CAIIA Status Report

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May 2020

COVID-19: What California Employers Ought to Know
Credit to Tyson & Mendes, La Jolla, CA

The federal government just passed the Families First Coronavirus Response Act (the "Act") to help employees and businesses facing challenges related to the coronavirus. The law becomes effective 15 days after President Trump signs the bill, which will make the bill effective no later than April 2, 2020. In sum, the Act guarantees free coronavirus testing, secures paid emergency leave, expands FMLA leave, and enhances Unemployment Insurance.

The following are some of the key provisions affecting employers across jurisdictions that all should be aware of.

Prohibition Against Discrimination and Retaliation

As an important initial point, the FFCRA makes it unlawful to discharge, discipline, or in any manner discriminate (including retaliation) against any employee who takes leave under the act. This very likely also includes employees who request leave under the act, who filed a complaint or initiated any proceeding under this act (including a proceeding to enforce this act) or has or is about to testify in any such proceeding.

Given the tumultuous times and lack of current and updated information provided to qualified businesses and employers, we anticipate due to the uncertainty, claims of discrimination and retaliation will arise in response to required actions and inactions based on the new leave requirements and layoffs happening across many sectors of our society.

Emergency Paid Sick Leave

The emergency paid sick leave provision of the act would be the first federal law requiring private employers to provide paid sick leave if the parameters for qualification are met.

Of importance, the bill appears to allow employers who already provide their employees sick leave covering the types of COVID-19 absences described below to apply their existing voluntary sick leave policies to fulfill the mandated emergency leave requirements. For employers who proactively implemented COVID-19 sick leave policies that are equal to, or more generous than, FFCRA, this new bill will serve as the foundation for applying sick leave.

The Act hold employers with fewer than 500 employees and government employers (with at least one (1) employee are required to provide two weeks (80 hours for full time employees and a typical number of hours for a typical two week period for part-time employees) of paid sick leave to any employee who is unable to work, or telework, because of any of the following:

The employee is subject to a Federal, State, or local quarantine or isolation order related to coronavirus;

a. The employee has been advised by a health care provider to self-quarantine due to concerns related to coronavirus;
b. The employee is experiencing coronavirus symptoms and seeking a medical diagnosis;
c. The employee is caring for an individual who is subject to an order as described in reason (a) or has been advised as described in reason (b).
d. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to the coronavirus.
e. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

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Presidents Message – May 2020

John Ratto
CAIIA President

I was going to make this a Covid-19 message but after taking a walk this evening, I decided that everybody's pretty much saturated by Covid-19 "messages" these days. I think everybody has a pretty good idea where they should be (indoors and 6 ft apart), what they're supposed to be doing (wearing a mask, etc) so I'll leave it at, It's all just a bit surreal, weird and well. We are living in interesting times. I think this thing hit everybody just too quickly - whatever you believe as to whether or not officials knew or didn't know, probably makes no difference now. We are here and we are living this and we own it. So with that positive message, let's do what we always do, not as Americans, but as humans – we are a unique species with so much hatred and love all bundled into one. That said, we know how to do one thing really, really, well- SURVIVE. Nothing else to say, do what you do best- love and survive…

Fortunately, as independent adjusters we have been deemed 'essential' workers, exempting us from any local and state Shelter in Place orders. Your CAIIA leadership made sure in the early days of these SIP's that we were in contact with the California Department of Insurance to confirm their interpretation of the SIPs was consistent with such a position and the carriers could also be confident that independents were free to continue to handle their claims. Admittedly, on occasion the workload made me want to be 'non-essential' but of course I am very grateful to be able to continue to work, while so many other workers do not have that opportunity. So, as an essential worker, I move to this month's contemplation… What makes for a good adjuster?

Of course, it's not just one thing! But I think one of the top three would be "attention to detail", especially during times such as the current environment when carriers representatives are under notable pressure and time constraints. Again, speaking only from my many years personal experience, I have rarely ever heard a carrier complain that they had received too much information regarding the handling of a claim file by an IA. In fact, many of my clients who handle losses nationwide consistently complain that they just don't get enough information in the reports sent by the independent adjuster (I mean… dude… if they keep calling you after getting your report and they always have more questions, it's time to change up your reporting style and give them more details! Just saying).

I know I have covered this before, but many times I've heard clients complain that while an independent was able to get a first report out within a few days of seeing a loss, it was clearly "form over substance". In fact, most clients I have worked with have commented that either a brief email or a phone call within a week of seeing the loss is more than sufficient. What they are ultimately looking for is the "substance" of the adjustment completed by the independent. As many of you are aware the fieldwork is only a small portion of our claim handling responsibilities. While it may be some of the most interesting aspect of claim handling, it is not where we make our mark. That, my friends, is the tedious desk work. And therein lies the most difficult aspect of what we do - taking the time to complete a bid comparison, review all the data, find the errors, question the invoices, prepare the detailed emails, all while getting interrupted with telephone calls and emails regarding other files. That's insane! I mean who works like that! Oh, that's right, we do!

Our organization had a very good Mid Term meeting on Friday, April 24th via Zoom. It worked well. While we were brought up to speed on many of the committees, we also thoroughly discussed some major changes in the organization bylaws. I know I have mentioned before that we have been working on the bylaws, but with the help of our current committee, I think we have some really exciting and substantive changes hammered out and I hope to report on in the next president's message…

For now-Be well!
Be safe!
Hug your loved ones and your pets! John

CAIIA Membership Special!!

ATTN: New Members and Existing Member

The CAIIA is offering **50% off** all new or renewal memberships for this year. Now is the time to join or renew your membership!

Press Release from the Insurance Commissioner:

Insurance Commissioner Lara calls for extension of policyholder deadlines for claims until after the COVID-19 state of emergency

Takes additional action to help wildfire survivors still trying to recover from November 2018 catastrophic wildfires

SACRAMENTO, Calif. – Insurance Commissioner Ricardo Lara today issued a Notice instructing all insurance companies to stop enforcing policy or statutory deadlines on policyholders for claims or coverage until 90 days after the statewide "state of emergency" or any other "state of emergency" has ended related to COVID-19. The Commissioner issued this latest Notice to protect policyholders from losing, limiting, or waiving policy benefits as a result of the current national state of emergency.

"We have a social responsibility to follow the directives of health care experts as well as federal, state, and local public health leaders as we work to slow the spread of COVID-19," said Commissioner Lara. "As our nation faces the greatest public health emergency of our time, policyholders should not be forced to lose their coverage or benefits because they cannot meet a deadline while complying with federal or state directives."

Insurers were notified that they should not attempt to enforce statutory deadlines on their policyholders for claim forms, proof of loss, medical examinations, and physical inspections, or any other deadlines which, if not met, could force policyholders to lose their coverage.

Commissioner Lara issued this latest Notice to also assist wildfire claimants after the Department of Insurance began receiving complaints that some insurance companies are insisting their insureds who suffered losses from the November 2018 fires must continue to repair or rebuild their homes during this COVID-19 crisis if they wished to obtain the full replacement cost and additional living expense (ALE) benefits owed to them. This, however, is inconsistent with applicable law that requires insurers to provide no less than 36 months, plus additional 6 month extensions for "good cause," for insureds to collect full replacement cost and ALE for delays in the reconstruction process that are the result of circumstances beyond the control of the insured such as unavoidable construction permit delays, lack of necessary construction materials, and lack of available contractors to perform the necessary work. Commissioner Lara and the California Department of Insurance have determined that the current COVID-19 pandemic is a circumstance beyond the control of the insured, thereby constituting "good cause" under the applicable laws.

Commissioner Lara requires insurance companies to fairly investigate all business interruption claims caused by COVID-19

LOS ANGELES, Calif. — After receiving numerous complaints from businesses, public officials, and other stakeholders of certain insurance representatives attempting to dissuade business policyholders affected by COVID-19 from filing a notice of claim under its business interruption insurance coverage or refusing to open and investigate these claims upon receipt of a notice of claim, Insurance Commissioner Ricardo Lara and the Department of Insurance issued a Notice requiring insurance companies and other Department licensees to comply with their contractual, statutory, regulatory, and other legal obligations and fairly investigate all business interruption claims caused by COVID-19.

"I want to be absolutely clear that insurance companies need to fairly investigate all business interruption claims as they would during any disaster," said Insurance Commissioner Ricardo Lara. "Policyholders deserve all the services, coverage, and benefits they are due under their policy."

The Notice and existing California regulations require insurance companies and other licensees to:

- Comply with their contractual, statutory, regulatory, and other legal obligations with all California insurance claims including, but not limited to, business interruption insurance claims, event cancellation claims, and other related claims filed by California businesses.
- Acknowledge the notice of claim immediately, but in no event more than 15 calendar days after receipt of the notice of claim.
- Provide the policyholder with the necessary forms, instructions, and reasonable assistance, including but not limited to, specifying the information the policyholder must provide in connection with the proof of claim and begin any necessary investigation of the claim.
- Accept or deny the claim, in whole or in part, immediately, but in no event more than 40 days after receipt of the proof of claim. The amount of the claim accepted or denied by the insurer must be clearly documented in the claim file unless the claim has been denied in its entirety.

The Department of Insurance strongly encourages businesses to review their policies, including policy exclusions, coverage limits, and applicable deductibles, and contact their insurance companies to determine what their policies cover as each insurance policy is different and the coverage varies.

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Employees who go on paid sick leave for reasons outlined in subsection (a), (b), or (c) will be paid at their regular rate of pay. Employees who use their leave for reasons outlined in subsections (d), (e), or (f) will be paid at two-thirds the employee's regular rate of pay. In no event, however, shall the paid sick leave exceed $511.00 per day and $5,110.00 in the aggregate for reasons outlined in subsection (a), (b), or (c), or $200.00 per day and $2,000.00 in the aggregate for subsections (d), (e), or (f).

Of importance, employers cannot require employees to use other forms of paid leave provided by the employer before using Paid Sick Leave under the Families First Coronavirus Response Act. Employers with existing sick leave policies ***must*** provide paid sick leave under the Families First Coronavirus Response Act in addition to the existing leave available. Employers may receive a payroll tax credit for the qualified sick leave wages paid out by the employer, subject to limitations.

The Act also authorizes the Secretary of Labor to exclude certain health care providers and emergency responders from providing the paid sick leave. Businesses employing less than 50 employees may also be excluded if the leave "would jeopardize the viability of the business." It remains unclear what businesses must do to receive an exemption under this section, however. We expect clarification as to this in the coming days/weeks.

Expanded Family and Medical Leave (FMLA)

The FFCRA also expands certain FMLA leave through the end of the year, December 31, 2020, for employers with fewer than 500 employees, subject to certain requirements. Employees who have been on the job for at least 30 days are eligible for ***12 weeks*** of paid family and medical leave if the employees are unable to work due to a need for leave to care for a child if the child's school or place of care has been closed or if the child care provider is unavailable, due to the coronavirus.

The first 10 days of the leave may be unpaid. However, employees may choose to use any accrued paid time off, including vacation and/or sick leave, to cover this initial 10-day period. If an employee needs leave beyond the initial 10-day period and continues to meet the requirements for paid leave as previously described, then the employee will be paid no less than two-thirds of the employee's regular rate of pay for the regular hours worked. In no event, however, shall the paid leave exceed $200.00 per day and $10,000.00 in the aggregate. If an employee's scheduled hours are uncertain due to variance in weekly hours, the employer should use the average number of hours scheduled over the prior six (6) month period, or the reasonable number of expected hours at the time of hiring, if the employee did not work the prior six months.

Employers will also receive a payroll tax credit for the qualified sick leave wages paid out by the employer, subject to caps based on the reason for the leave and daily maximums.

Employers are required to restore employees to their same or similar position ***unless:***

1. The employer has fewer than 25 employees;
2. The position held by the employee no longer exists due to economic or other operating conditions that affect employment and are caused by the public health condition;
3. The employer attempts to restore the employee to a similar position; or
4. The attempts to restore to a similar position fail, and the employer contacts the employee if such a position becomes available.

The Act also authorizes the Secretary of Labor to exclude certain health care providers and emergency responders from providing the paid sick leave. Businesses employing less than 50 employees may also be excluded if the leave "would jeopardize the viability of the business." It remains unclear what businesses must do to receive an exemption under this section. WE will update this section as new information to this end becomes available.

COVID-19 Testing

The FFCRA requires all private health plans to provide coverage for COVID-19 diagnostic testing, including the cost of a provider, urgent care, and emergency room visits in order to receive testing. Coverage for testing must be provided at no cost to the consumer.

Next Steps

The FFCRA's expansion of the existing FMLA requirements by guaranteeing the above referenced leave benefits create a number of unanswered questions as to important issues related to required medical certification for school closures and/or quarantining, notice requirements to qualified employees regarding these new/temporary benefits, how other eligible state leave programs are affected by the Act, whether backpay is necessary to employees already on leave, and whether eligible employees who are laid off prior to the effective date of the Act are entitled to leave and/or restoration rights under the Act.

We recommend employers begin implementing protocols for notice to employees as to the above program changes/additions and immediate compliance with these provisions to mitigate against potential abuses as well as lawsuits for discrimination and retaliation down the road. Employers should also closely monitor new developments as this is a rapidly changing area of the law. We will provide updated information and recommendations as the situation as to the above develops.

Montrose III: Vertical Exhaustion Applies in Upper Layers of Excess Coverage

Credit to Haight, Brown and Bonesteel, Los Angeles, CA

In *Montrose Chemical Corp. of Cal. v. Superior Court* (No. S244737, filed 4/6/20) (*Montrose III*), the California Supreme Court held that, as between excess insurers at differing levels of coverage, a rule of "vertical exhaustion" or "elective stacking" applies, whereby the insured may access any excess policy once it has exhausted other excess policies with lower attachment points in the same policy period. The Court limited the rule to excess insurance, stating that "[b]ecause the question is not presented here, we do not decide when or whether an insured may access excess policies before all primary insurance covering all relevant policy periods has been exhausted."

Montrose manufactured the insecticide DDT in Torrance from 1947 to 1982. In 1990, the state and federal governments sued Montrose for environmental contamination and Montrose entered into partial consent decrees agreeing to pay for cleanup. Montrose claimed to have expended in excess of $100 million doing so, and asserted that its future liability could exceed that amount.

Recounting that in *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, the Court adopted the "all sums" rule, that insurers must pay all sums for property damage attributable to the polluted site, up to their policy limits, as long as some of the continuous property damage occurred while each policy was on the loss. And further, in *State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186, the Court adopted the "all-sums-with-stacking indemnity" rule that effectively stacks the insurance coverage from different policy periods to form "one giant uber-policy" with a coverage limit equal to the sum of all purchased insurance policies. The *Montrose III* Court stated: "Having adopted an all-sums-with-stacking approach to the coverage of long-tail injuries, we are now presented with a follow-on question: In what order may an insured access excess policies from different policy periods to cover liability arising from long-tail injuries?"

The *Montrose III* Court rejected the insurers' argument for horizontal exhaustion, under which the insured would have to exhaust all of its lower layer excess coverage across all relevant policy periods before accessing any of its higher layer coverage. Instead, the Court agreed with Montrose that vertical exhaustion applies, permitting an insured to access any higher layer excess policy once it has exhausted the directly underlying excess policy covering the same period.

The answer lay in the excess policies' "other insurance" clauses. While identifying several different wordings, the *Montrose III* Court found one common characteristic: "The 'other insurance' clauses at issue clearly require exhaustion of underlying insurance, but none clearly or explicitly states that Montrose must exhaust insurance with lower attachment points purchased for different policy periods. Policies that disclaim coverage for amounts covered by 'other underlying insurance,' or require exhaustion of 'all underlying insurance,' for example, could fairly be read to refer only to other directly underlying insurance in the same policy period that was not specifically identified in the schedule of underlying insurance, anticipating that the scheduled underlying insurance may later be replaced or supplemented with different policies."

The *Montrose III* Court said that "[t]he insurers do not explain why the reference [to 'other insurance' or 'other underlying insurance'] is not properly understood to mean 'other directly underlying insurance'—that is, a requirement that the insured exhaust only excess insurance with lower attachment points from the same policy period. This is one clue that the plain language of these clauses is not adequate to resolve the dispute in the insurers' favor."

The *Montrose III* Court then cited numerous authorities for the proposition that "other insurance" clauses are meant to avoid double recovery under concurrent insurance policies and do not govern allocation of successive policies for continuous losses, making it "difficult to read the clauses here as a clear and explicit direction to adopt a requirement of horizontal exhaustion in cases of long-tail injury."

The Court also noted that requiring horizontal exhaustion would potentially change the effect of the specifically scheduled underlying limits of the respective policies for a continuous loss because requiring exhaustion of all insurance in every policy period in the layer below would effectively raise the attachment point of the individual higher-level policy.

Making reference to "reasonable expectations," the *Montrose III* Court also noted the burden of making the insured have to possibly prove coverage under multiple underlying policies, all with varying terms and exclusions, in order to access the higher level of excess insurance. By contrast, the Court said that nothing in its "vertical exhaustion" rule precludes a triggered excess insurer from seeking contribution from other insurers.

Having limited its decision to excess insurance only, the *Montrose III* Court distinguished *Community Redevelopment Agency v. Aetna Casualty & Surety Co.* (1996) 50 Cal.App.4th 329, as only addressing horizontal exhaustion as between primary and first-layer excess insurance.

The *Montrose III* Court summed up, stating: "California law permits Montrose to seek indemnification under any excess policy once Montrose has exhausted the underlying excess policies in the same policy period. Montrose is not required to exhaust excess insurance at lower levels for all periods triggered by continuous injury before obtaining coverage from higher level excess insurance in any period."

Attacking the Recovery of Treble Damages Against Public Entities in California Childhood Sexual Assault Cases
Credit to Tyson & Mendes, La Jolla, CA

On January 1, 2020, amendments to California Code of Civil Procedure Section 340.1 went into effect, extending the statute of limitations in childhood sexual assault cases until the date the plaintiff turns 40, or until five years after the plaintiff discovers the connection between the abuse and psychological injury, whichever occurs later. Additionally, the bill ***does*** have a retroactive provision, meaning currently pending cases and cases that would have otherwise been barred are revived and sets a deadline of January 1, 2023 for these cases to be filed. Additionally, a change in Section 340.1 permits plaintiff's attorneys' to seek treble damages in childhood sexual assault claims, potentially allowing for recovery of three times the actual damages if a defendant is found to have covered up the sexual assault. Section 340.1(b)(2) defines a "cover up" as a concerted effort to hide evidence relating to childhood sexual assault. Although allegations that public entities like school districts are covering up childhood sexual assault are usually false, these allegations are increasingly being made in complaints under Section 340.1 in attempts to increase plaintiffs' damages recovery.

Public entities must be hypervigilant for claims of treble damages in new complaints, and when initially appearing in a case should immediately attack those claims and argue they are immune from such recovery. Government Code Section 818 states, "a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant."
The goal of treble damages is to encourage citizens to sue for violations that are harmful to society in general and deter the perpetrator from committing future violations. Treble damages clearly fall within the category of damages "imposed primarily for the sake of example and by way of punishing the defendant," stated in Government Code Section 818. This is analogous to a plaintiff's request for treble damages under the treble damages provision in the Unruh Act. California courts have determined that the provision for treble damages in the Unruh Act is punitive in nature; therefore, governmental entities are immune. (See Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3D 1142, 1172.)

Takeaway: In childhood sexual assault cases, it is critical to narrow issues and damages from the outset at the initial pleading stage. Be on the lookout for prayers for the recovery of treble damages against public entities and be swift to strike these prayers early on.

Suggestions for (Safely) Celebrating Mom this Year

- Order Takeout from her Favorite Restaurant
- Make Brunch and deliver it to her
- Drive by the House with Posters and Balloons
- Set up chairs 6 feet apart on the Driveway
- Have a Backyard Picnic
- Get the whole family together and have a virtual Tea Party

On the Lighter Side :

Most of our members are small businesses and can relate to the plight of small business in these times. Support your local, small businesses when you can.

Order take-out from the Mom and Pop restaurants.

Buy gift cards to use later when the business is re-opened or give gift cards to those that are in need.

Some restaurants are providing groceries as well as prepared meals and some of them even offer delivery.

Help promote your favorite small business by promoting them on social media.

When you shop local, your dollars stay in the community and help local development.

We don't want our towns to look like this after the pandemic is over: