



May 22, 2020

George Parisotto, Administrative Director
Division of Workers' Compensation
1515 Clay Street, 6th Floor
Oakland, CA 94612-1519

Subject: COVID-19 Executive Order Clarifications

Dear Mr. Parisotto,

The recent Executive Order N-62-20 signed by Gov. Newsom on May 6, 2020 brought needed direction to the California workers' compensation community in regard to the COVID-19 pandemic. While addressing many questions, the Executive Order remains unclear in several areas and needs further clarification through the regulatory process available to the Administrative Director as cited in the Executive Order itself, at paragraph 7.

We appreciate the opportunity to submit our comments for your consideration in the drafting of additional emergency regulations. The below comments identify several of the specific areas of the EO needing clarification and our suggestions for clarification.

Paragraph 1(a): Date of Injury for COVID-19 situations

We recommend clarification on determining the DOI for COVID-19 cases. As written, the Executive Order can be interpreted several different ways when establishing an injured employee's DOI. Many claims administration software systems will not permit the issuance of payments for service dates or disability dates that are prior to the date of injury.

As this is undefined, parties could reasonably use any of the following:

- The date last worked in public facing job or in an office at direction of the employer,
- The date of the positive test,
- The date of the actual known exposure, or
- The date the diagnostic test was administered.

To remove this confusion and promote consistency with current claims practices in determining the date of injury for other cumulative injuries or illnesses, we recommend using the last date worked as the Date of Injury. This would ensure that there is no gap in entitlement to benefits for eligible employees.

Further, by establishing that the date of injury is the last date worked, the unsolvable challenge of attempting to pay benefits that pre-date the date of injury is avoided.

The last date worked should be defined consistent with the Executive Order, to be a public facing position or Office setting at the direction of the employer and not a home-work space.

Paragraph 1(a) and (d): Positive test results

We recommend further regulatory clarification be provided for the term “positive test”. We recommend regulations clarify the date of the positive test be established by the date the sample is collected for determining eligibility for the COVID-19 presumption.

In regard to antibody testing being deemed a method for triggering the presumption, we have concerns about the science behind antibody testing. It has been reported there have been significant numbers of false positives and false negatives. Accordingly, we would ask that you consider removing the antibody testing as a determinant of a COVID-19 diagnosis, but at a minimum consider revisiting this issue as more scientific evidence is developed.

We also request the positive test result be required to be submitted to the employer or claims administrator in writing.

Paragraph 6: Designated workers’ compensation physician

We recommend clarification be added which confirms the employee may use a physician or surgeon of their choice, only when there is neither a Medical Provider Network or Health Care Organization, a predesignated workers’ compensation physician, or a physician in the employee’s group health plan.

We suggest the following change in paragraph 6, as noted by italics.

The certifying physician can be a designated workers’ compensation physician in an applicable Medical Provider Network or Health Care Organization, a predesignated workers’ compensation physician, or a physician in the employee’s group health plan. *Where the employer provides a Medical Provider Network, the employee’s certification will be obtained from a Medical Provider Network physician. If none, the employee temporary disability may be certified by their pre-designated workers’ compensation physician or group health plan.* If none, the employee may be certified by a physician of the employee’s choosing who holds a physician and surgeon license.

Unless the physician certifying the employee for temporary disability is within the employer’s Medical Provider Network, Health Care Organization, or is predesignated by the employee pursuant to Labor Code Sec. 4600, subdivision (d), no physician certifying temporary disability shall be considered a primary treating physician for any purposes other than the certification of temporary disability set forth in the Labor Code or in regulations adopted by the Division of Workers’ Compensation or the Workers’ Compensation Appeals Board.

Distribution of FAQs

Lastly, we request the COVID-19 Frequently Asked Questions (FAQs) recently posted on the DIR website on May 18, 2020 be distributed to the workers’ compensation community via the DWC Newslines.

Respectfully submitted,



Jason Schmelzer
Legislative Advocate