

First Supplement to Memorandum 2020-34

Emergency-Related Reforms: Commission Authority

In Memorandum 2020-34, the staff presented Commissioner suggestions for possible new emergency-related topics, that the Commission¹ might wish to request authority to study.

To aid the Commission in evaluating those topics, the staff reviewed the COVID-related legislation that is currently pending before the Legislature. The staff did so by searching for any bill that uses the term “COVID” in its text or in the Legislative Counsel’s digest. There are currently 125 such bills.

Those bills were then reviewed to determine whether they (1) address any of the topics noted in Memorandum 2020-34 and (2) remain viable.

Only two of the Commissioner-suggested topics are addressed by the pending COVID-related legislation:

- Government liability
- Employment matters

For each of those topics, the staff prepared a table that lists the pending bills, briefly describes their effects, and lists the current support and opposition (attached). The lists of support and opposition were drawn from the most recent legislative analyses (if any). Some bills do not have analyses because the COVID-related material was added through a recent amendment and the bills have not yet been heard in their amended forms.

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

DISCUSSION

Open Meeting Law

The staff found no pending COVID-related legislation that would affect the state and local government open meeting statutes. As a double-check, the staff searched for any pending bills that would affect the specific provisions on teleconferencing in public meetings.² There were no such bills.

Government Liability

Assembly Bill 1384 (O'Donnell) and Assembly Bill 1759 (Salas) would limit the liability of schools and post-secondary institutions for COVID-19 related harms. The first bill, which affects local schools, would condition the immunity on the schools adopting public safety standards based on state guidance and making reasonable efforts to implement them.

Those bills were amended too recently for there to be any legislative analysis that would list support and opposition. The staff's intuition is that these will be controversial bills, as they pit the financial interests of the affected educational entities against the claims of those who are injured by the negligence of those entities. The potential claimants could include students and teachers. The politics in this area may be heightened by divided public opinion on issues of school safety and reopening.

Senate Bill 1473 (Committee on Governance and Finance) would authorize the use of electronic communications when filing a claim under the Government Claims Act. The apparent purpose is to minimize in-person contact. This bill has not yet been analyzed in its current form. It seems uncontroversial.

Employment Matters

There are several pending COVID-related bills that address employment matters. They address five main areas:

- Employee leave and disability
- Workers' compensation insurance
- Safety measures
- Liability
- Rehire preference for laid off employees

The bills affecting those matters are discussed below.

2. Gov't Code §§ 11123 (Bagley-Keene Act), 54953 (Brown Act).

Employee Leave

Senate Bill 729 (Portantino) would establish a food service worker’s right to up to 80 hours of COVID-19 supplemental paid sick leave. The leave could be used if the worker is unable to work for any of the following reasons:

(A) The food sector worker is subject to a federal, state, or local quarantine or isolation order related to COVID-19.

(B) The food sector worker is advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19.

(C) The food sector worker is prohibited from working by the food sector worker’s hiring entity due to health concerns related to the potential transmission of COVID-19.

Assembly Bill 3216 (Kalra) would have created extensive new leave and disability rights for employees affected by the pandemic. However, that bill was amended on August 5, 2020, to remove all of the leave and disability related material.³ Although the bill would no longer make those changes, they are summarized below to illustrate the range of issues that the Legislature has been considering:

- Employee would have been entitled to 12 weeks of family leave for qualifying exigency related to the public health emergency, school or childcare closure due to emergency, or absence of caregiver due to emergency.
- Employee would have had a right to reinstatement in same or comparable position after end of family leave.
- Employee would have been entitled to 24 hours paid “emergency leave” for public health emergency.
- Employee would have been entitled to use sick leave if subject to a federal, state, or local public health order related to a public health emergency, to care for a family member subject to an order, including if the child or family member’s school or place of care has been closed, and in specified other circumstances related to a state of emergency.
- Employee would have been allowed to self-certify as to emergency-related disability when applying for benefits; doctor certification would not have been required.⁴

3. Assembly Bill 3216 would still add a rule on preferential rehiring of laid-off employees. It is discussed below in connection with that content.

4. See AB 3216 (Kalra) (as amended July 16, 2020).

Workers' Compensation Insurance

Workers' compensation insurance provides medical benefits and wage replacement for a disability to employees who are injured on the job. There are three bills that would address the extent to which a COVID-19 infection is a workplace injury for the purposes of workers' compensation insurance.

Assembly Bill 196 (Gonzalez) would create a *conclusive* presumption, for certain specified "essential workers," that a COVID-19 infection arising during or within 90 days after that employment is a workplace injury governed by workers' compensation.

Assembly Bill 664 (Cooper, Bonta, Gonzalez) (with 30 coauthors from both the Assembly and Senate) would make the following changes for certain firefighters, policer officers, and hospital employees:

- Define "injury" to include being diagnosed with a communicable disease that is the subject of a public health emergency declared after January 1, 2020.
- Provide that the compensation for such an injury includes full hospital, surgical, medical treatment, disability indemnity, and death benefits.
- Make an existing rule, requiring causation-based apportionment of liability for a permanent disability, inapplicable to such an injury.
- Create a rebuttable presumption that the injury arose out of employment.
- Provide paid leave to an employee who is quarantined due to an exposure to such a disease. The employee could not be required to use other accrued leave for that purpose.

Senate Bill 1159 (Hill) would only apply to an illness that arose, while employed or shortly thereafter, between March 19, 2020, and July 5, 2020. Such an illness would be defined as an injury. There would be a rebuttable presumption that the illness was a workplace injury. The employee would be required to exhaust other leave before receiving benefits for a temporary disability related to the injury.

Safety Measures

Assembly Bill 664 (Cooper, Bonta, Gonzalez) would require employers to provide or reimburse employees for personal protective equipment.

Assembly Bill 685 (Reyes) would require employers to notify their employees and specified public health agencies when the employer knows or

reasonably should have known of an employee's COVID-19 exposure. A violation would be a misdemeanor. The public health agencies would publish the information on their websites.

Assembly Bill 2043 (Rivas, Garcia, and Gonzalez) would require the Division of Labor Standards Enforcement (DLSE) to conduct a public information outreach campaign aimed at educating agricultural workers about COVID-19 and their employment rights related to the pandemic. DLSE would also be required to publish information about its efforts on the Internet. This bill has widespread support and no reported opposition.

Assembly Bill 2537 (Rodriguez) would require employers to provide personal protective equipment to certain healthcare workers.

In addition to the reforms related to paid sick leave for food service workers (discussed above), **Senate Bill 729 (Portantino)** would require employers to permit food service workers to wash their hands every 30 minutes (or more frequently as needed).

Liability

Assembly Bill 1035 (Ramos) would exempt a small business with 25 or fewer employees from liability for an injury or illness to a person due to a COVID-19 infection that is contracted at that small business or due to the actions of the small business. This immunity would only apply if the small business is in compliance with all applicable public health requirements. It would not apply to grossly negligent, willful, or wanton misconduct, or to illegal discrimination.

Rehire Preference for Laid Off Employees

In its current form, **Assembly Bill 3216 (Kalra)** would require an employer to offer its laid off employees specified information about job positions that become available for which the laid off employees are qualified, and to offer positions to those laid off employees based on a preference system.

CONCLUSION

With respect to the topics that were suggested by the Commission for possible study, most of the Legislature's attention has been focused on employment matters. The pending legislation in that area addresses the most obvious problems arising from the pandemic: leave for employees who cannot work because of infection or the need to care for dependents, wage replacement

and medical benefits for those who are infected (through the existing workers' compensation system), rehiring of laid-off employees, workplace safety, and employer liability. Some of the proposals would impose significant costs on employers and are opposed by employer groups.

All of that suggests two things to the staff:

- (1) The Legislature is focused on addressing employment-related COVID-19 issues. It seems likely that focus will continue in 2021.
- (2) Those issues involve fundamentally political questions (e.g., who should bear the cost of wage replacement and health benefits for those affected by COVID-19 infection).

That does not prevent the Commission from requesting authority to weigh in on such matters. But it does suggest that the Commission's resources might be put to more effective and beneficial use elsewhere. Employment issues are already receiving considerable legislative attention, with input from experts and affected stakeholders. It is not clear what the Commission would add to that process. It is also true that the Commission has had a poor track record when working on fundamentally political topics, where the outcome requires a choice between competing interests, rather than achieving consensus.

The Commission now needs to decide whether it will request any additional study authority on emergency-related reforms. If so, how should the request be framed?

One possibility was discussed at the July meeting; the Commission could cherry-pick specific topic areas and request authority for those selected topics. If the Commission takes that approach, it needs to decide which specific topics to request.

The staff sees another possibility worth mentioning. The Commission could request a more general grant of authority, coupled with a mechanism for legislative feedback, along the following lines:

The Law Revision Commission is authorized to study and recommend statutory reforms to provide special rules that would apply only in a period of declared emergency or its immediate aftermath. Before beginning a study under this authority, the Commission would provide notice to any legislative policy committee with jurisdiction over the proposed study topic and would consider any formal or informal feedback received from committee members or staff.

Such a provision would combine maximum flexibility as to topics with a mechanism that the Legislature could use to alert the Commission if it has concerns about a particular topic.

How would the Commission like to proceed?

Respectfully submitted,

Brian Hebert
Executive Director

Table 1. Government Liability

Bill (Author)	Purpose	Support	Opposition
AB 1384 (O'Donnell)	<ul style="list-style-type: none"> • Local educational agencies would be required to adopt health and safety policies and procedures consistent with COVID-19 guidance from State Department of Public Health. • Local educational agency that makes reasonable efforts to comply with those policies would be exempt from liability for COVID-19 related harms. 	Bill not yet analyzed in present form.	Bill not yet analyzed in present form.
AB 1759 (Salas)	Institutions of higher education would be broadly immunized from liability for COVID-19-related harms.	Bill not yet analyzed in present form.	Bill not yet analyzed in present form.
SB 1473 (Committee on Governance and Finance)	Would authorize the use of electronic delivery for notices under the Government Claims Act.	Bill not yet analyzed in present form.	Bill not yet analyzed in present form.

Table 2. Employment Matters

Bill (Author)	Purpose	Support	Opposition
AB 196 (Gonzalez)	Conclusive presumption that COVID infection acquired during period of employment is workplace injury for purposes of workers compensation insurance.	Bill not yet analyzed in present form.	Bill not yet analyzed in present form.
AB 664 (Cooper)	<ul style="list-style-type: none"> • Rebuttable presumption that infection by communicable disease that is subject of declared public health emergency is workplace injury for purposes of workers compensation insurance. • Require provision of PPE to employees. 	Bill not yet analyzed in present form.	Bill not yet analyzed in present form.
AB 685 (Reyes)	Employer duty to notify employees and specified public health agencies of COVID exposure. Failure to give notice is misdemeanor. State to publish notices on Internet.	California Labor Federation AFL-CIO Western States Council United Food and Commercial Workers Asian Americans Advancing Justice-California California Nurses Association California Professional Firefighters California Rural Legal Assistance Foundation California State Council of SEIU Californians for Pesticide Reform Community Alliance with Family Farmers Environmental Working Group WORKSAFE	Acclamation Insurance Management Services Advanced Medical Technology Association African American Farmers of California Airlines for America Allied Managed Care American Council of Engineering Companies, California American Pistachio Growers Association of California Healthcare Districts Building Owners and Managers Association California Agricultural Aircraft Association California Apple Commission California Assisted Living Association California Association of Health Facilities California Association of Joint Powers Authorities California Association of Sheet Metal & Air Conditioning Contractors National Association California Association of Winegrape Growers California Attractions and Parks Association California Bankers Association California Beer and Beverage Distributors California Blueberry Association California Blueberry Commission California Building Industry Association

Bill (Author)	Purpose	Support	Opposition
			California Business Properties Association California Business Roundtable California Cable & Telecommunications Association California Chamber of Commerce California Citrus Mutual California Construction and Industrial Materials Association California Cotton Ginners & Growers Association California Dental Association California Farm Bureau Federation California Fresh Fruit Association California Grocers Association California Hospital Association California Hotel & Lodging Association California Landscape Contractors Association California League of Food Producers California Life Sciences Association California Lodging Industry Association California Manufacturers & Technology Association California Pool & Spa Association California Professional Association of Specialty Contractors California Restaurant Association California Retailers Association California Rice Commission California Special Districts Association California State Association of Counties California Travel Association Carlsbad Chamber of Commerce Civil Justice Association of California CSAC Excess Insurance Authority Family Business Association of California Family Winemakers of California Far West Equipment Dealers Association Healthcare Distribution Alliance Independent Lodging Industry Association International Council of Shopping Centers League of California Cities NAIOP of California Commercial Real Estate Development Association National Federation of Independent Business Nisei Farmers League

Bill (Author)	Purpose	Support	Opposition
			Official Police Garages of Los Angeles Olive Growers Council of California Orange County Business Council Plumbing Heating Cooling Contractors of California Plumbing-heating-cooling Contractors Association of California Public Risk Innovation, Solutions, and Management (PRISM) Rural County Representatives of California Simi Valley Chamber of Commerce Southwest California Legislative Council Technet Urban Counties of California Western Agricultural Processors Association Western Electrical Contractors Association Western Growers Association Western Plant Health Association 6beds, INC.
AB 1035 (Ramos & Mayes)	Small business that complies with applicable public health laws immune from liability for COVID-19 infection that arises on business property or due to business actions.	Bill not yet analyzed in present form.	Bill not yet analyzed in present form.
AB 2043 (Rivas, et al)	DLSE outreach to agricultural workers to inform them of rights and best practices related to COVID-19. DLSE to publish results of investigations on Internet.	California Association of Winegrape Growers California Climate and Agriculture Network California Citrus Mutual California Farmworker Advocacy Working Group California Farmworker Foundation California Food & Farming Network California Immigrant Policy Center California Rural Legal Assistance Foundation Californians for Pesticide Reform Catholic Charities Diocese of Monterey Center for Farmworker Families Center on Race, Poverty & the Environment Cesar Chavez Environmental Corps City of Salinas City of Watsonville Clean Water Action	None.

Bill (Author)	Purpose	Support	Opposition
		Community Agency for Resources, Advocacy, and Services Community Alliance with Family Farmers Community Bridges/Puentes de la Comunidad Community Water Center County of Monterey County of Santa Clara, Office of the County Executive County of Santa Cruz, Board of Supervisors Everyone's Harvest Farmworker Institute of Education and Leadership Development Friends of the Earth Grower-Shipper Association of Central California La Cooperativa Campesina de California Latino Coalition for a Healthy California Leadership Counsel for Justice and Accountability League of California Cities, Latino Caucus Lideres Campesinas National Association of Social Workers, California Chapter Natural Resources Defense Council NextGen California Nutrition & Fitness Collaborative of the Central Coast Pesticide Action Network Showing Up for Racial Justice, South County Teamsters Union Local 890 Thriving Immigrants Collaborative of Santa Cruz County United Food & Commercial Workers Western States Council Watsonville Campesino Appreciation Caravan Women's International League for Peace and Freedom, Santa Cruz	
AB 2537 (Rodriguez)	Employer duty to provide PPE to healthcare employees	California Labor Federation California Nurses Association	California Children's Hospital Association
AB 3216 (Kalra)	Reemployment preferences for laid-off employees.	Bill not yet analyzed in present form.	Bill not yet analyzed in present form.

Bill (Author)	Purpose	Support	Opposition
SB 729 (Portantino)	<ul style="list-style-type: none"> • COVID-19 supplemental paid sick leave for food sector workers. • Food sector workers must be given opportunity to wash hands every 30 minutes or as necessary. 	California Labor Federation California State Council of Service Employees International Union (SEIU California) California Teamsters Public Affairs Council Clean Water Action Environmental Working Group United Food and Commercial Workers Western States Council	Almond Alliance of California American Pistachio Growers Association of California Egg Farmers California Association of Winegrape Growers California Attractions and Parks Association California Chamber of Commerce California Citrus Mutual California Farm Bureau Federation California Fresh Fruit Association California Grain and Feed Association California Grocers Association California League of Food Producers California Restaurant Association California Rice Commission California Seed Association California Strawberry Commission California Warehouse Association National Federation of Independent Business (NFIB) Western Agricultural Processors Association Western Growers Association
SB 1159 (Hill)	Rebuttable presumption that COVID-19 illness arose out of employment and is compensable, for purposes of workers compensation insurance.	None.	None.