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5350 Skylane Boulevard
Santa Rosa, CA 95403

Tel: (707) 524-2690
Fax: (707) 578-0517
santarosa@sclscal.org
www.sclscal.org

General Counsel
Carl D. Corbin

Attorneys
Monica D. Batanero
Jennifer Henry
Nancy L. Klein
Damara L. Moore
Jennifer E. Nix
Steven P. Reiner
Kaitlyn A. Schwendeman
Loren W. Soukup
Erin E. Stag

Of Counsel
Ellie R. Austin
Robert J. Henry
Frank Zotter, Jr.

LEGAL UPDATE

December 4, 2020

To: Superintendents, Member School Districts (K-12)
From: Nancy L. Klein, Senior Associate General Counsel *Nancy Klein*
Subject: Employer Notice Obligations Related to COVID-19 Exposure and Outbreaks (AB 685)
Memo No. 57-2020 REVISED

Except as noted below, effective January 1, 2021, Labor Code section 6409.6 requires employers to notify certain employees, their exclusive representatives, and employers of contracted employees, within one business day, after the employer receives a “notice of potential exposure” to COVID-19. Section 6409.6 also requires notice to the local public health agency, within 48 hours, after learning of a “COVID-19 outbreak” at a worksite.

A “notice of potential exposure” means notice (1) from a public health officer or licensed medical provider that an employee was exposed to a “qualifying individual” at the “worksite”, (2) from an employee or the employee’s emergency contact that the employee is a “qualifying individual”, (3) pursuant to the employer’s testing protocol that an employee is a “qualifying individual”, or (4) from a subcontracted employer that a qualifying individual was on the worksite of the employer. (Labor Code section 6409.6 (a)(1))

A “qualifying individual” means a person (1) who has a laboratory-confirmed case of COVID -19¹, a positive COVID-19 diagnosis from a licensed health care provider, or a COVID -19-related order to isolate provided by a public health official or (2) who died due to COVID-19, as determined by the county public health department or per inclusion in the county COVID-19 statistics. (Labor Code section 6409.6 (d)(4))

I. Written Notice to Employees and Employers of Subcontracted Employees within One Business Day

A. Notify all employees and employers of subcontracted employees who were on the premises of the same “worksite” as the “qualifying individual” within the “infectious period” of potential exposure to COVID-19. (Labor Code section 6409.6 (a)(1))

¹ Laboratory-confirmed case of COVID-19 means a positive result on any viral test for COVID-19, which includes nucleic acid (PCR) and antigen tests.



1. “Infectious period” means the time a COVID-19-positive individual is infectious, as defined by the California Department of Public Health (CDPH).² (Labor Code section 6409.6 (d)(3))
2. “Worksite” means the building, store, facility, agricultural field, or other location where a worker worked during the infectious period. It does not apply to buildings, floors, or other locations of the employer that a qualified individual did not enter. (Labor Code section 6409.6 (d)(5))

B. Content of the Written Notice

The notice must include the information below.

1. The employee *may have been exposed to COVID 19*. (Labor Code section 6409.6 (a)(1))
2. ***For Employees Only***: Information regarding COVID-19-related benefits to which the employee may be entitled, such as:
 - a. Emergency Paid Sick Leave under the Families First Coronavirus Response Act (FFCRA),
 - b. Leave pursuant to the Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA),
 - c. Worker’s Compensation,
 - d. Sick Leave,
 - e. Extended Illness Leave (Differential / 50% Leave), and
 - f. Rights specified in the employee’s collective bargaining agreement or an applicable MOU. (Labor Code section 6409.6 (a)(3))
3. The “disinfection and safety plan that the employer plans to implement and complete per [CDC] guidelines.” (Labor Code section 6409.6 (a)(4))

C. Form and Transmittal of Written Notice

1. The notice must be provided in English and in the language understood by the majority of employees.
2. The notice may be provided by personal service, email, text, or other method “if it can reasonably be anticipated to be received by the employee within one business day of sending...” (Labor Code section 6409.6 (a)(1))

² As of 11/23/20, CDPH defines the “infectious period” for symptomatic persons as two days before symptom onset and 10 days after onset, and for asymptomatic persons, two days before the date of collection of the specimen for the first positive COVID-19 test until 10 days after the specimen collection date.



II. Written Notice to the Exclusive Representative, if any, within One Business Day

Notify the exclusive representative of employees entitled to receive written notice, as specified in Section I, of the following:

- A. Information regarding COVID-19-related benefits to which the employees may be entitled (See Section I.B.2, above);
- B. The “disinfection and safety plan that the employer plans to implement and complete per [CDC] guidelines”; and
- C. The information required in an incident report in a Cal/OSHA Form 300 injury and illness log,³ unless the information is inapplicable or unknown to the employer. (NOTE: This requirement applies regardless of whether the employer is required to maintain a Cal/OSHA Form 300 log.) (Labor Code sections 6409.6 (a)(2), (a)(3), and (c))

III. Notice to the Local Public Health Agency within 48 Hours

If the employer is notified of a sufficient number of cases at a worksite to constitute a “COVID-19 outbreak,” as defined by the State Department of Public Health, *within 48 hours*, the employer must notify the local public health agency in the jurisdiction of the worksite of:

- A. The names, number, occupation, and worksite of employees who are “qualifying individuals,” and
- B. The business address and North American Industry Classification (NAIC) code of the employees’ worksites. (Labor Code section 6409.6 (b))

“A COVID-19 outbreak in a non-healthcare workplace means at least three COVID-19 cases among workers at the same worksite within a 14-day period... [A] COVID-19 case is someone who:

1. Has a positive viral test for COVID-19,
2. Is diagnosed with COVID-19 by a licensed health care practitioner,
3. Is ordered to isolate for COVID-19 by a public health official, OR
4. Dies due to COVID-19, as determined by a public health department.”⁴

Effective Date: This notice is also required under CDPH’s “Responding to COVID-19 in the Workplace for Employers” and currently in effect.

³ Employee’s name, job title, date of injury or onset of illness (date of potential exposure), where the event occurred, description of injury or illness (potential exposure to COVID-19), most serious result for each employee, number of days employee was away from work or on the job transfer or restriction, type of “injury” – injury, skin disorder, respiratory condition, poisoning, hearing loss, other.

⁴ <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Employer-Guidance-on-AB-685-Definitions--en.pdf>



IV. Maintenance of Records and Prohibition of Retaliation / Enforcement

A. Three Years

Employers are required to maintain records of the written notifications to employees and their exclusive representatives, if any, for a period of at least three years. (Labor Code section 6409.6(k))

B. Retaliation is Prohibited

Retaliation against any worker for disclosing a positive COVID-19 test or diagnosis or order to quarantine or isolate is prohibited. (Labor Code section 6409.6(f))

Complaints regarding retaliation or failure to provide notices will be investigated by the Division of Labor Standards Enforcement. Notice violations may result in the issuance of citations and civil penalties. (Labor Code section 6409.6(1))

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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