

# Enactment of AB 685 Establishes COVID-19 Exposure Notice Requirements for California Employers and Cal/OSHA Enforcement Changes

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On September 17, 2020, Governor Newsom signed [Assembly Bill \(AB\) 685](#) into law, establishing new requirements for employers to notify employees and their unions about a potential COVID-19 exposure in the workplace. The new law, which will be in effect from January 1, 2021, until January 1, 2023, also requires employers to report a COVID-19 “outbreak” at the worksite to local health authorities. Further, AB 685 relaxes the pre-citation requirements that the Division of Occupational Safety and Health (“Cal/OSHA”) must follow before issuing a citation for a serious violation related to COVID-19. This article breaks down the various requirements of the new law and identifies potential complications or issues that employers should be aware of when attempting to comply with the new requirements.

## Requirements for Notifying Employees of Potential COVID-19 Exposure

Throughout the ongoing COVID-19 pandemic, employers have been advised to notify employees who may have been in close contact with an infected employee. In May, Cal/OSHA published [general industry guidelines](#) on protecting workers from COVID-19, which simply stated that if an employer learns that an onsite worker has a confirmed COVID-19 case, the employer should inform employees of their possible exposure while still maintaining confidentiality as required by the Americans with Disabilities Act (ADA). Subsequently, in late July, the California Department of Public Health (“CDPH”) issued its guidance entitled “[COVID-19 Employer Playbook For a Safe Reopening](#).” The CDPH advised that when an employer learns of a worker who has tested positive for COVID-19 or a worker who has symptoms, the employer should notify all workers who were potentially exposed to the individual with COVID-19 while still complying with privacy laws. The CDPH even went one step further and provided a draft communication for employers to send to employees.

Under AB 685, the requirement to notify employees who may have been exposed to an infected employee is now mandatory for public and private employers under new Labor Code section 6409.6.

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Section 6409.6(a) requires an employer or representative of the employer who receives “notice of potential exposure” to COVID-19 to take the following actions within one business day.

- **Notify Potentially Infected Employees**: Provide a written notice to all employees, and the employers of subcontracted employees, who were on the premises at the same “worksite” as the “qualifying individual” within the “infectious period” and may have been exposed to COVID-19. To comply with competing obligations to preserve employee privacy, the notice to employees should be provided in a manner that does not reveal the identity of the qualifying individual.
  - **Infectious Period**: Section 6409.6(d)(2) defines “infectious period” as “the time a COVID-19-positive individual is infectious, as defined by the State Department of Public Health.” However, this information is not easily located. In [CDPH guidance](#) updated on July 31, 2020, the CDPH states that for symptomatic cases, the infectious period is up to 10 days after onset and for asymptomatic cases, the CDPH recommends isolating for 10 days. In addition, the CDPH and CDC advise that an infected person can spread COVID-19 starting 2 days before the person has any symptoms or tests positive for COVID-19. Thus, an employee’s infectious period may vary by individual. For example, if an employee notifies his employer on the first day that symptoms appear and then quarantines, the infectious period should be the two days prior (if the employee worked those two days). However, if the same employee continues to work and waits to quarantine until two days after symptoms first appear, then the infectious period is four days. Accordingly, employers should continue to stress to employees the importance of staying home if symptoms appear and limiting an employee’s infectious period.
  - **Notice of Potential Exposure**: Section 6409(d)(3) defines “notice of potential exposure” as including any of the following: notice to the employer or its representative from (a) a public health official/licensed medical provider that an employee was exposed to the qualifying individual at the worksite, or (b) from an employee/employee’s emergency contact that the employee is qualifying individual; (c) notice through the employer’s testing protocol that an employee is a qualifying individual; or (d) notice from a subcontracted employer that a qualifying individual was on the worksite.
  - **Qualifying Individual**: Section 6409.6(d)(4) defines a “qualifying individual” as a person who: (1) has a laboratory-confirmed positive case or a diagnosis from a licensed health care provider, (2) received an isolation order from a public health official, or (3) died due to COVID-19. Because an individual may receive a local isolation order based on potential exposure and not a confirmed case, the inclusion of such individuals may subject employers to providing notice more frequently.
  - **Worksite**: Section 6409.6(d)(5) defines “worksite” as “the building, store, facility, agricultural field, or other location where a worker worked during the infectious period.” The term “worksite” “does not apply to buildings, floors, or other locations of the employer that a qualified individual did not enter.” Further, “[i]n a multiworksite environment, the employer need only notify employees who were at the same worksite as the qualified individual.” Although this definition may limit the number of notice recipients for some employers, an employer with hundreds of employees in a large warehouse or store may have to notify more employees than an employer which

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occupies multiple floors in a building.

- **Notify the Union for Potentially Infected Employees:** Provide a written notice to the exclusive representative (union), if any, of the employees in item 1 above.
  - **Contents of Union Notice:** Section 6409.6(c) states that the notice to the union representative must contain the same information required in an incident report in a [Cal/OSHA Form 300 log](#) (unless inapplicable or unknown to the employer), regardless of whether the employer is required to maintain a Form 300 log. A Form 300 log requests the following information: the employee's name, job title, date of onset of illness, where the illness occurred, description of illness, days away from work, and whether the employee died. Before AB 685's enactment, employers were at risk of violating the [California Confidentiality of Medical Information Act](#) (Civ. Code §§ 56-56.16) ("CMIA") if they disclosed the medical information contained in a Form 300 log without an employee's specific authorization. However, CMIA provides an exception "if the disclosure is compelled by" a "specific provision of law." (Civ. Code § 56.20(c)(1).) Therefore, with the addition of section 6409.6 to the Labor Code, employers may now disclose the employee's information contained in a Form 300 log to the employee's union representative without the need to obtain employee authorization.
- **Notify Potentially Infected Employees and Their Union of COVID-19 Related Benefits:** Provide all employees who may have been exposed, and their exclusive representative, if any, with information regarding COVID-19-related benefits that the employee(s) may be entitled to receive, including workers' compensation benefits, COVID-19 related leave, company sick leave, paid sick leave, supplemental paid sick leave, as well as the company's anti-retaliation and anti-discrimination policies.
  - Under section 6409.6(l), a violation of this particular notice requirement will not result in a Cal/OSHA citation and notice of civil penalty (whereas violation of 1, 2, and 4 will) under the new statute. Nonetheless, it is advisable that employers satisfy this notice requirement as citations could be issued under the Cal/OSHA General Duty Clause or the Injury and Illness Prevention Plan regulations under Title 8, California Code of Regulations section 3203. In addition, there is some risk of a PAGA claim after exhaustion through Cal/OSHA.
- **Notify All Employees and Their Union of the Employer's COVID-19 Safety Plan:** Notify all employees, the employers of subcontracted employees, and the exclusive representative, if any, on the company's COVID-19 disinfection protocols and safety plan that the company plans to implement and complete to prevent further exposures, per federal Centers for Disease Control and Prevention ("CDC") guidelines.

The requirement to provide the notices above, however, does not apply to employees who, as part of their duties, conduct COVID-19 testing or screening or provide direct patient care or treatment to individuals who are known to have tested positive for COVID-19, are persons under investigation, or are in quarantine or isolation related to COVID-19, unless the qualifying individual is an employee at the same worksite.

The written notice provided to employees should be communicated in a manner that the employer

normally uses to communicate employment-related information, which may include, but is not limited to, personal service, e-mail, or text message if it can reasonably be anticipated to be received by the employee within one business day of sending. The written notice must be in both English and the language understood by the majority of the employees. In addition to the information contained in items 3 and 4 above, Section 6409.6 does not specify what information must be in the written notice provided to employees other than notifying employees at the same worksite during the qualifying individual's infectious period that they "may have been exposed to COVID-19." In providing the notice, employers must still be mindful that they do not disclose the identity of the infected employee as AB 685 only slightly expanded the Labor Code to permit the specific disclosures identified above and does not permit unauthorized disclosures of identifying personal information to fellow employees. Disclosing an employee's identity may still result in violation of ADA, CMIA and workplace privacy laws. Additionally, employers must maintain records of the written notice in item 1 above for at least three years, which must be reasonably secured to prevent unauthorized access and exfiltration, theft, or disclosure, pursuant to California Civil Code sections 1798.80-1798.84 and 1798.150.

## **Requirements for Reporting an Outbreak to Local Health Authorities**

Under Labor Code section 6409.6(b), employers must notify the local public health department within 48 hours of notice of a COVID-19 "outbreak" (as defined by the CDPH). The CDPH currently defines an "outbreak" as "three or more laboratory-confirmed cases of COVID-19 among workers who live in different households within a two-week period." The notice must identify the number of qualifying individuals, the name, occupation, and worksite for those individuals, the employer's business address, and the NAICS code of the worksite. Following the reporting of an outbreak, the employer must continue to give notice to the local health department of any subsequent laboratory-confirmed cases at the worksite. Surprisingly, this requirement does not include a cut-off date for when an employer may cease reporting subsequent confirmed cases. Consistent with the exception described above, this section does not apply to a "health facility," as defined in Health and Safety Code section 1250.

Section 6409.6(b) also requires the CDPH to make specified information on outbreaks publicly available on its website. Local public health departments and Cal/OSHA must also provide a link to this page on their websites. This aspect of the requirement may be particularly concerning to businesses, given that they may be subject to negative public or customer reaction in response to learning of the "outbreaks." Even more frustrating to businesses is that many of the "outbreaks" will likely not be publicized by the CDPH until after potentially infected employees have quarantined and cleaning and disinfecting already occurred.

The use of "worksite" in this section relies on the same definition described above in connection with employee notice. Thus, again, this requirement appears to impact an employer with hundreds of employees in a large warehouse or store differently than an employer who occupies multiple floors in a building. For example, under the law's definition of worksite, reporting may not be required if an employer learns of two qualifying individuals on one floor and one qualifying individual on another floor within a two-week period. Absent further clarification from Cal/OSHA, employers should consult with experienced employment counsel immediately to determine whether reporting is necessary, especially in light of the apparent requirement to continue to report any confirmed cases indefinitely.

Similar to disclosure to an employee's union, an employer was at risk of violating CMIA prior to AB 685's enactment if the employer disclosed information about an infected employee to public health authorities without the employee's specific authorization or consent. However, as noted above, AB 685 expanded the Labor Code to specifically require employers to provide this information to public

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health authorities under the circumstances described. Thus, employers may disclose this information without an employee's authorization.

## **Changes to Cal/OSHA Enforcement**

Under Labor Code section 6325, Cal/OSHA already possessed the authority to shut down a worksite or prohibit the operation of certain equipment that presents an ["imminent hazard."](#) Cal/OSHA defines an imminent hazard as a "hazard which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of the hazard can be eliminated through regular Cal/OSHA enforcement procedures." AB 685 amended section 6325 by adding section 6325(b), which specifically provides that Cal/OSHA can prohibit operations when, in the opinion of Cal/OSHA, a worksite or operation "exposes workers to the risk of infection" of COVID-19 so as to constitute an imminent hazard. The amendment does not identify any specific level or type of exposure to COVID-19 that may create an imminent hazard and instead leaves that determination entirely up to Cal/OSHA.

The latitude of discretion given to Cal/OSHA in its determination is particularly concerning because AB 685 also modified the process for when Cal/OSHA intends to issue a serious citation under Labor Code section 6432. Normally, if Cal/OSHA plans to issue a serious citation, the agency first must provide a "1BY" notice of intent to the employer that identifies alleged violations and conditions that warrant a citation. The employer then has the option of responding to the notice with evidence within 15 days. However, AB 685 eliminated the requirement for Cal/OSHA to provide a 1BY notice for COVID-19 related hazards. Consequently, Cal/OSHA can effectively issue a citation immediately and employers will no longer have the ability to learn of a citation in advance and respond accordingly. Given the lack of a notice period, employers must be ready to move quickly when responding to a COVID-19 investigation or citation.

## **Confidentiality and Privacy under AB 685**

AB 685 seeks to resolve the tension between employees' privacy and employers' needs to have effective means to record, control, and communicate COVID-19 outbreaks. Employers have been facing challenging demands from public health authorities or unions who argue they have a need to know this information to preserve public health or workplace safety. Prior to AB 685, health authorities and unions were arguably required under CMIA to obtain judicial or administrative process before employers could legally disclose information contained in a Form 300 log. Alternatively, employers could seek specific, written authorization from employees for the release of such information, a process further complicated by the unique challenges of the post-COVID workplace. AB 685 now provides employers with a limited ability to disclose positive test cases under the specific conditions outlined in this article so as to balance employees' rights against employers' legal obligations. Indeed, employers must still provide notice to other employees in a way that does not reveal the identity of the confirmed case and preserves the employees' privacy.

AB 685 also requires the CDPH to make specific information that it receives on outbreaks from local public health departments publicly available on its internet website. Again, the new law attempts to strike a balance between the public's need to know the number and frequency of COVID-19 outbreaks against employees' privacy rights because CDPH is prohibited from publicizing or posting "personally identifiable employee information" under Labor Code section 6409.6(g). Additionally, given the delay between when this information becomes publicly available and when the outbreak actually occurred, there is a low risk employees' identities may be inferred through other means.

## Takeaway

The new notice requirements and changes to Cal/OSHA enforcement under AB 685 all require employers to respond quickly to learning of an employee's confirmed case, "outbreak," or Cal/OSHA investigation or citation. Thus, while AB 685 is not effective until January 1, 2021, employers should begin reviewing their COVID-19 related processes and procedures now to ensure they are compliant once the law goes into effect. Given that employee notices, in particular, must be circulated within one business day, it is imperative that employers have their employee notice process in place ahead of time. Employers with any questions or concerns about AB 685 should consult with experienced employment counsel to ensure they are compliant.

As you are aware, things are changing quickly and there is a lack of clear-cut authority or bright line rules on implementation. This article is not intended to be an unequivocal, one-size fits all guidance, but instead represents our interpretation of where things currently and generally stand. This article does not address the potential impacts of the numerous other local, state and federal orders that have been issued in response to the COVID-19 pandemic, including, without limitation, potential liability should an employee become ill, requirements regarding family leave, sick pay and other issues.

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