COVID 19
Miscellaneous Workers' Compensation State Responses
As of: 6.24.20

State	Contact	Resource
Illinois	Robert Maciorowski rmaciorowski@msulaw.com	**ILLINOIS LEGISLATURE MODIFIES OCCUPATIONAL DISEASES ACT AND CREATES REBUTTABLE PRESUMPTION REGARDING COVID19 EXPOSURES** The Illinois Legislature accomplished through appropriate legislation what the Governor tried to do improperly by Executive Order. On Friday, May 22, 2020, the Illinois Legislature modified the Occupational Diseases Act by putting in a rebuttable presumption of work relatedness for those employees who contracted and were diagnosed with COVID-19. The Statue provides "In any proceedings before the Commission, in which the employee is a COVID-19 first responder or front line worker, as defined in the subsection, if the employee's injury or occupational disease resulted from exposure to and contraction of COVID-19, the exposure and contraction shall be rebuttably presumed to have arisen out of and in the course of the employee's first responder or front line worker employment and the injury or occupational disease shall be rebuttably presumed to be casually connected to the hazards or exposures of the employee's first responder or front line worker employment." Rebuttable presumption is not new to Illinois occupational disease cases. We have been dealing with this rebuttable presumption in occupational disease cases brought by firefighters. The court in *Johnson v. Industrial Workers' Compensation Commission*, 80 N.E.3d 573, 2017 discussed in terms of a firefighter what rebuttable presumption means. The legislative history regarding this modification to the Occupational Diseases Act, also discussed the meaning of rebuttable presumption and gave examples of same. Prior to and after this modification, the employer, to rebut the presumption, must introduce some evidence to the contrary. Once the employer/respondent, introduced evidence to the contrary, the presumption is rebutted and the burden shifts back to the employee to prove the exposure occurred. 1. Rebutting the presumption of COVID-19

		The modification to the Occupational Diseases Act sets forth a series of three different ways that the employer can rebut statutory presumption. 1. The presumption can be rebutted by showing that the employee was working from their home for 14 or more consecutive days immediately prior to the injury, occupational disease or period of incapacity from COVID-19; 2. The employee was exposed to COVID-19 by an alternative source; 3. The employer was engaging in and applying to the best of its ability, industrial specific work place sanitation, social distancing and health and safety practices based on CDC guidelines. The employer can rebut the presumption by showing that the employee had been protected consistent with the directives of the CDC for at least 14 days prior to the injury, occupational disease or period of incapacity. This would include requirement of personal protective equipment including, but not limited to face coverings, gloves, safety glasses, safety face shields, barriers, shoes, etc. The legislature backdated this modification to March 9, 2020 and made it effective to December 31, 2020. Usually, these types of modifications cannot be backdated because they are substantive and cannot be applied retroactively. There will be Constitutional challenges to those exposures that occurred prior to the Governor signing this modification into law. The unchallenged effective date will most likely be May 29, through December 31, 2020. In my opinion, the modification to add rebuttable presumption will have very little, if any, affect on the outcome of these cases and the issue of causal connection. Prior to this modification, the employee only needed to testify to the exposure at work and obtain a medical opinion that their condition of ill-being might or could have been related to an exposure at work. If the employer in this case offered no evidence to the contrary, the employee met its burden of proof and the Illinois Workers' Compensation Commission would find causation. Under this modification, it is not much different than it was before in that if the employer offers no evidence to the contrary, the Commission would find the condition causally related to the employment. The key under any standard is to offer evidence to the contrary which would put the burden back on the employee to show actual exposure and causation.
Iowa	Alison Stewart	The Commissioner has extended the suspension of in-person hearings in regular procedure contested cases proceedings

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Kansas	Kim Martens Kim@martensworkcomplaw.com	**COVID-19 and Workers Compensation Exposure in KANSAS** **Question 1:** What happens when an employer sends its employees home for several weeks without pay, out of a general concern for safety and for prevention of contagion? Must the employer pay workers' compensation benefits? **Answer:** No, but the employee will likely be entitled to claim unemployment compensation benefits. **Question 2:** What if an employer advises an employee that he or she must be quarantined because the employee may have been exposed to someone at work who has the coronavirus? Must the employer pay workers' compensation benefits? **Answer:** No, because the mere possibility of an injury or occupational disease is insufficient to trigger coverage under the Act. However, if the employee choses to file a work injury incident report, it triggers the employer's ability and need to immediately invoke the claim investigation and assessment protocols. **Question 3:** What if the government shuts down a company for a 30-day period and the company has to send everyone home for that period of time with no work available from home. Does the employer owe workers' compensation benefits? **Answer:** No, but the employee will likely be entitled to claim unemployment compensation benefits. **Question 4:** What if an employee becomes worried that he has symptoms similar to that of the coronavirus and refuses to come to work? He/she quarantines for 14 days out of concern for his safety and that of fellow employees. No one at work has the virus and it is unclear where the employee may have been exposed, if there was exposure at all. Does this generate an obligation to pay workers' compensation? **Answer:** No, because the mere possibility of an injury or occupational disease is insufficient to trigger coverage under the Act. However, if the employee choses to file a work injury incident report, it triggers the employer's ability and need to immediately invoke the claim investigation and assessment protocols. **Question 5:** Along the lines above, suppose the employer finds out that the HR Director's son just returned from Italy, where the number of deaths from coronavirus have now topped those in China. The employer advises the HR Director that she

must quarantine for 14 days. Are workers' compensation benefits due?

Answer: No, because the mere possibility of an injury or occupational disease is insufficient to trigger coverage under the Act.

Question 6: What if two police officers alternate use of a patrol vehicle. On Monday, Officer Chris is driving the vehicle alone and begins to experience symptoms of coronavirus later that evening, unknown to Officer Aiello, who then drives the vehicle on Tuesday alone. Later in the evening Officer Aiello finds out that Officer Chris just entered quarantine for suspected coronavirus. Officer Aiello sees her primary care physician who recommends a quarantine period for her. Officer Aiello files a first report of injury based on potential exposure to the virus in the patrol vehicle when she drove it. Is Officer Aiello entitled to payment of temporary disability compensation benefits?

Answer: Not automatically, because the mere possibility of an injury or occupational disease is insufficient to trigger coverage under the Act.

> In Kansas, under an occupational disease claim theory if alleged, the worker must be able to establish: 1) Disease arising out of and in the course of employment; 2) resulting from the nature and conditions of employment which includes a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk. **Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall <u>not</u> be compensable as occupational diseases….**
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> Therefore, for COVID-19 to be considered a compensable occupational disease in Kansas, the employee would have to be able to prove that contracting it occurred at work and was due to hazards in excess of those ordinarily incident to employment in general **<u>and</u>** that it is peculiar to the employee's occupation. It may be difficult for an employee to show that contracting the virus resulted from a risk of employment. The reason being that,

like the flu, individuals face the same sort of risk when you go home or when you walk about in public.

Some state laws have presumptions for health care workers and/or first responders. Kansas is not one of those states with regard to a contracting a virus. Without a statutory presumption in place, the Kansas employer defenses could be difficult to overcome, and it may be difficult to prove causation.

Finally, as noted above, before a preliminary benefit denial determination is made, the employer and defense team should consider the alternative world of workers compensation coverage bestowing preferred insurance against a civil negligence or other tort claim by the employee against the employer.

Question 7: Suppose a hospital floor nurse has been working for the past month with patients who have been tested for possible coronavirus. So far, all the tests have been negative. The nurse is diagnosed with coronavirus herself, becomes seriously ill and is hospitalized. She files for workers' compensation benefits for her lost time and medical bills. Is she entitled to workers' compensation benefits?

Answer: Possibly. Investigate immediately and analyze the issues and considerations with your entire defense team.

Question 8: Given that thousands of employees are now working from home in Kansas due to state and federal guidelines, and/or employer requests, what if an employee claims "work" injury at home while allegedly doing work, and files a workers compensation claim?

Answer: Potentially compensable. The Kansas Workers Compensation Act does not specifically address telecommuter/home based worker compensability issues and there are not currently any higher appellate court opinions in Kansas directly answering the telecommuter injury compensability issue.

There is an older administrative agency Workers Compensation Appeals Board decision involving an over-the-road trucker that was employed by a transport company and claimed work injury while allegedly working at his home property. Clifford Johnson injured his right shoulder when he fell from his semi-tractor while it was parked on his driveway at home. At the time, he was packing clean clothes and clean bedding in preparation of traveling to Hillsboro, Kansas, to pick of a load of honey.

The Kansas Workers Compensation Appeals Board denied his work injury claim finding that the injury at home ***did not arise***

		in the course of his employment because his home should not be construed as the employer's work premises at the time of the accident. Furthermore, the accidental injury ***did not arise out of his employment*** because his activities at the time of injury were of a personal nature and did not arise out of the nature, conditions, obligations or incidents of his employment. ***Johnson v. Skillet & Sons, Inc.***, Docket No. 208,642 (WCAB June 1996). Courts in other states have distinguished telecommuters from individuals who may just happen to be performing work at home on a given day. In those states, once it was established that the employee and employer entered into a telecommuting arrangement, the hazards of the home were considered to be workplace hazards. **Written telecommuting policies** prepared by the employer which dictate hours of employment, areas of the house that are considered work space, work duties to be exercised at home in the designated work space and rules concerning prohibited activity and safety are recommended to help employers and employees identify in advance where and what work activities which might give rise to injury are arising out of and in the course of the telecommuting work activity.
Michigan	Brian Richards Brian.Richards@crh-law.com	**Update for Michigan Employers/Workers' Compensation Carriers in re: Claimant Job Searches and Independent Medical Examinations in the COVID-19 Era** On June 12, 2020, the Michigan Workers' Disability Compensation Agency updated its previous guidance for employers and insurance carriers regarding claimant job searches under MCL 418.301 and 401 during the COVID-19 pandemic. The WDCA had previously issued guidance to employers/carriers via a memorandum dated March 24, 2020, which urged a temporary waiver of the usual statutory requirement for a clamant to show that he/she has engaged in a "good faith" job search in order to qualify for workers' compensation wage loss benefits. The WDCA's updated memorandum of June 12, 2020, notes that many of Governor Whitmer's Executive Orders in relation to COVID-19 have since been modified and loosened to allow for Michigan residents to resume various nonessential types of employment. However, despite this loosening of some employment restrictions, the WDCA notes that Governor Whitmer has maintained her previous Order indicating, "Any work that is capable of being performed remotely must be performed remotely." Additionally, the WDCA has cautioned employers that, even if an injured/disabled worker is offered a return to work for the same employer at lighter or accommodated duties, or if that injured/disabled worker finds suitable work at a different employer, any employment circumstance must comply with all currently applicable

		Executive Orders regarding employee safety in order to satisfy the requirement that a job is considered "reasonable" employment under MCL 418.301(11) and MCL 418.401(9). The WDCA has also updated its guidance to employers/carriers regarding independent medical examinations under MCL 418.385. Pursuant to the previous memorandum of March 24, 2020, the WDCA urged employers/carriers to postpone all independent medical examinations while Governor Whitmer's "Stay Home, Stay Safe" Order remained in effect. Likewise, the WDCA previously cautioned that employers/carriers may be liable for penalties if any adverse action was taken against a claimant for failing to attend an independent medical examination during the Statewide COVID-19 shutdown. The WDCA's updated memorandum of June 12, 2020, notes that employers/carriers may now begin to schedule claimants for independent medical examinations, following Governor Whitmer's recission of the "Stay Home, Stay Safe" Order. However, similar to the point raised above regarding the "reasonableness" of a job offer, an employer's/carrier's request for an independent medical examination should only be made if the examination facility is in full compliance with all currently applicable Executive Orders for businesses, including health care facilities, to operate with utmost safety precautions in place. Further, the WDCA has cautioned employers/carriers that an injured worker's refusal to participate in a medical examination at a facility that is not in compliance with all applicable Executive Orders should not have any adverse impact upon a claimant's eligibility for workers' compensation benefits. **Thus, considering the WDCA's updated guidance regarding claimant job searches and independent medical examinations during the COVID-19 pandemic, Michigan employers should remain conservative in their approach to disputing/terminating workers' compensation benefits for the foreseeable future.**
Ohio	Donald Lampert DLampert@Calfee.com	Ohio House currently has before it two COVID bills which have not gone to the Ohio Senate. Both are for the duration of Governor DeWine's Executive Order. House Bill 605 defines COVID as an occupational disease for employees of retail food establishments and/or food processing establishments but considers it a "rebuttable presumption." House Bill 573 is structured similarly but applies the "rebuttable presumption" to those employees required to work outside the home. Both bills have a long way to go.