compensation, including filing a claim form, and provides that an injury is presumed compensable if liability is not rejected within 90 days after the claim form is filed, as specified. Existing case law provides for how certain presumptions may be rebutted.

This bill would define "injury" for an employee to include illness or death resulting from the 2019 novel coronavirus disease (COVID-19) under specified circumstances, until January 1, 2023. The bill would create a disputable presumption, as specified, that the injury arose out of and in the course of the employment and is compensable, for specified dates of injury. The bill would limit the applicability of the presumption under certain circumstances. The bill would require an employee to exhaust their paid sick leave benefits and meet specified certification requirements before receiving any temporary disability benefits or, for police officers, firefighters, and other specified employees, a leave of absence. The bill would also make a claim relating to a COVID-19 illness presumptively compensable, as described above, after 30 days or 45 days, rather than 90 days. Until January 1, 2023, the bill would allow for a presumption of injury for all employees whose fellow employees at their place of employment experience specified levels of positive testing, and whose employer has 5 or more employees.

This bill would require the Commission on Health and Safety and Workers' Compensation to conduct a study of the impacts of COVID-19 and the specific presumptions created by this bill and report its findings to the Legislature and the Governor, as specified.

This bill would declare that it is to take effect immediately as an urgency statute.

Vote Required: TWO THIRDS Appropriation: NO Fiscal Committee: YES Local Program: NO Immediate Effect YES Urgency: YES Tax Levy: NO Election: NO Usual Current Expenses: NO Budget Bill: NO Prop 25 Trailer Bill: NO

The people of the State of California do enact as follows:

SECTION 1. Section 77.8 is added to the Labor Code, to read:

77.8. The Commission on Health and Safety and Workers' Compensation shall conduct a study of the impacts claims of COVID-19

have had on the workers' compensation system, including overall impacts on indemnity benefits, medical benefits, and death benefits, including differences in the impacts across differing occupational groups, and including the effect of Sections 3212.87 and 3212.88. A preliminary report or a final report shall be delivered to the Legislature, pursuant to Section 9795 of the Government Code, and the Governor by December 31, 2021, and the final report shall be delivered to the Legislature, pursuant to Section 9795 of the Government Code, and the Governor no later than April 30, 2022.

SEC. 2. Section 3212.86 is added to the Labor Code, immediately following Section 3212.85, to read:

3212.86. (a) This section applies to any employee with a COVID-19-related illness.

(b) The term "injury," as used in this division, includes illness or death resulting from COVID-19 if both of the following circumstances apply:

(1) The employee has tested positive for or was diagnosed with COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction.

(2) The day referenced in paragraph (1) on which the employee performed labor or services at the employee's place of employment at the employer's direction was on or after March 19, 2020, and on or before July 5, 2020. The date of injury shall be the last date the employee performed labor or services at the employee's place of employment at the employer's direction.

(3) If paragraph (1) is satisfied through a diagnosis of COVID-19, the diagnosis was done by a licensed physician and surgeon holding an M.D. or D.O. degree or state licensed physician assistant or nurse practitioner, acting under the review or supervision of a physician and surgeon pursuant to standardized procedures or protocols within their lawfully authorized scope of practice, and that diagnosis is confirmed by testing or by a COVID-19 serologic test within 30 days of the date of the diagnosis.

(c) The compensation that is awarded for injury pursuant to this section shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division.

(d) (1) If an employee has paid sick leave benefits specifically available in response to COVID-19, those benefits shall be used and exhausted before any temporary disability benefits or benefits under Section 4800, 4800.5, or 4850 are due and payable. If an employee does not have those sick leave benefits, the employee shall be provided temporary disability benefits or Section 4800, 4800.5, or 4850 benefits, if applicable, from the date of disability. There shall not be a waiting period for temporary disability benefits.

(2) To qualify for temporary disability or Section 4800, 4800.5, or 4850 benefits under this section, an employee shall satisfy either of the following:

(A) If the employee has tested positive or is diagnosed with COVID-19 on or after May 6, 2020, the employee shall be certified for temporary disability within the first 15 days after the initial diagnosis, and shall be recertified for temporary disability every 15 days thereafter, for the first 45 days following diagnosis.

(B) If the employee has tested positive or was diagnosed with COVID-19 before May 6, 2020, the employee shall have obtained a certification, no later than May 21, 2020, documenting the period for which the employee was temporarily disabled and unable to work, and shall be recertified for temporary disability every 15 days thereafter, for the first 45 days following diagnosis.

(3) An employee shall be certified for temporary disability by a physician holding a physician's and surgeon's license issued pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code. If the employee has a predesignated physician pursuant to subdivision (d) of Section 4600, is covered by a medical provider network pursuant to Article 2.3 (commencing with Section 4616) of Chapter 2 of Part 2, is covered by a workers' compensation health care organization pursuant to Article 2 (commencing with Section 4600) of Chapter 2 of Part 2, or is covered by a group health plan, the certifying physician shall be a physician and surgeon in that network, organization, or plan. Otherwise, the certifying physician may be a physician and surgeon of the employee's choosing.

(e) An injury described in subdivision (b) is presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence. Unless controverted, the appeals board is bound to find in accordance with the presumption.

(f) Notwithstanding Section 5402, if liability for a claim of a COVID-19-related illness is not rejected within 30 days after the date the claim form is filed pursuant to Section 5401, the illness shall be presumed compensable. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 30-day period.

(g) The Department of Industrial Relations shall waive the right to collect any death benefit payment due pursuant to Section 4706.5 arising out of claims covered by this section.

(h) This section applies to all pending matters except as otherwise specified, including, but not limited to, pending claims relying on Executive Order N-62-20. This section is not a basis to rescind, alter, amend, or reopen any final award of workers' compensation benefits.

(i) For purposes of this section:

(1) "COVID-19" means the 2019 novel coronavirus disease.

(2) "Place of employment" does not include an employee's residence.

(j) This section shall remain in effect only until January 1, 2023, and as of that date is repealed.

SEC. 3. Section 3212.87 is added to the Labor Code, to read:

3212.87. (a) This section applies to the following employees:

(1) Active firefighting members, whether volunteers, partly paid, or fully paid, of all of the following fire departments:

(A) A fire department of a city, county, city and county, district, or other public or municipal corporation or political subdivision.

(B) A fire department of the University of California and the California State University.

(C) The Department of Forestry and Fire Protection.

(D) A county forestry or firefighting department or unit.

(2) Active firefighting members of a fire department that serves a United States Department of Defense installation and who are certified by the United States Department of Defense as meeting its standards for firefighters.

(3) Active firefighting members of a fire department that serves a National Aeronautics and Space Administration installation and who adhere to training standards established in accordance with Article 4 (commencing with Section 13155) of Chapter 1 of Part 2 of Division 12 of the Health and Safety Code.

(4) Active firefighting members of a fire department that provides fire protection to a commercial airport regulated by the Federal Aviation Administration (FAA) under Part 139 (commencing with Section 139.5) of Subchapter G of Chapter 1 of Title 14 of the Federal Code of Regulations and are trained and certified by the State Fire Marshal as meeting the standards of Fire Control 5 and Section 139.319 of Title 14 of the Federal Code of Regulations

(5) Peace officers, as defined in Section 830.1 of the Penal Code, subdivisions (a), (b), (e), (f), and (h) of Section 830.2 of the Penal Code, subdivision (a) of Section 830.3 of the Penal Code, subdivisions (a) and (b) of Section 830.37 of the Penal Code, subdivisions (a) and (b) of Section 830.5 of the Penal Code, and subdivision (a) of Section 830.53 of the Penal Code, who are primarily engaged in active law enforcement activities.

(6) (A) Fire and rescue services coordinators who work for the Office of Emergency Services.

(B) For purposes of this paragraph, "fire and rescue services coordinators" means coordinators with any of the following job classifications: coordinator, senior coordinator, or chief coordinator.

(7) An employee who provides direct patient care, or a custodial employee in contact with COVID-19 patients, who works at a health facility. For the purposes of this subdivision, "health facility" means a health facility as defined in subdivision (a), (b), (c), (m), or (n) of Section 1250 of the Health and Safety Code.

(8) An authorized registered nurse, emergency medical technician-I, emergency medical technician-II, emergency medical technician-paramedic, as described in Chapter 2 (commencing with Section 1797.50) of Division 2.5 of the Health and Safety Code.

(9) An employee who provides direct patient care for a home health agency, as defined under Section 1727 of the Health and Safety Code.

(10) Employees of health facilities, other than those described in paragraph (7). For these employees, the presumption shall not apply if the employer can establish that the employee did not have contact with a health facility patient within the last 14 days who tested positive for COVID-19. If it is determined that the presumption does not apply, the claim shall be evaluated pursuant to Sections 3202.5 and 3600. For the purposes of this subdivision, "health facility" means a health facility, as defined in subdivision (a), (b), (c), (m), or (n) of Section 1250 of the Health and Safety Code.

(11) A provider of in-home supportive services under Article 7 (commencing with Section 12300) of Chapter 3 of Part 3 of Division 9 of, or Sections 14132.95, 14132.952, and 14132.956 of, the Welfare and Institutions Code, when they provide the in-home supportive services outside their own home or residence.

(b) The term "injury," as used in this division, includes illness or death resulting from COVID-19 if all of the following circumstances apply:

(1) The employee has tested positive for COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction.

(2) The day referenced in paragraph (1), on which the employee performed labor or services at the employee's place of employment at the employer's direction, was on or after July 6, 2020. The date of injury shall be the last date the employee performed labor or services at the employee's place of employment at the employer's direction prior to the positive test.

(c) The compensation that is awarded for injury pursuant to this section shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division.

(d) If an employee has paid sick leave benefits specifically available in response to COVID-19, those benefits shall be used and exhausted before any temporary disability benefits or benefits under Section 4800, 4800.5, or 4850 are due and payable. If an employee does not have those sick leave benefits, the employee shall be provided temporary disability benefits or Section 4850 benefits, if applicable, from the date of disability. There shall not be a waiting period for temporary disability benefits.

(e) An injury described in subdivision (b) is presumed to arise out of and in the course of the employment, except as provided in this subdivision. This presumption is disputable and may be controverted by other evidence. Unless controverted, the appeals board is bound to find in accordance with the presumption. This presumption shall be extended to a person described in subdivision (a) following termination of service for a period of 14 days, commencing with the last date actually worked in the specified capacity at the employee's place of employment as described in subdivision (b).

(f) Notwithstanding Section 5402, if liability for a claim of a COVID-19-related illness is not rejected within 30 days after the date the claim form is filed pursuant to Section 5401, the illness shall be presumed compensable. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 30-day period.

(g) The Department of Industrial Relations shall waive the right to collect any death benefit payment due pursuant to Section 4706.5 arising out of claims covered by this section.

(h) This section applies to all pending matters, unless otherwise specified in this section, but shall not be a basis to rescind, alter, amend, or reopen any final award of workers' compensation benefits.

(i) For purposes of this section:

(1) "COVID-19" means the 2019 novel coronavirus disease.

(2) Unless otherwise indicated, "test" or "testing" means a PCR (Polymerase Chain Reaction) test approved for use or approved for emergency use by the United States Food and Drug Administration to detect the presence of viral RNA. "Test" or "testing" does not include serologic testing, also known as antibody testing. "Test" or "testing" may include any other viral culture test approved for use or approved for emergency use by the United States Food and Drug Administration to detect the presence of viral RNA which has the same or higher sensitivity and specificity as the PCR Test.

(3) An "employee's place of employment" does not include an employee's home or residence.

(j) This section shall remain in effect only until January 1, 2023, and as of that date is repealed.

SEC. 4. Section 3212.88 is added to the Labor Code, to read:

3212.88. (a) This section applies to employees who are not described in Section 3212.87, who test positive during an outbreak at the employee's specific place of employment, and whose employer has five or more employees.

(b) The term "injury," as used in this division, includes illness or death resulting from COVID-19 if all of the following circumstances apply:

(1) The employee tests positive for COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction.

(2) The day referenced in paragraph (1) on which the employee performed labor or services at the employee's place of employment at the employer's direction was on or after July 6, 2020. The date of injury shall be the last date the employee performed labor or services at the employee's place of employment at the employer's direction prior to the positive test.

(3) The employee's positive test occurred during a period of an outbreak at the employee's specific place of employment.

(c) The compensation that is awarded for injury pursuant to this section shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division.

(d) If an employee has paid sick leave benefits specifically available in response to COVID-19, those benefits shall be used and exhausted before any temporary disability benefits, benefits under Section 4800, 4800.5, or 4850 or Section 44977, 44984, 45192,

45196, 87780, 87787, 88192, or 88196 of the Education Code are due and payable. If an employee does not have those sick leave benefits, the employee shall be provided temporary disability benefits or Section 4850 benefits, if applicable, from the date of disability. There shall not be a waiting period for temporary disability benefits.

(e) (1) An injury described in subdivision (b) is presumed to arise out of and in the course of the employment, except as provided in this subdivision. This presumption is disputable and may be controverted by other evidence. Unless controverted, the appeals board is bound to find in accordance with the presumption. This presumption shall be extended to a person described in subdivision (a) following termination of service for a period of 14 days, commencing with the last date actually worked in the specified capacity at the employee's place of employment. This section does not affect an employee's rights to compensation for an injury or illness under this division in accordance with a preponderance of evidence.

(2) Evidence relevant to controverting the presumption may include, but is not limited to, evidence of measures in place to reduce potential transmission of COVID-19 in the employee's place of employment and evidence of an employee's nonoccupational risks of COVID-19 infection.

(f) Notwithstanding Section 5402, if liability for a claim of a COVID-19-related illness is not rejected within 45 days after the date the claim form is filed pursuant to Section 5401, the illness shall be presumed compensable. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 45-day period.

(g) The Department of Industrial Relations shall waive the right to collect any death benefit payment due pursuant to Section 4706.5 arising out of claims covered by this section.

(h) This section applies to all pending matters, unless otherwise specified in this section, but is not a basis to rescind, alter, amend, or reopen any final award of workers' compensation benefits.

(i) When the employer knows or reasonably should know that an employee has tested positive for COVID-19, the employer shall report to their claims administrator in writing via electronic mail or facsimile within three business days all of the following:

(1) An employee has tested positive. For purposes of this reporting, the employer shall not provide any personally identifiable information regarding the employee who tested positive for COVID-19 unless the employee asserts the infection is work related or has filed a claim form pursuant to Section 5401.

(2) The date that the employee tests positive, which is the date the specimen was collected for testing.

(3) The specific address or addresses of the employee's specific place of employment during the 14-day period preceding the date of the employee's positive test.

(4) The highest number of employees who reported to work at the employee's specific place of employment in the 45-day period preceding the last day the employee worked at each specific place of employment.

(j) An employer or other person acting on behalf of an employer who intentionally submits false or misleading information or fails to submit information when reporting pursuant to subdivision (i) is subject to a civil penalty in the amount of up to ten thousand dollars ($10,000) to be assessed by the Labor Commissioner.

(1) If, upon inspection or investigation, the Labor Commissioner determines that an employer or other person has intentionally submitted false or misleading information in violation of subdivision (i), the Labor Commissioner may issue a citation to the person in violation. The citation may be served personally, in the same manner as provided for service of a summons as described in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure, by certified mail with return receipt requested, or by registered mail in accordance with subdivision (c) of Section 11505 of the Government Code. Each citation shall be in writing and shall describe the nature of the violation, including reference to the statutory provision alleged to have been violated.

(2) If a person desires to contest a citation or the proposed assessment of a civil penalty therefor, they shall, within 15 business days after service of the citation, notify the office of the Labor Commissioner which appears on the citation of their request for an informal hearing. The Labor Commissioner or their deputy or agent shall, within 30 days, hold a hearing at the conclusion of which the citation or proposed assessment of a civil penalty shall be affirmed, modified, or dismissed. The decision of the Labor Commissioner shall consist of a notice of findings, findings, and order which shall be served on all parties to the hearing within 15 days after the hearing by regular first-class mail at the last known address of the party on file with the Labor Commissioner. Service shall be completed pursuant to Section 1013 of the Code of Civil Procedure. Any amount found due by the Labor Commissioner as a result of a hearing shall become due and payable 45 days after notice of the findings and written findings and order have been mailed to the party assessed. A writ of mandate may be taken from this finding to the appropriate superior court, as long as the party agrees to pay any judgment and costs ultimately rendered by the court against the party for the assessment. The writ of mandate shall be taken within 45 days of service of the notice of findings, findings, and order thereon.

(3) An employer or person to which a citation has been issued shall, in lieu of contesting a citation pursuant to this section, transmit to the office of the Labor Commissioner designated on the citation the amount specified for the violation within 15 business days after issuance of the citation.

(4) If the party filing a writ of mandate is unsuccessful in challenging the decision of the hearing officer, the Labor Commissioner shall recover costs and attorney fees.

(k) (1) The claims administrator shall use information reported pursuant to subdivision (i) to determine if an outbreak has occurred for the purpose of administering a claim pursuant to this section. To calculate the number of employees at a specific place of employment, the claims administrator shall utilize the data reported pursuant to subdivision (i) for the first employee who is part of the outbreak, or, for claims between July 6, 2020, and the effective date of this section, the number reported under paragraph (2).

(2) Any employer who is aware of an employee testing positive on or after July 6, 2020, and prior to the effective date of this section, shall report to their claims administrator, in writing via electronic mail or facsimile, within 30 business days of the effective date of this section, all of the data required in subdivision (i). For the data required by paragraph (4) of subdivision (i), the employer shall instead report the highest number of employees who reported to work at each of the employee's specific places of employment on any given work day between July 6, 2020, and the effective date of this section. The claims administrator shall use the information reported under this paragraph to determine if an outbreak has occurred from July 6, 2020, to the effective date of this section, for the purpose of applying the presumption under this section.

(l) A claim is not part of an outbreak if it occurs during a continuous 14-day period where the requisite number of positive tests under paragraph (4) of subdivision (m) have not been met. For purposes of applying the presumption in this section, the claims administrator shall continually evaluate each claim to determine whether the requisite number of positive tests have occurred during the surrounding 14-day periods.

(m) For purposes of this section:

(1) "COVID-19" means the 2019 novel coronavirus disease.

(2) Unless otherwise indicated, "test" or "testing" means a PCR (Polymerase Chain Reaction) test approved for use or approved for emergency use by the United States Food and Drug Administration to detect the presence of viral RNA. "Test" or "testing" does not include serologic testing, also known as antibody testing. "Test" or "testing" may include any other viral culture test approved for use or approved for emergency use by the United States Food and Drug Administration to detect the presence of viral RNA which has the same or higher sensitivity and specificity as the PCR Test.

(3) (A) "A specific place of employment" means the building, store, facility, or agricultural field where an employee performs work at the employer's direction. "A specific place of employment" does not include the employee's home or residence, unless the employee provides home health care services to another individual at the employee's home or residence.

(B) In the case of an employee who performs work at the employer's direction in multiple places of employment within 14 days of the employee's positive test, the employee's positive test shall be counted for the purpose of determining the existence of an outbreak at each of those places of employment, and if an outbreak exists at any one of those places of employment, that shall be the employee's "specific place of employment."

(4) An "outbreak" exists if within 14 calendar days one of the following occurs at a specific place of employment:

(A) If the employer has 100 employees or fewer at a specific place of employment, 4 employees test positive for COVID-19.

(B) If the employer has more than 100 employees at a specific place of employment, 4 percent of the number of employees who reported to the specific place of employment, test positive for COVID-19.

(C) A specific place of employment is ordered to close by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent due to a risk of infection with COVID-19.

(n) This section shall remain in effect only until January 1, 2023, and as of that date is repealed.

SEC. 5. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the California Constitution and shall go into immediate effect. The facts constituting the necessity are:

In light of the Governor's declaration on March 4, 2020, of a state of emergency due to the spread of COVID-19, and because of the heightened risk of COVID-19 infection to frontline workers and workers whose workplaces have suffered a COVID-19 outbreak, it is necessary that this act take effect immediately.

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