

## RISK REPORT

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### COVID-19 Emergency Rating Changes Take Effect

# X-MOD

**T**HE DEPARTMENT of Insurance has approved emergency workers' compensation rules dealing with COVID-19 and California employers.

The rules were recommended by the Workers' Compensation Insurance Rating Bureau to bring fairness for employers' experience rating during the COVID-19 pandemic amid shelter-at-home orders and for dealing with claims of workers who contract COVID-19 on the job. The following new rules took effect July 1:

#### 1. Classification changes for staff working from home

As a result of the California stay-at-home order, many employers have altered employees' duties so they can be accomplished from home, and often those duties are clerical-like in nature.

Under the rule, an employee can be assigned payroll classification code 8810 if:

- Their duties meet the definition of a "clerical office employee" while working from home, and
- Their payroll for the balance of the policy period is not assignable to a standard classification that specifically excludes clerical office employees.

There are a number of other classifications that already include clerical operations in their definitions, and those classifications would not be eligible for a change.

#### 2. Non-working, paid staff

Salaries paid to workers who are at home not working, yet still collecting a paycheck, will be excluded from payroll for workers' comp premium calculation purposes when the payments are less than or equal to the employee's regular rate of pay.

#### 3. COVID-19-related claims

Under the emergency rules all workers' comp claims directly arising from a diagnosis of COVID-19 will not be included in the calculation of your experience modification.

The Rating Bureau said in proposing this change that since the occurrence of COVID-19 workers' compensation claims are unlikely to be a strong predictor of future claim costs incurred by an employer, their inclusion in X-Mod calculations would not reflect an employer's safety efforts and would not reflect the intended goal of the experience rating system.

#### The takeaway

These rules are effective during the time the stay-at-home order by Gov. Gavin Newsom is in effect, and 60 days after the order is lifted.

If you have employees who work from home, discuss with your insurance company or us whether you should change the class code to reflect their new duties. If you do reclassify employees or are paying workers who are not working, document those changes too, and keep careful records.

Also, worker COVID-19 claims will be eligible for workers' compensation benefits under a second order by Newsom, but under these new rules, they will not count against your X-Mod.

### CONTACT US

## MINDFUL

INSURANCE SOLUTIONS INC.

2043 ANDERSON RD, SUITE C  
DAVIS, CA 95616

Toll Free: 877-223-4437  
Fax: (530) 419-4811

E-mail: [info@mindfulins.com](mailto:info@mindfulins.com)

License #0167525

## Pandemic Transition

# How to Reopen, Bring Staff Back to Work Safely

**I**F YOUR business is reopening after a relaxation of shelter-in-place orders, you should proceed with caution and make sure you have safeguards in place to protect your workers, as well as customers if they are entering your premises.

Here are some recommendations from the Los Angeles Department of Public Health and other sources that can apply to any municipality anywhere in the country.

### Measures to protect employees

- If someone can continue working from home, let them do so.
- Tell employees not to come to work if sick.
- If any employee tests positive for, or has symptoms that are consistent with COVID-19, you should:
  - Ask that they isolate at home, and
  - Ask all employees who may have come in contact with that colleague to immediately self-quarantine at home.
- Check employees for symptoms or a fever before they enter. This must include a check-in concerning cough, shortness of breath or fever and any other symptoms the employee may be experiencing.
- These checks can be done remotely or in person upon the employee's arrival. A temperature check should be done at the worksite, if feasible.
- Offer at no cost to your employees cloth face coverings if they are going to have contact with the public during their shift. If they are disposable, masks should be thrown away at the end of every shift. If they are reusable, they should be washed after every shift in hot water.
- Instruct employees not to touch their masks.
- Disinfect break rooms, restrooms and common areas frequently.
- Place hand sanitizer in strategic locations.
- Allow employees to take frequent breaks to wash their hands.

### Signage

Place signs at each public entrance of your facility to inform all employees and customers that they should:

- Avoid entering if they have a cough or fever.
- Maintain a minimum 6-foot distance from one another.
- Wear a mask for their own protection, as well as for the safety of others.

### Controlling crowds, lines

Limit the number of customers on the premises at any one time, to allow customers and employees to easily maintain at least 6-foot distance from one another at all practicable times.

Post an employee at the door to ensure the maximum number of customers in the facility is not exceeded. If people are queuing up, mark the ground outside to ensure proper social distancing.



### Spacing between employees

- Require employees to work at least 6 feet apart. You may need to reorganize work spaces to ensure proper spacing.
- In jobs where workers are on their feet, mark spots on the floor where they should stand to ensure social distancing.
- Space out tables, chairs and microwaves in break rooms.
- Another option is to use partitions made of plexiglass so workers can communicate and make eye contact.
- In addition, you may want to abandon the popular open workspace concept and revert to using cubicles, which gained popularity in the 1980s and 1990s as a way to increase productivity by putting barriers between office workers. Having that divider will make your staff feel safer and can offer some protection.
- Reconfigure furniture placement in offices, public seating areas and other work areas to support physical distancing.

### Cleaning and circulation

Take steps to minimize air from fans blowing from one worker directly at another. Also consider opening windows for circulation.

Also important are:

- Disinfecting surfaces in workspaces, as well as door-knobs, buttons and controls. Pay special attention to areas that are frequented and touched more often.
- Providing workers and customers with tissues and trash receptacles.
- Employees who are cleaning and disinfecting should wear disposable gloves.
- Cleaning surfaces using soap and water, then using disinfectant.
- Sanitizing any other personal protective equipment such as hardhats after every shift.

## Workers' Compensation

# New Telecommuter Class Code in the Works



**D**UE TO the COVID-19 pandemic, California's workers' compensation rating agency plans to implement a new class code for telecommuting employees on Jan 1, 2021.

The Workers' Compensation Insurance Rating Bureau of California started work on the new classification as companies ordered employees to start working at home after stay-at-home orders were issued to contain the spread of the coronavirus.

The new code for telecommuting workers will be 8871. Under a prior emergency rule, the Rating Bureau had recommended that employees who were thrust into telecommuting because of the COVID-19 outbreak be assigned the 8810 "Clerical Office Employee" code.

This is a major change in the class code structure and will affect employers throughout the state. If you have telecommuting staff, you should prepare for this change now.

### The specifics

Until now, telecommuting employees whose duties meet the definition of clerical employees in the California Workers' Compensation Uniform Statistical Reporting Plan have been assigned class code 8810 "Clerical Office Employees," or their employers' standard classification if that classification specifically includes clerical office staff.

Rating Bureau staff has proposed that class code 8871 be the code for clerical employees who work more than 50% of their time at their home or other office space that is not on the employer's premises.

As mentioned, the class code will be used only if the class code for the employer does not include clerical em-

ployees. Currently there are 41 class codes that include clerical staff. There are also two codes that specifically exclude them. If a company includes all of its staff in the same code, any clerical staff on its payroll are not assigned the 8810 "Clerical Employee" class code and instead assigned the code for the company as a whole.

For the sake of continuity, the Rating Bureau staff has recommended that those 43 class codes be amended to specifically include or exclude clerical telecommuting staff.

### What you should do

If you have staff on your payroll who are telecommuting, you should start preparing your accounting or bookkeeping software to add in this code for when your policy comes due in 2021.

Starting work on this now can help your insurer more accurately price your future policies, or when they decide to audit your payroll.

Conversely, you should not attempt to change the class code for your currently telecommuting employees now or at any time before Jan. 1, 2021, as the final rules have not yet been written, approved or promulgated. They also need to be approved by the state insurance commissioner.

The Rating Bureau plans to apply the rate for the class code for clerical employees to the new class code for the first few years, and until it can gather enough data to set a unique rate for the code.

That could take a few years as the Rating Bureau typically uses a window of the past three years of claims experience and costs when setting class code rates.

## Coronavirus Risks

# Ten Employee Lawsuit Risks During Pandemic

**T**HE NOVEL coronavirus that broke out in the winter has caused immeasurable suffering, both physical and economic.

For employers struggling to stay in business, this is a fraught time where mistakes in managing their workforces could lead to employee lawsuits. Here are 10 potential trouble spots to watch for.

**1. Workplace safety** – Businesses that still have employees working on-site run the risk that a single infected worker may send the virus ripping through the entire workforce.

While workers' compensation laws may prevent employees from suing, their family members who become ill or suffer through a worker's illness face no such constraints.

**2. Sick time and paid leave** – Congress enacted the Families First Coronavirus Response Act in March, guaranteeing full-time employees of small businesses 80 hours of sick leave (part-timers get a prorated amount.)

Mistakes in administering these benefits could prompt lawsuits.

**3. Workplace discrimination** – Because the coronavirus originated in China, there have been reports of Asian-Americans being targets of racist actions. Employers must take care to avoid the appearance of making workplace decisions based even partly on employees' race.

**4. Americans with Disabilities Act** – The ADA prohibits discrimination against disabled individuals and requires employers to make reasonable accommodations for these workers.

Employees who become ill from COVID-19 (the illness caused by the virus) may suffer after-effects that include trouble breathing, speaking and working at their former pace. Employers must accommodate these workers to the extent that is practical.

**5. Wage and hour violations** – Non-exempt employees working remotely may be working more than their regular hours, missing rest and meal breaks, and using their own

equipment.

Employers must keep careful records, reimburse employees for their use of personal equipment where warranted, and remind employees to take mandatory breaks.

**6. Battered retirement plans** – Stock markets have cratered since the beginning of the year, taking retirement account balances down with them.

Questions may be asked about whether fund managers did enough to limit the damage. Employees who are not satisfied with the answers may go to court.

**7. Health information privacy** – Employee health information privacy is protected by law. Employers must secure the records of infected employees from unauthorized access by individuals within and outside the company.

**8. Union contracts** – Collective bargaining agreements may contain provisions that go beyond federal requirements for breaks, paid leave, layoff notices, and workplace safety.

Employers must keep their CBAs in mind and work with their unions to avoid contract violations.

**9. Disparate impact from layoffs** – If layoffs are necessary, employers must take a thoughtful approach when deciding which employees to part company with.

An appearance of singling out older workers or other protected classes under discrimination laws could invite lawsuits.

**10. WARN Act** – The Workers Adjustment and Retraining Notification Act requires some employers to provide at least 60 days' notice before layoffs. Many businesses' revenues fell off the cliff so quickly that they were unable to provide that much notice.

### A final thought

The pandemic is a crisis that few businesses foresaw. The effects, including the litigation, may haunt them for a long time to come.

