



November 2020

## LEGAL BULLETIN ON AB 685 – COVID-19 CAL/OSHA POWERS, REPORTING REQUIREMENTS, AND ANTI-RETALIATION PROTECTIONS

On September 17, 2020, Governor Newsom signed into law AB 685. The bill includes new requirements for employers around notifying employees of exposures or potential exposures to COVID-19, as well as new powers for Cal/OSHA. Full text of the law is available [here](#).

The provisions do not go into effect until January 1, 2021, however, they should begin impacting bargaining now. Chapters should consider using the law as an argument at the bargaining table for why the employer should agree to rigorous contact tracing programs right now, since by January 1, 2021, the law will require them to do an important element of any contact tracing program—the notification to employees of certain potential exposures to COVID-19.<sup>1</sup> Chapters should also be aware of the law so that they do not use excessive bargaining leverage on issues that will be resolved by legislative mandate shortly. For more information on bargaining-related issues, please review the [C4OB Bargaining Advisory: Bargaining a Return to Work During the COVID-19 Pandemic and Difficult Economic Times](#) (5/22/2020) and its related links, as well as the other [COVID-19 Resources for Leaders](#) on the CTA website.

### KEY TAKEAWAYS

- Effective January 1, 2021, if a district receives specified notices of a COVID-19 exposure, it must **provide written notice** to all employees at an affected worksite, as well as information “regarding COVID-19 related benefits to which the employee may be entitled....” The notice must be provided to all worksite employees and exclusive bargaining representatives of those employees within one business day.
- The law includes protections for employee **privacy** and makes **retaliation** against an employee for disclosing a positive test, diagnosis, quarantine order or isolation order unlawful.
- Cal/OSHA has new powers to close unsafe worksites.

### Employer Obligation to Provide Employees with Notice of Potential Exposure

If an employer receives notice of a potential exposure (defined below), under the new law they will be required to inform employees “who were on the premises at the same worksite as the qualifying individual within the infectious period” in writing within one business day. Labor Code § 6409.6 (a) &

<sup>1</sup> [Existing state guidance](#) already requires isolation of known cases and investigation of COVID-19 exposures, but AB 685 is more specific regarding notices to not only employees, but also the exclusive representative. Comprehensive contact tracing programs should do more than simply provide a notice of an exposure. For more on negotiating regarding contact tracing see C4OB’s guidance: [C4OB Bargaining Advisory: Health and Safety, What Will It Take to Reopen Schools?](#) (5/31/2020) and [Sample Contract/MOU Language: Reopening Schools During the COVID-19 Pandemic](#) (6/22/2020).

(a)(1). The notice should be “in a manner the employer normally uses to communicate employment-related information.” The form should be one where “it can reasonably be anticipated to be received by the employee within one business day of sending.” Examples used in the law include email and text message. Labor Code § 6409.6(a)(1).<sup>2</sup> A written notice should also go to the exclusive representative within one business day. Labor Code § 6409.6(a)(2). The notice to the exclusive representative should contain the information that would be in a Cal/OSHA Form 300 (a reporting form generally provided to Cal/OSHA when an injury is work-related).

Labor Code § 6409.6(c).<sup>3</sup> A copy of a blank Form 300 showing the information needed is available [here](#).

#### “TO DO” FOR CHAPTERS

- Chapters should bargain for the additional elements of contact tracing needed to keep worksites safe, including a plan for robust testing of students and staff, protocols and leave provisions for isolation and quarantines, additional exposure notifications (particularly of cases where students, parents, or visitors may have been the source of exposure), and agreements regarding return to work after isolation and quarantines.
- Chapters should make sure the law is on their employers’ radar and **request bargaining** in advance of any COVID-19 cases so that the chapter can have a voice regarding the discretionary aspects of the law, including the content of the required notices.
- Chapters should notify employees of the privacy protection and the anti-retaliation provision. Suspected violations should be reported to the Legal Department.

#### What Is a “Potential Exposure”?

An employer’s duty to notify employees of a potential exposure is triggered by information coming to the employer that there has been a potential exposure. As a first step, the law identifies a class of people who may be a COVID-19 risk to others with whom they are in contact. These people are labeled “qualifying individuals” under the law. This category includes:

- Those who have a lab-confirmed case of COVID-19,
- Those who have a positive COVID-19 diagnosis from a licensed health provider,
- Those who have a COVID-19 related order to isolate by a public health official, and,
- Those who have died of COVID-19.

Four things qualify as information to an employer sufficient to trigger the duty of an employer to pass on information in a notice of potential exposure to employees:

- Notification from a **public health official** or **licensed medical provider** that an employee was exposed to a qualifying individual at the worksite.
- Notification from an **employee** or the employee’s **emergency contact** that the employee is a qualifying individual.
- Notification through **an employer’s testing protocol** that an employee is a qualifying individual.
- Notification to the employer from a **subcontracted employer** that a qualifying individual was on

<sup>2</sup> Although not all parts of the Labor Code apply to public employers, the provisions in Labor Code § 6409.6, including the provisions regarding employer obligations to provide notices, disclosure protection, and anti-retaliation protection, explicitly apply to public employers. Labor Code § 6409.6(h).

<sup>3</sup> Depending on the circumstances, the employer may or may not need to complete and submit to Cal/OSHA a Form 300. The fact that the same information required by this form must be provided to the union does not mean that a Form 300 must be completed and does not have any impact on the determination of whether the injury is work-related.

the worksite.<sup>4</sup>

## Notice of COVID-19 Related Benefits

When an employer must give notice to employees that they potentially have been exposed to COVID-19, the law requires employers to also notify the employee and the exclusive representative of information regarding COVID-19 related benefits, such as:

- Worker's Compensation Benefits
- Leave, Including Sick Leave & "Negotiated Leave Provisions"
- Anti-retaliation Protections
- Anti-discrimination Protections

Chapters should seek to review these notices with employers and request that the employer include union-related benefits, such as contractual protections against retaliation/discrimination, catastrophic leave, or other contract benefits with which employees may not be familiar. For more information regarding legally-required benefits related to COVID-19, see [CTA's COVID-19 Leave of Absence Accommodation Information](#) (7/30/20) and [CTA Know Your Rights: Leaves](#) (8/11/20), both of which are posted on the [COVID-19 Resources for Leaders](#) page.

## Notice of Safety and Disinfection Plan

The law requires employers that receive notice of a potential exposure to provide notice to all employees, employees of any subcontractor, and the exclusive representative of any safety and disinfection plan "per the guidelines of the federal Centers for Disease Control." Labor Code § 6409.6(a)(4). Again, this notice should be given within one business day.

## Outbreak Protocols

The law states that if an employer has an outbreak, as defined by the California Department of Public Health, the employer must give information on it within 48 hours to the local public health department and then update them on any additional cases. Currently, the [CDPH definition for an outbreak in a school reads](#) "[a]t least three probable or confirmed COVID-19 cases within a 14-day period in people who are epidemiologically-linked in the setting, are from different households, and are not identified as close contacts of each other in any other case investigation."

## Disclosure & Privacy Protection

Labor Code Section 6409.6(e) prohibits employers from requiring employees to disclose medical information "unless otherwise required by law." This likely does not override any employer right to request information for the purpose of conducting an interactive process to determine if the employee requires a reasonable accommodation or access to a benefit such as FFCRA leave that is premised on the employee having a specific medical condition. Still, this section may be useful to push back on an employer attempting to make a process for accessing employment rights and/or benefits onerous by requiring a significant amount of medical information.

Additionally, Labor Code Section 6409.6(j) states that no "personally identifiable employee information"

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<sup>4</sup> The text defines "worksite" as the building where a worker worked during the infectious period, but the definition excludes "floors" the qualified individual did not enter. Section 6409.6(d)(5).

shall be subject to a Public Records Act request or “similar request,” and it shall not be posted on a public website. Section 8 of the law makes a finding that employee privacy outweighs the interest in public disclosure of such information.

### **Retaliation Protection**

Labor Code Section 6409.6(f) prohibits retaliation for disclosing a positive COVID-19 test, diagnosis, quarantine order, or isolation order.

### **Enforcement**

A Cal/OSHA complaint may be filed to enforce the reporting requirements (1) to employees who may have been exposed, (2) to the exclusive representative regarding a workplace exposure, and (3) to all employees regarding the disinfection and safety plan. Labor Code § 6409.6(l). The same obligation to go through Cal/OSHA does not exist to enforce the provisions requiring that (1) employers provide a notice of available benefits to employees, (2) employers do not compel employees to disclose unnecessary medical information, and (3) employers do not retaliate against employees. Those provisions are enforceable through a state court action, and workers who believe they have been retaliated against for disclosing a positive COVID-19 diagnosis or order may file a complaint with the Division of Labor Standards Enforcement.

### **Cal/OSHA Power to Close Worksites and Issue Citations for Serious Violations**

The new law would require employers to post a notice to employees when the risk of an exposure to the coronavirus in a workplace is such that it creates an imminent hazard, and would allow Cal/OSHA to prohibit entry into the area (also known as an Order Prohibiting Use). Labor Code § 6352(b). Given this clarification of Cal/OSHA’s power, this provision is a logical first step for any chapter considering a refusal to work for safety reasons. The law also allows Cal/OSHA to issue a citation for a serious violation without giving 15-days of lead time. Labor Code § 6432(h). These provisions sunset January 1, 2023.

Chapters considering Cal/OSHA complaints should consult with their primary contact staff person, who will coordinate with the Legal Department.