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AB-685 COVID-19: imminent hazard to employees: exposure: notification: serious violations. (2019-2020)

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Assembly Bill No. 685

CHAPTER 84

An act to amend, repeal, and add Sections 6325 and 6432 of, and to add and repeal Section 6409.6 of, the Labor Code, relating to occupational safety.

[Approved by Governor September 17, 2020. Filed with Secretary of State September 17, 2020.]

LEGISLATIVE COUNSEL'S DIGEST

AB 685, Reyes. COVID-19: imminent hazard to employees: exposure: notification: serious violations.

(1) Existing law, the California Occupational Safety and Health Act of 1973 (OSHA), requires the Division of Occupational Safety and Health, when, in its opinion, a place of employment, machine, device, apparatus, or equipment or any part thereof is in a dangerous condition, is not properly guarded, or is dangerously placed so as to constitute an imminent hazard to employees, to prohibit entry or use, as applicable, and to attach a conspicuous notice of that condition, as specified. OSHA requires that this prohibition be limited to the immediate area in which the imminent hazard exists. OSHA prohibits this notice from being removed except by an authorized representative of the division under certain conditions. OSHA makes a violation of this provision regarding dangerous conditions a crime.

This bill would authorize the division, when, in its opinion, a place of employment, operation, or process, or any part thereof, exposes workers to the risk of infection with severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2, also known as COVID-19), so as to constitute an imminent hazard to employees, to prohibit the performance of that operation or process, or entry into that place of employment. The bill would require the division to provide a notice thereof to the employer, to be posted in a conspicuous place at the place of employment. The bill would require such a prohibition to be limited to the immediate area in which the imminent hazard exists, as specified. The bill would require such a prohibition to be issued in a manner so as not to materially interrupt the performance of critical governmental functions essential to ensuring public health and safety functions or the delivery of electrical power or water. By expanding the scope of a crime, the bill would impose a state-mandated local program.

This COVID-19 imminent hazard provision would be repealed on January 1, 2023.

(2) Existing law requires an employer to file a report of every occupational injury or occupational illness, as defined, of each employee that results in lost time beyond the date of the injury or illness, and that requires medical treatment beyond first aid, with the Department of Industrial Relations, on a form prescribed by the department. Existing law requires an employer to immediately report a serious occupational injury, illness, or death to the division by telephone or email, as specified.

This bill would require a public or private employer or representative of the employer, except as specified, that receives a notice of potential exposure to COVID-19 to provide specified notifications to its employees within one business day of the notice of potential exposure. The bill would require the employer to provide prescribed notice to all employees, and the employers of subcontracted employees, who were on the premises at the same worksite as a qualifying individual, as defined, within the infectious period, as defined, that they may have been exposed to COVID-19. The bill would require notice to the exclusive representative, if any, of notified employees. The bill would require an employer to provide those employees and any exclusive representative with certain information regarding COVID-19-related benefits and options. The bill would require an employer to notify all employees, the employers of subcontracted employees, and any exclusive representative on the disinfection and safety plan that the employer plans to implement and complete per the guidelines of the federal Centers for Disease Control. The bill would require an employer to maintain records of notifications for at least 3 years. The bill would provide for a specified civil penalty for an employer that violates the notification requirements. The bill would define additional terms for its purposes.

The bill would require an employer, if the employer or representative of the employer is notified of the number of cases that meet the definition of a COVID-19 outbreak, as defined, within 48 hours, to report prescribed information to the local public health agency in the jurisdiction of the worksite. The bill would require an employer that has an outbreak to continue to give notice to the local health department of any subsequent laboratory-confirmed cases of COVID-19 at the worksite. The bill would exempt a health facility, as defined, from this reporting requirement.

The bill would require the State Department of Public Health to make specified information on outbreaks publicly available on its internet website, as specified. The bill would require local public health departments and the division to provide a link to this page on its internet websites. By requiring additional duties from local public health departments, this bill would impose a state-mandated local program.

(3) OSHA creates a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. OSHA requires the division, before issuing a citation alleging that a violation is serious, to make a reasonable attempt to determine and consider certain facts. This OSHA requirement is satisfied if the division sends, at least 15 days before issuing such a citation, a standardized form containing descriptions of the alleged violation the division intends to cite as serious and clearly soliciting the prescribed information. OSHA permits an employer to rebut the presumption, as prescribed, and establishes inferences that may be drawn at hearing with regard to information provided by an employer in rebuttal.

This bill would exempt a citation alleging a serious violation relating to SARS-CoV-2 from the precitation standardized form provision and the rebuttal at hearing provision.

This exemption would be repealed on January 1, 2023.

(4) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

(5) Existing constitutional provisions require that a statute that limits the right of access to the meetings of public bodies or the writings of public officials and agencies be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

This bill would make legislative findings to that effect.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares all of the following:

(a) As COVID-19 continues to ravage California, one of the best tools available for limiting exposure and minimizing spread is to gather thorough and accurate data.

(b) As the average age of those falling ill from COVID-19 has become younger, it is critical to track workplace exposure and to use that data to find ways to keep workers safe on the job.

(c) With infections and deaths disproportionately high in the Latino, Black, and Asian-Pacific Islander communities, more information about workplace illness and industry clusters can inform policy makers in addressing healthcare disparities and protecting vulnerable workers.

(d) Current law lacks clarity as to an employer's reporting requirements, including to their own workforce. This deficiency has led to workers and members of the public living in fear for their own safety, unaware of where outbreaks may already be occurring.

(e) Consistent with California's efforts to track and trace COVID-19 cases, it is imperative that positive COVID-19 tests or diagnoses be reported immediately in the occupational setting, to members of the public, and to relevant state agencies.

SEC. 2. Section 6325 of the Labor Code is amended to read:

6325. (a) When, in the opinion of the division, a place of employment, machine, device, apparatus, or equipment or any part thereof is in a dangerous condition, is not properly guarded or is dangerously placed so as to constitute an imminent hazard to employees, entry therein, or the use thereof, as the case may be, shall be prohibited by the division, and a conspicuous notice to that effect shall be attached thereto. Such prohibition of use shall be limited to the immediate area in which the imminent hazard exists, and the division shall not prohibit any entry in or use of a place of employment, machine, device, apparatus, or equipment, or any part thereof, which is outside such area of imminent hazard. Such notice shall not be removed except by an authorized representative of the division, nor until the place of employment, machine, device, apparatus, or equipment is made safe and the required safeguards or safety appliances or devices are provided. This subdivision shall not prevent the entry or use with the division's knowledge and permission for the sole purpose of eliminating the dangerous conditions.

(b) When, in the opinion of the division, a place of employment, operation, or process, or any part thereof, exposes workers to the risk of infection with severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) so as to constitute an imminent hazard to employees, the performance of such operation or process, or entry into such place of employment, as the case may be, may be prohibited by the division, and a notice thereof shall be provided to the employer and posted in a conspicuous place at the place of employment. Such prohibition of use shall be limited to the immediate area in which the imminent hazard exists, and the division shall not prohibit the performance of any operation or process, entry into or use of a place of employment, or any part thereof, which is not exposing employees to, or is outside such area of imminent hazard. In addition, this prohibition shall be issued in a manner so as not to materially interrupt the performance of critical governmental functions essential to ensuring public health and safety functions or the delivery of electrical power or water. This notice shall not be removed except by an authorized representative of the division, nor until the place of employment, operation, or process is made safe and the required safeguards or safety appliances or devices are provided. This subdivision shall not prevent the entry or use with the division's knowledge and permission for the sole purpose of eliminating the dangerous conditions.

(c) This section shall remain in effect only until January 1, 2023, and as of that date is repealed.

SEC. 3. Section 6325 is added to the Labor Code, to read:

6325. (a) When, in the opinion of the division, a place of employment, machine, device, apparatus, or equipment or any part thereof is in a dangerous condition, is not properly guarded or is dangerously placed so as to constitute an imminent hazard to employees, entry therein, or the use thereof, as the case may be, shall be prohibited by the division, and a conspicuous notice to that effect shall be attached thereto. Such prohibition of use shall be limited to the immediate area in which the imminent hazard exists, and the division shall not prohibit any entry in or use of a place of employment, machine, device, apparatus, or equipment, or any part thereof, which is outside such area of imminent hazard. Such notice shall not be removed except by an authorized representative of the division, nor until the place of employment, machine, device, apparatus, or equipment is made safe and the required safeguards or safety appliances or devices are provided. This section

shall not prevent the entry or use with the division's knowledge and permission for the sole purpose of eliminating the dangerous conditions.

(b) This section shall become operative on January 1, 2023.

SEC. 4. Section 6409.6 is added to the Labor Code, to read:

6409.6. (a) If an employer or representative of the employer receives a notice of potential exposure to COVID-19, the employer shall take all of the following actions within one business day of the notice of potential exposure:

(1) 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 that they may have been exposed to COVID-19 in a manner the employer normally uses to communicate employment-related information. Written notice may include, but is not limited to, personal service, email, or text message if it can reasonably be anticipated to be received by the employee within one business day of sending and shall be in both English and the language understood by the majority of the employees.

(2) Provide a written notice to the exclusive representative, if any, of employees under paragraph (1).

(3) Provide all employees who may have been exposed and the exclusive representative, if any, with information regarding COVID-19-related benefits to which the employee may be entitled under applicable federal, state, or local laws, including, but not limited to, workers' compensation, and options for exposed employees, including COVID-19-related leave, company sick leave, state-mandated leave, supplemental sick leave, or negotiated leave provisions, as well as antiretaliation and antidiscrimination protections of the employee.

(4) Notify all employees, and the employers of subcontracted employees and the exclusive representative, if any, on the disinfection and safety plan that the employer plans to implement and complete per the guidelines of the federal Centers for Disease Control.

(b) If an employer or representative of the employer is notified of the number of cases that meet the definition of a COVID-19 outbreak, as defined by the State Department of Public Health, within 48 hours, the employer shall notify the local public health agency in the jurisdiction of the worksite of the names, number, occupation, and worksite of employees who meet the definition in subdivision (d) of a qualifying individual. An employer shall also report the business address and NAICS code of the worksite where the qualifying individuals work. An employer that has an outbreak subject to this section shall continue to give notice to the local health department of any subsequent laboratory-confirmed cases of COVID-19 at the worksite.

(c) The notice required pursuant to paragraph (2) of subdivision (a) shall contain the same information as would be required in an incident report in a Cal/OSHA Form 300 injury and illness log unless the information is inapplicable or unknown to the employer. This requirement shall apply regardless of whether the employer is required to maintain a Cal/OSHA Form 300 injury and illness log. Notifications required by this section shall not impact any determination of whether or not the illness is work related.

(d) For purposes of this section, the following definitions apply:

(1) "COVID-19" means severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

(2) "Infectious period" means the time a COVID-19-positive individual is infectious, as defined by the State Department of Public Health.

(3) "Notice of potential exposure" means any of the following:

(A) Notification to the employer or representative from a public health official or licensed medical provider that an employee was exposed to a qualifying individual at the worksite.

(B) Notification to the employer or representative from an employee, or their emergency contact, that the employee is a qualifying individual.

(C) Notification through the testing protocol of the employer that the employee is a qualifying individual.

(D) Notification to an employer or representative from a subcontracted employer that a qualifying individual was on the worksite of the employer receiving notification.

(4) "Qualifying individual" means any person who has any of the following:

(A) A laboratory-confirmed case of COVID-19, as defined by the State Department of Public Health.

(B) A positive COVID-19 diagnosis from a licensed health care provider.

(C) A COVID-19-related order to isolate provided by a public health official.

(D) Died due to COVID-19, in the determination of a county public health department or per inclusion in the COVID-19 statistics of a county.

(5) "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. In a multiworksite environment, the employer need only notify employees who were at the same worksite as the qualified individual.

(e) An employer shall not require employees to disclose medical information unless otherwise required by law.

(f) An employer shall not retaliate against a worker for disclosing a positive COVID-19 test or diagnosis or order to quarantine or isolate. Workers who believe they have been retaliated against in violation of this section may file a complaint with the Division of Labor Standards Enforcement pursuant to Section 98.6. The complaint shall be investigated as provided in Section 98.7.

(g) The State Department of Public Health shall make workplace industry information received from local public health departments pursuant to this section available on its internet website in a manner that allows the public to track the number and frequency of COVID-19 outbreaks and the number of COVID-19 cases and outbreaks by industry reported by any workplace in accordance with subdivision (b). Local public health departments and the division shall provide a link to this page on their internet websites. No personally identifiable employee information shall be made public or posted.

(h) This section shall apply to both private and public employers, except that subdivision (b) shall not apply to a "health facility," as defined in Section 1250 of the Health and Safety Code.

(i) This section shall 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.

(j) No personally identifiable employee information shall be subject to a California Public Records Act request or similar request, posted on a public internet website, or shared with any other state or federal agency.

(k) An employer shall maintain records of the written notifications required in subdivision (a) for a period of at least three years.

(l) The division shall enforce paragraphs (1), (2), and (4) of subdivision (a) by the issuance of a citation alleging a violation of these paragraphs and a notice of civil penalty in a manner consistent with Section 6317. Any person who receives a citation and penalty may appeal the citation and penalty to the appeals board in a manner consistent with Section 6319.

SEC. 5. Section 6432 of the Labor Code is amended to read:

6432. (a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:

(1) A serious exposure exceeding an established permissible exposure limit.

(2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.

(b) (1) Before issuing a citation alleging that a violation is serious, the division shall make a reasonable attempt to determine and consider, among other things, all of the following:

(A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.

(B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.

(C) Supervision of employees exposed or potentially exposed to the hazard.

(D) Procedures for communicating to employees about the employer's health and safety rules and programs.

(E) Information that the employer wishes to provide, at any time before citations are issued, including, any of the following:

(i) The employer's explanation of the circumstances surrounding the alleged violative events.

(ii) Why the employer believes a serious violation does not exist.

(iii) Why the employer believes its actions related to the alleged violative events were reasonable and responsible so as to rebut, pursuant to subdivision (c), any presumption established pursuant to subdivision (a).

(iv) Any other information that the employer wishes to provide.

(2) The division shall satisfy its requirement to determine and consider the facts specified in paragraph (1) if, not less than 15 days prior to issuing a citation for a serious violation, the division delivers to the employer a standardized form containing the alleged violation descriptions ("AVD") it intends to cite as serious and clearly soliciting the information specified in this subdivision. The director shall prescribe the form for the alleged violation descriptions and solicitation of information. Any forms issued pursuant to this section shall be exempt from the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).

(c) If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The employer may accomplish this by demonstrating both of the following:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

(d) If the employer does not provide information in response to a division inquiry made pursuant to subdivision (b), the employer shall not be barred from presenting that information at the hearing and no negative inference shall be drawn. The employer may offer different information at the hearing than what was provided to the division and may explain any inconsistency, but the trier of fact may draw a negative inference from the prior inconsistent factual information. The trier of fact may also draw a negative inference from factual information offered at the hearing by the division that is inconsistent with factual information provided to the employer pursuant to subdivision (b), or from a failure by the division to provide the form setting forth the descriptions of the alleged violation and soliciting information pursuant to subdivision (b).

(e) "Serious physical harm," as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment, that results in any of the following:

(1) Inpatient hospitalization for purposes other than medical observation.

(2) The loss of any member of the body.

(3) Any serious degree of permanent disfigurement.

(4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity,

second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(f) Serious physical harm may be caused by a single, repetitive practice, means, method, operation, or process.

(g) A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that their division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

(h) Paragraph (2) of subdivision (b) and subdivision (d) shall not apply to a citation alleging a serious violation relating to the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

(i) This section shall remain in effect only until January 1, 2023, and as of that date is repealed.

SEC. 6. Section 6432 is added to the Labor Code, to read:

6432. (a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:

(1) A serious exposure exceeding an established permissible exposure limit.

(2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.

(b) (1) Before issuing a citation alleging that a violation is serious, the division shall make a reasonable attempt to determine and consider, among other things, all of the following:

(A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.

(B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.

(C) Supervision of employees exposed or potentially exposed to the hazard.

(D) Procedures for communicating to employees about the employer's health and safety rules and programs.

(E) Information that the employer wishes to provide, at any time before citations are issued, including, any of the following:

(i) The employer's explanation of the circumstances surrounding the alleged violative events.

(ii) Why the employer believes a serious violation does not exist.

(iii) Why the employer believes its actions related to the alleged violative events were reasonable and responsible so as to rebut, pursuant to subdivision (c), any presumption established pursuant to subdivision (a).

(iv) Any other information that the employer wishes to provide.

(2) The division shall satisfy its requirement to determine and consider the facts specified in paragraph (1) if, not less than 15 days prior to issuing a citation for a serious violation, the division delivers to the employer a standardized form containing the alleged violation descriptions ("AVD") it intends to cite as serious and clearly soliciting the information specified in this subdivision. The director shall prescribe the form for the alleged violation descriptions and solicitation of information. Any forms issued pursuant to this section shall be exempt from the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).

(c) If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The employer may accomplish this by demonstrating both of the following:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

(d) If the employer does not provide information in response to a division inquiry made pursuant to subdivision (b), the employer shall not be barred from presenting that information at the hearing and no negative inference shall be drawn. The employer may offer different information at the hearing than what was provided to the division and may explain any inconsistency, but the trier of fact may draw a negative inference from the prior inconsistent factual information. The trier of fact may also draw a negative inference from factual information offered at the hearing by the division that is inconsistent with factual information provided to the employer pursuant to subdivision (b), or from a failure by the division to provide the form setting forth the descriptions of the alleged violation and soliciting information pursuant to subdivision (b).

(e) "Serious physical harm," as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment, that results in any of the following:

(1) Inpatient hospitalization for purposes other than medical observation.

(2) The loss of any member of the body.

(3) Any serious degree of permanent disfigurement.

(4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(f) Serious physical harm may be caused by a single, repetitive practice, means, method, operation, or process.

(g) A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that their division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

(h) This section shall become operative on January 1, 2023.

SEC. 7. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution for certain costs that may be incurred by a local agency or school district because, in that regard, this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

However, if the Commission on State Mandates determines that this act contains other costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

SEC. 8. The Legislature finds and declares that Section 4 of this act, which adds Section 6409.6 to the Labor Code, imposes a limitation on the public's right of access to the meetings of public bodies or the writings of public officials and agencies within the meaning of Section 3 of Article I of the California Constitution. Pursuant to that constitutional provision, the Legislature makes the following findings to demonstrate the interest protected by this limitation and the need for protecting that interest:

The need to protect the privacy of employees from the public disclosure of their personally identifiable information outweighs the interest in public disclosure of that information.