On Covid, Chocolate, and Presumptions: California's Perfect Storm for COVID19 Liability

By Gregory Grinberg

In March of 2020, California experienced one of those "black swan events" that seemed to change everything. Governor Gavin Newsom issued a stay-at-home order, via Executive Order N-33-20, requiring the closure of various businesses and gathering places unless they were deemed "essential."

As the numbers of COVID19 cases, illnesses, and deaths climbed steadily, those employers in California that remained open in accordance with EO N-33-20, provided the venue for a growing issue to be faced in Workers' Compensation and in civil liability as well: how should the state address claims of industrial COVID19 exposure?

Those employees who remained on the job outside of the home claimed they were facing increased risk of exposure. Employers could reasonably respond that COVID19 was *everywhere* and that the employer was providing Personal Protective Equipment such as limiting the number of customers, plexiglass walls, and enforced social distancing, which employees did not have outside of their work hours.

Well, what followed shortly after was a series of presumptions to shift the burden of proof from employees to employers regarding COVID19 causation. First, Governor Newsome issued Executive Order N-62-20 on May 6, 2020. This created a presumption that positive COVID19 cases obtained within 14 days of working at the employer's premises between March 19, 2020, and July 6, 2020, would be presumed industrial. EO N-62-20 also limited the employer's investigation period from the standard 90 days to 30.

In September of 2020, Governor Newsome signed into law SB-1159, which codified EO N-62-20, but also created additional presumptions: Active firefighters, peace officers, and employees providing direct patient care were granted presumption of industrial causation for COVID19 cases. SB-1159 also created an "outbreak" category, triggered when an employee tests positive within 14 days of working within a facility where at least 4 employees or 4% of the on-site workforce (whichever is greater) tested positive for COVID-19 within the last 14 days.

However, SB-1159 is set to expire on January 1, 2023. This "sunset" clause was a year away from activating when California's Legislature introduced AB 1751, which, if passed, would extend the presumptions another year until January 1, 2024.

But, while AB1751 is pending before the California Legislature, the California Supreme Court has its own pending question in the case of *Kuciemba* v. *Victory Woodworks*. The question posed in this case, as was the case in *Ek* v. *See's Candies*, was whether employers have a duty of care to the cohabitants of employees in handling COVID19 exposure. In other words, in both the *Ek* and the *Kuciemba* cases, family members and cohabitants of employees are seeking damages against the employers of family members who, allegedly, brought COVID19 home from work and created a domestic exposure. Earlier

in 2022, the California Supreme Court declined to order the lower courts to grant See's motion for summary judgment, requiring the employer to address the claims on the merits.

This theory would not be new in California, as in 2016, the California Supreme Court held that employers had a duty of care to "members of a worker's household" of employees in the handling of asbestos exposure. By the same reasoning, the California Supreme Court might rule in the *Kuciemba* case and, ultimately, in the *Ek* case, that employers likewise have a duty of care to "members of a worker's household" in the handling of COVID19 exposures.

While serious cases, hospitalizations, and deaths are trending downward in the United States, the risk of pending litigation and exposure endures and is on the verge of flooding California's legal system with claims.

The "perfect storm" for California employers lies in the interplay of the COVID19 presumptions and the extension of the duty of care to household members. If the presumption applies to conclude that the employee's infection of COVID19 occurred at work, how much easier will it be to prove that the infected employee then spread COVID19 to household members?

At the moment, California business are sensible in carefully watching for the answers to three questions:

1. Will the legislature extend COVID19 presumption laws past January 1, 2023?
2. Will the California Supreme Court impose a duty of care on employers as to the household members of employees with respect to COVID19?
3. Will presumptions of industrial COVID19 exposure in workers' compensation cases ease the burden of proof for household member claims against employers in showing causation?

The answers to these questions, expected in the coming months, will determine the scope of COVID19 liability for employers in California. To the extent that other states might follow suit, the risk lies for employers in the rest of the 49 states as well. In other words, it is very likely that employers are nowhere near the end of addressing the effects of the COVID19 pandemic.