**Covid-19**
**Compensability – State By State Survey**
**As of 05.24.21**

| State | Response |
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| Alabama | New Jersey lawyer and nationally recognized workers' compensation guru, John Geaney recently posted a COVID-19 Q&A on his award winning Blog site. The questions are certainly relevant nationally and so the following are Alabama specific answers.<br><br>**Question 1:** What happens when an employer sends its employees home for several weeks out of a general concern for safety and for prevention of contagion? Must the employer pay workers' compensation benefits?<br>**Answer:** No, but the employee will likely be entitled to unemployment benefits.<br><br>**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?<br>**Answer:** No, because the mere possibility of an injury or occupational disease is insufficient to trigger coverage under the Act.<br><br>**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?<br>**Answer:** No, but the employee will likely be entitled to unemployment benefits.<br><br>**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 quarantines himself 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?<br>**Answer:** No, because the mere possibility of an injury or occupational disease is insufficient to trigger coverage under the Act.<br><br>**Question 5:** Along the lines above, suppose the employer finds outht 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?<br>**Answer:** No, because the mere possibility of an injury or occupational disease is insufficient to trigger coverage under the Act.<br><br>**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 benefits?<br>**Answer:** No, because the mere possibility of an injury or occupational disease is insufficient to trigger coverage under the Act. Further, in Alabama, an occupational disease is defined as "a disease arising out of and in the course of employment… which is due to hazards in excess of those ordinarily incident to employment in general **and** is peculiar to the occupation in which the employee is engaged but without regard to negligence or fault, if any, of the employer." |

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| | Therefore, for COVID-19 to be considered compensable in Alabama, the employee would have to be able to prove that contracting it was due to hazards in excess of those ordinarily incident to employment in general **and** that it is peculiar to the employee's occupation. It will be difficult for an employee to show that contracting the virus resulted from a risk of employment. The reason being that, like the flu, you 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 or first responders. Alabama is not one of those states. Without a statutory presumption in place, it would be nearly impossible to prove causation.<br><br>**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?<br>**Answer:** Probably not. See answer to #6.<br><br>**Question 8:** Given that tens of thousands of employees are now working from home in Alabama due to state and federal guidelines, what if an employee gets injured at home and files a workers' compensation claim?<br>**Answer:** The Alabama Workers' Compensation Act does not specifically address telecommuter/home based workers and there are not currently any high court opinions in Alabama addressing the issue. 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 work place hazards. Written telecommuting agreements that dictate hours of employment, areas of the house that are considered work space, and rules concerning prohibited activity are recommended to help employers and employees know what is and is not considered work activity.<br><br>This blog submission was prepared by Mike Fish, an attorney with Fish Nelson & Holden, LLC, a law firm dedicated to representing self-insured employers, insurance carriers, and third party administrators in all matters related to workers' compensation. Fish Nelson & Holden is a member of the National Workers' Compensation Defense Network. If you have any questions about this submission or Alabama workers' compensation in general, please contact Fish by e-mailing him at mfish@fishnelson.com or by calling him directly at 205-332-1448. |
| Alaska | Alaska Statute 23.30.395(24) includes in its definition of an injury, "an occupational disease or infection that arises naturally out of the employment or that naturally or unavoidably results from an accidental injury." It is well established that a virus such as COVID-19, or Coronavirus, is an illness that if contracted in the workplace, would entitle the affected worker to workers' compensation benefits that may arise from the illness.<br><br>The Alaska Supreme Court, in *Delaney v. Alaska Airlines, *held that in order to succeed in a claim for an "occupational disease" or illness, an employee must show that: 1) the disease was caused by the conditions of their employment; and 2) as a result of the conditions of the employment, the risk of contracting the disease is greater than that which generally prevails in employment and living conditions. In a claim for Coronavirus, the Board would evaluate this two-prong test at the first step of the compensability analysis. Both elements must be satisfied to create the "preliminary link" between employment and the claimed workplace disease. The Alaska Supreme Court described the rationale for requiring a "preliminary link" before finding a worker is entitled to workers' compensation benefits as, "… the idea is to rule out cases in which claimant can show neither that the injury occurred in the course of employment nor that it arose out of it, as where he contracted the disease but has no evidence to show where he got it. In claims that are 'based upon highly technical medical considerations,' medical evidence will likely be necessary for the employee to meet their burden of showing a 'preliminary link.'"<br><br>In reviewing claims for Coronavirus, the Board would likely find that the disease is a "highly technical medical consideration" and require some medical evidence that the worker has contracted the virus. Once medical evidence establishes that a person has the virus, they will also need to show that they contracted it through the conditions of their employment. The Alaska Supreme Court has held that this |

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| | requirement is intended to bar claims where an employee "has no evidence" that they contracted an illness out of the course of their employment. Employees seeking benefits for Coronavirus would likely need to prevail on one of the two theories of compensability for occupational disease. If the employee can show evidence of direct contact with a person positive for Coronavirus in the workplace, the presumption of compensability will have attached. Or, alternatively, if the employee can show that the condition of their employment exposed them to a greater risk of contracting the disease than the general public, there is also a good chance that the Board would find a preliminary link between the employment and the disability or need for treatment, and the employer and its carrier may be liable.<br><br>If the employee can establish the "preliminary link," the employer must rebut the presumption, or pay benefits on the claim. In *Huit v. Ashwater Burns,* the Alaska Supreme Court held that rebutting the presumption requires the employer to either eliminate the possibility that the illness was related to the employment, or show that some other source outside of the employment caused the disease. It will be difficult to rebut the presumption in cases where the claimant can show direct contact with an infected person in the workplace. In such instances, benefits will likely need to be paid for any disability or need for treatment related to the Coronavirus. Employers and their insurers should have more factual grounds to dispute a claimant's assertion that their workplace has placed them at a greater risk for contracting the virus than the general population. Factors to consider are how many people might the claimant come in close contact with on an average day, were there safety precautions such as hand sanitizing stations or masks, or other measures in the workplace to reduce the likelihood of spreading the disease was acquired through work exposure.<br><br>We recommend that Alaska employers and their insurers and adjusters be prepared for an influx of claims related to the Coronavirus. Actions are being taken at the local and State level to minimize the spread of the virus, and as a result of keeping people away from workplaces that have high risks for spreading the disease, it could result in a significant decrease in the potential burden on employers and their workers' compensation carriers during this pandemic. Where possible, employers are encouraged to take steps in reducing the possibility of spreading the disease in the workplace. By doing so, it may improve chances of convincing the Board that the person's employment did not place the claimant at greater risk of getting the disease than the general population.<br><br>Claims should be closely evaluated when they come in for whether they satisfy the first step of the presumption analysis and create the preliminary link between their employment and their illness. It will be during that first step of the presumption analysis that employers will have the best chance to successfully deny a claim, because once the presumption has been attached, it may be difficult to successfully rebut under the standard articulated by the Court in *Huit*. Please feel free to contact us if there is more information we can provide on this issue.<br><br>Below are informational links from the Division about how COVID-19 is effecting Board and Appeals Commission procedures and from the State of Alaska regarding its mandates which may affect medical care in workers' compensation claims. Please note that these bulletins and mandates can change.<br><br>http://labor.state.ak.us/wc/bulletins/20-02.pdf<br>http://labor.state.ak.us/wc/bulletins/20-02.pdfhttp://labor.state.ak.us/wc/bulletins/20-03.pdf<br>http://labor.state.ak.us/WCcomm/documents/AWCAC_Procedureal_Order_No1.pdf<br>http://dhss.alaska.gov/News/Documents/press/2020/SOA_03192020_HealthMandate005_ElectiveMedProcedures.pdf<br>We wish you all good health! Meshke Paddock & Budzinski, P.C. |
| Arizona | For clients handling COVID exposure allegations in Arizona, the Crawford and Treadway cases hold that in order for a disease to be compensable as arising out of and in the course of employment, there must be a causal connection with the employment, and not a mere coincidental connection, and there must be a clearly established facet of special exposure in excess of that of the "commonalty." These COVID-19 claims are being handled like other infectious disease claims in AZ.<br><br>Additionally, the ICA is conducting hearings telephonically for now, and we are doing our best to make sure depositions are still conducted on schedule telephonically. As for IME's, we encourage adjusters to call individual doctors on their pro se claims to make sure the doctor is actually conducting IME's at this time. |
| Arkansas | Compensability questions arising from the COVID-19 epidemic will likely be governed by Arkansas Code |

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| | Annotated § 11-9-601 which deals with Occupational Disease in general. The Arkansas statute defines an occupational disease as "any disease that results in disability or death and arises out of and in the course of the occupation or employment of the employee or naturally follows or unavoidably results from an injury as that term is defined in this chapter." However, no compensation shall be payable for an occupational disease unless it is due to the nature of a given employment in which the hazards of the disease actually exist and are a characteristic of and peculiar to the trade, occupation, process or employment and is actually incurred in the employment. Examples would be exposure to asbestos in certain trades. It certainly seems a stretch to place COVID-19 into such a category, especially when more specific language from the statute applies.<br><br>More likely, COVID-19 will likely be considered either a "contagious or infectious disease" or an "ordinary disease of life to which the general public is exposed." Under the strict construction required by Arkansas law, no compensation shall be payable for an ordinary disease of life to which the general public is exposed. On the other hand, compensation may be payable for a contagious or infectious disease contracted in the course of employment in or immediately connected to a hospital or sanitorium in which persons suffering from that disease are cared for or treated.<br><br>In other words, we believe that COVID-19 cases will only be covered in employment situations involving the provision of health care services and could possibly extend to first responders and emergency medical personnel. Even in those instances, the claimant would still bear the burden of proving a causal connection between the employment and COVID-19 by a preponderance of the evidence. Certainly, claimants, and their attorneys will try and get creative, but this crisis seems to fit right into Arkansas' statutory language, which must be strictly construed.<br><br>For additional information, please contact Scott Zuerker or Jim Arnold. rsz@lcahlaw.com \| www.lcahlaw.com 479.782.7294 |
| California | On behalf of Hanna Brophy MacLean McAleer & Jensen LLP, we want to let our clients know that we are fully operational in the midst of COVID-19 and the unique challenges it presents to our community as employers as well as insurance carriers and their agents with responsibility for defending workers' compensation cases for alleged COVID-19 exposure.<br><br>SUMMARY: We are taking serious precautionary measures on behalf of our team as well as our clients. Care should be taken to preserve your physical and emotional wellbeing as well as that of your employees and insureds. It is important to review COVID-19 claims through a fact-specific lens to determine compensability. We have detailed below effective methods for determining compensability of questionable COVID-19 claims.<br><br>HANNA BROPHY'S RESPONSE<br>We want you to be assured that in addition to the welfare and safety of our team internally, you, our valued clients, are at the top of our minds. We at Hanna Brophy take immense pride in our customer service-focused approach to litigation. We are here for you. In our 75 years of providing California workers' compensation defense, we have seen unusual times before and we have always come through them. It is one of the reasons why Hanna Brophy decided to shift to a paperless, electronic system more than 15 years ago. We anticipate little, if any, delay in our ability to continue providing excellent legal services to you, our valued clients.<br><br>As a precaution, we have all non-essential members of the Hanna Brophy team working outside the office. We have kept a team in place to allow for normal business operations. All of our attorneys and managers are accessible via email and can be located on our website at www.hannabrophy.com.<br><br>It can be reasonably anticipated the Sacramento could pass emergency legislation on the COVID-19 virus that could impact California workers' compensation issues. Attention must be paid to any Legislative changes.<br><br>WORKERS' COMPENSATION IMPLICATIONS: Our clients are exclusively the defense community - the various responsibilities and concerns may vary between Insurance Carriers, Preferred Employer Organizations, Self-Insured Employers, and Third Party Administrators. Employment counsel should be engaged as to wage and hour concerns.<br><br>Potential workers' compensations issues, pursuant to the California Labor Code and related case law, |

include injury AOE/COE, medical treatment, temporary disability, and in some cases death benefits. The issue of permanent disability will not likely be a major issue absent extraordinary facts. One evidentiary consideration is whether a med-legal expert in the field of infectious disease or internal / pulmonary will be necessary for a full and adequate determination on causation.

COVID-19 presents as a novel virus, but it is not unlike any other common contagion. Injured workers claiming workers' compensation benefits due to COVID-19 will need to: a) test positive for the specific virus, and b) establish actual industrial exposure from a known source. Remember, any industrial injury must both arise out of and in the course of employment.

AOE/COE: There is some very old case law concerning flu-like illness. Historically cases involving colds, flu and even pneumonia have been successfully defended absent extenuating circumstances. The basic law was established by the Supreme Court case of Marsh v. IAC (1933) 217 C 338. In that case, the court stated, "An ailment does not become an occupational disease simply because it is contracted on the employer's premises. It must be one of which is commonly regarded as natural to, inherent in, and incident and concomitant of the work in question." This sounds like an absolute defense to all flu like conditions. It is not. The determination of injury AOE/COE in such situations will depend on the facts.

Special Risk & Increased Risk: In the case of Bethlehem Steel Co. v. IAC (1943) 21 CA2d the Court stated, "Where an employee contracts a contagious or infectious disorder he must in order to recover compensation, establish the fact that he was subjected to some special exposure in excess of that of the commonalty, and the absence of such showing, the illness cannot be said to have been proximately caused from an injury arising out of his employment." Based on this holding the issue of injury AOE/COE for the COVID-19 virus is nothing more than a proximate cause issue. The injured worker will have the burden of proof. The injured worker will be required to establish that the workplace subjected the employee to some "special exposure."

What is meant by "special exposure" is a wide open field. We know the injured worker will not be required to prove that the exposure was caused by the employment to a degree of scientific certainty, but rather merely to a degree of reasonable medical probability. In the case of Mail- Well Inc. v. WCAB (2003) 68 Cal Comp Cases 960, writ denied, the WCAB found that the applicant's Parkinson's disease was aggravated by his hydrocarbon exposure at work. There was no scientific evidence linking Parkinson's disease with exposure to hydrocarbons. However, the applicant demonstrated that exposure to various components increased the risk of an aggravation of Parkinson's disease. So in place of scientific certainty the test became one of "increased risk."

An increased risk standard would mean that the injured worker would have to prove that the risk of contracting the COVID-19 virus was greater on the job than contracting the virus in a general public setting. Of course, this would be a factually driven termination.

A line of cases that is regularly encountered in in the southern San Joaquin Valley relate to the exposure to the coccidioidomycosis fungi spores. This is commonly referred to as "Valley Fever." Spores can thrive in areas of the San Joaquin Valley and Arizona, which are dry and undisturbed. Wind storms can cause the spores to spread further and in greater concentration. These type of cases are won and lost on a regular basis at the Worker's Compensation Appeals Board. If the employee can document that they had an increase in the risk of exposure due to their employment they might prevail on the issue of industrial causation. However, if the employer can prove there was no increased risk, they might prevail with respect to the issue of industrial causation.

Since it is impossible to scientifically test the air that the employee was breathing on the job at the time of the exposure, medical opinions are usually given in terms of reasonable medical probability combined with a risk of exposure. So employee who lived and worked in an endemic area and the employment did not involve any extra outside exposure may not be able to prove that Valley Fever was work related. The WCAB could apply the same standard to the COVID-19.

Employers would be well-advised to document preventative measures taken in the wake of COVID-19 at the worksite. A non-exhaustive list might include records related to which cleaning supplies have been used and the frequency of cleanings, promoting social distancing and/or remote work

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| | opportunities (documenting which employees worked remotely), and even keeping tabs on employee reports of indirect exposure emanating from outside the workplace.<br><br>TO ACCEPT, DELAY, OR DENY? While some firms are recommending outright denial, it is always a good idea for defendants to conduct good faith discovery upon presentation of any claims by employees for benefits related to COVID-19. Each case must be understood individually before denials issue. Employers would be well-advised to permit questioning by workers' compensation specialist to avoid violating HIPAA.<br><br>Upon receipt of a claim, initial questions might include the following: 1) Has the claimant been tested for COVID-19? Where was the test done? Are the test results in writing and available? Was testing positive for COVID-19?; 2) What symptoms is the claimant experiencing? (You might refer to the CDC site: https://www.cdc.gov/coronavirus/2019- ncov/symptoms-testing/symptoms.html); 3) Has the claimant lost time from work (remotely or otherwise); and 4) Has the claimant been in direct contact with any other employees?<br><br>In the case of safety officers who might qualify for a presumption pursuant to Labor Code Section 3212 for pneumonia, care should be taken to develop medical evidence as to the source of the pneumonia. Pneumonia is a very specific diagnosis. While COVID-19 has respiratory illness implications, it does not appear to cause pneumonia in all cases and the presumption would likely not apply absent a clear diagnosed pneumonia.<br><br>RESOURCES: Hanna Brophy (www.hannabrophy.com) is making every effort to stay on top of key developments and will keep our clients up to date via Linkedin: https://www.linkedin.com/company/hanna-brophy-maclean-mcaleer-&-jensen/<br><br>For WCAB status, the DWC publishes updates via its Newsline, which can be accessed here: https://www.dir.ca.gov/dwc/dwc_newsline.html.<br>Details about Corona Virus (COVID-19) can be found here: https://www.cdc.gov/coronavirus/2019-ncov/.<br>The World Health Organization issues Situation Reports, which can be found here: https://www.who.int/emergencies/diseases/novel-coronavirus2019/situation-reports<br>WHO MythBusters: https://www.who.int/emergencies/diseases/novelcoronavirus-2019/advice-for-public/myth-busters.<br>The California EDD has published guidelines for affected employees in a variety of situations: https://www.edd.ca.gov/about_edd/coronavirus-2019.htm. |
| Colorado | **DOWC Emergency Rules 03/24/2020 -** The Division of Workers' Compensation has issued Emergency Rules (attached) applicable during the state of emergency declared by the Governor due to Covid-19.<br>1. Notarization of claimant's signature on settlement documents is not required so long as the agreement is accompanied by a photocopy, scan, or photograph of a government issued photo ID.<br>2. Updated procedure for rejection of coverage.<br>3. Updated procedure for submission of disfigurement benefit requests.<br>4. Motions to close for failure to prosecute must be filed via e-mail and include an e-mail address for all parties, including represented claimants. The motions must be sent to cdle_dowc_filings@state.co.us.<br>5. Rule 16-3(A)(5)(c) (ATP must examine claimant within first three visits to physician's office) is suspended.<br>6. The seven (7) day requirement for a denial of a request for prior authorization (Rule 16-7(B)) is extended to thirty-five days for requests relating to a procedure or treatment which is currently unavailable due emergency restrictions.<br>7. All information submitted to the Division must be submitted via e-mail.<br><br>Only one document per e-mail is permitted.<br><br>The subject line must include: WC#, Claimant first and last name, and type of document (FAL, GAL, etc.). |

The certificate of service should reflect the date of e-mail.

GAL/FAL/Petitions to Modify, Terminate, Suspend/Requests for lump sum must be addressed to: cdle_dowc_filings@state.co.us

Motions (other than a motion to close) and submission to the prehearing unit must be addressed to: cdle_docw_prehearings@state.co.us

All other documents not specifically addressed by the emergency rule must be addressed to: cdle_workers_compensation@state.co.us

Electronic submission via mechanisms other than e-mail requires advances approval.

If you have any questions about the Emergency Rules please reach out to any Ritsema attorney. Also, if you have suggestions for additional rule changes, please forward as well. This is a continuing process and we suspect there may be additional changes.

**CO DOWC Emergency Rules Breakdown 03/31/2020** Late Monday, the Colorado Division of Workers' Compensation issued a second set of emergency rules (attached). These rules address telehealth billing and return to work. For our purposes, the most important provision is Section 5:

"Parties are encouraged to utilize telehealth wherever medically appropriate. Telehealth appointments are specifically allowed for return to work evaluations of essential employees of critical employers as defined in Amended Public Health Order 20-24, when those employees are physically able to do so. Notwithstanding any other provision of rule, an in-person examination will not be required where either the injured worker or medical provider objects to such an examination."

Thus, the Division is encouraging physicians to utilize telehealth appointments whenever appropriate, including medical appointments addressing return to work. In other words, we may set telehealth appointments for ATPs to address work restrictions, including release to full duty. If you haven't already, please confirm that your ATPs are utilizing telehealth.

In addition, The DIME Unit issued an advisory (attached) to the Level II physicians regarding performing DIMEs in light of Covid-19. The DIME Unit advised that telehealth appointments are permissible for DIME appointments. Accordingly, if you receive feedback from a DIME physician that they are unwilling to perform an in person evaluation, please advise that telehealth is an option.

As always, if you have any questions, please contact me directly, or any Ritsema attorney. Stay safe.

Viral Pandemics, COVID-19, and the Work Place in Colorado

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Pandemic influenza is discussed and defined by OSHA as follows: A worldwide outbreak of influenza among people when a new strain of the virus emerges that has the ability to infect humans and to spread from person to person. During the early phases of an influenza pandemic, people might not have any natural immunity to the new strain; so the disease would spread rapidly among the population. A vaccine to protect people against illness from a pandemic influenza virus may not be widely available until many months after an influenza pandemic begins. Pandemics can vary in severity from something that seems simply like a bad flu season to an especially severe influenza pandemic that could lead to high levels of illness, death, social disruption and economic loss.

OSHA advises that in the event of a viral pandemic, employers will play a key role in protecting employees' health and safety as well as in limiting the impact of the virus on the economy and society.

A disease's classification as a pandemic depends on both its geographical spread, the ease with which it passes from person to person, and it's severity. The coronavirus outbreak, which originated in China in 2019, and causes the respiratory illness COVID-19, was officially declared a global pandemic by the World Health Organization on March 11, 2020.

On March 10, 2020, Colorado Governor Jared Polis declared a state of emergency in response to COVID-19. This memorandum will address dilemmas faced by Colorado employers struggling to respond to the threat of COVID-19 in the work place.

1. An employee has been diagnosed with a confirmed case of COVID-19. The employee reports to his supervisor that he believes he acquired the illness through exposure at work. What should the employer do?

   Follow your normal employer protocols for when any employee reports an alleged workers' compensation claim or occupational disease.

- Complete incident and investigation paperwork.
- Provide the employee with a Designated Provider Letter.
- Report the claim to the worker's compensation carrier/third party administrator (TPA) within 10 days.
- The carrier/TPA should report the claim to the Division of Worker's Compensation within 10 days.
- If there is lost time in excess of 3 days, a fatality, or anticipated permanent impairment, the carrier/TPA must take a position on compensability within 20 days.

2. If there was an exposure to COVID-19 in the work place is the employee likely to establish a compensable worker's compensation claim? The Act does not specify what a claimant must show to prove that a contagious disease arose out of and occurred within the course and scope of employment. In Colorado, injuries fall into two categories: (1) accidental injuries, which are traceable to a particular time, place, and cause, and (2) occupational diseases, which are the result of exposure occasion by the nature of the employment.

- Contagious diseases simply do not fit well within either category. A survey of Colorado case law shows that, because of this uncertainty in the law, claimants tend to bring a claim under both categories when seeking compensation for a contagious disease.
- Under either category, a claimant must still prove that the contagious disease resulted from the work environment.

  <u>Accidental Injury:</u> For an accidental injury, a claimant must show that he or she contracted the disease at a particular point in time and specify the cause. See Hallenbeck v. Butler, 101 Colo. 486, 74 P.2d 708 (1937). Several cases outside of Colorado have allowed recovery on the "preponderance of probabilities," when the place of work was attended with a much higher proportional risk of infection.

  Essentially, the argument is that the employment throws people together in close quarters and thereby increases the risk of contagion or that the employee's job duties such as travel place him or her in the midst of an epidemic. However, several Colorado cases have concluded that showing an increased risk does not, as a matter of law, entail a finding of causation.

- In Likens v. Colo. Dept. of Corr., W.C. No. 4-272-604 (Aug. 28, 1997), the Panel distinguished between testimony showing an increased risk of exposure to a contagious disease and whether it was probable that the claimant contracted the disease at work. Based on the testimony of the claimant's expert, there was an increased risk of exposure to Hepatitis C because of claimant's work as a correctional officer. However, the Panel upheld the ALJ

determination that it was "possible" but not probable that the claimant contracted Hepatitis C at work.

- In Franks v. Apria Healthcare, Inc., W.C. No. 4-484-507 (Nov. 20, 2002), the claimant worked as a nurse treating AIDS patients and she contracted tuberculosis during the course of her employment. She presented evidence that a greater percentage of AIDS patients have tuberculosis versus the general population and therefore her condition was work related. Respondents showed that none of the patients with whom the claimant worked had TB. The Panel affirmed the ALJ's determination that the claimant failed to prove that it was more likely than not that she actually sustained a work related exposure to TB.

- In Cassianni v. Hospice & Palliative Care of W. Colo., W.C. No. 4-887-148-03 (Nov. 5, 2013), a nurse who worked in a hospice contacted MRSA. She presented evidence of a greater likelihood of exposure to MRSA in the hospice setting than in the general population. Respondents presented evidence that the claimant likely had community- acquired MRSA based on a set of risk factors including claimant's frequent use of antibiotics. The evidence also showed that the claimant had not been exposed to any patients at the hospice who had her form of MRSA. The ALJ concluded that the claimant had not sustained her burden to show a compensable injury.

A critical factor in all of these cases is that the claimants were not able to show a specific instance of infection. Simply showing an increased risk was not enough to show that the incident was work related. However, none of these cases address an epidemic. In that context, the causation analysis should consider: (1) whether the epidemic is localized to the workplace; (2) if not, whether there is an increased risk of infection because of the workplace? In theory, the claim should only be deemed compensable if the evidence shows the workplace was attended with a much higher proportional risk of infection than the general population.

<u>Occupational Disease</u> In Colorado, claimants might also bring claims for infectious disease under the guise of an occupational disease.

- A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment duties or working conditions. Wal-Mart Stores, Inc. v. ICAO, 989 P.2d 251, 252 (Colo. App. 1999).

- The Act also imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. Anderson v. Brinkhoff, 859 P.2d 819 (Colo. 1993).

Arguably, an infectious disease is not the same as an occupational disease. Generally, an occupational disease requires multiple exposures from work related activities, i.e. an "occupational" low back injury requires extended periods of lifting and twisting. Conversely, infectious diseases typically are contracted after a single exposure to a contagion.

Currently, there is no case law in Colorado distinguishing occupational diseases from contagious diseases, but some other states have drawn this distinction. If claimants are allowed to bring their claim as an occupational disease, they still have the burden to show that the working conditions directly and proximately caused the infection.

Claimant must additionally demonstrate the risk of a contagious disease was peculiar to the work environment. Simply showing that there is an increased risk should not necessarily satisfy the claimant's burden to show that the working conditions directly and proximately caused the disease.

3. An employee reports to his supervisor that he believes he was exposed to COVID-19 at work because he worked with a co-worker who has confirmed COVID-19. Does the employer need to report the alleged work exposure to the worker's compensation carrier/TPA?

In most circumstances, no. Exposure to a contagious disease does not necessarily mean the employee sustained a compensable injury. A compensable injury is one that causes a disability or the need for medical treatment. City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967).

Testing and post-exposure preventative treatment may be compensable under some circumstances where the exposure results from an accident. Mere exposure to a contagion, without an "accident", should be insufficient to establish a causal connection such that preventative measures are covered by the Act.

- In Vanbuskirk v. Eagle Picher, WC 4-613-913 (ICAO April 13, 2005), Claimant was exposed to cadmium. Further testing revealed elevated enzyme levels, which required continued monitoring. The ALJ found the continued monitoring to be a compensable medical benefits. The ICAO reversed, concluding the ALJ did not adequately find that elevated enzyme levels related directly to the exposure or that Claimant contracted a disease.

- In Aranda v. Integrated Cleaning Services, WC 4-451-413 (ICAO February 21, 2001), Claimant sustained a needle stick. As a result, Claimant was required to undergo preventative measures pursuant to OSHA regulations. Claimant sought worker's compensation benefits under the theory of an accidental injury. The ICAO concluded such preventative measures, which the accidental injury precipitated, flowed from the employment relationship and were compensable.

- In Littleton v. Schum, 553 P2d 399 (Colo Ct App 1976), the claimant believed that he had been exposed to hepatitis by a co-worker who had confirmed hepatitis. The claimant was a firefighter and he asserted that he had been exposed to hepatitis because he used the same dishes and shared the same personal protective equipment that had been used by his co-worker. As a precautionary measure the claimant had himself and his family inoculated. Claimant did not contract the disease, but he requested reimbursement for the inoculation. The court of appeals concluded the claim should be denied because (1) infectious hepatitis is not an "occupational disease" as exposure to hepatitis is not indigenous solely to claimant's occupation and (2) claimant did not contract the disease.

With COVID-19, if there is a compensable accident that results in a possible exposure to the coronavirus, preventative measures per the CDC include self-quarantining for approximately two weeks. If the employee is unable to work remotely while quarantined, temporary disability benefits could be due to the employee per the Worker's Compensation Act.

4. Can employers send employees home who exhibit potential symptoms of contagious illnesses at work?

Yes. If an employee displays viral or influenza type symptoms at work, the Americans with Disabilities Act (ADA) does not prohibit an employer from encouraging or requesting that the employee leave work.

5. May an employer encourage employees to telework as an infection-control strategy?

Yes. The Equal Employment Opportunity Commission (EEOC) has opined that telework is an effective infection-control strategy. The EEOC has also stated that employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation under the ADA to reduce their chances of infection during a pandemic.

6. Must an employer offer telework as a reasonable accommodation under the ADA during a viral pandemic?

Generally, no. In most cases COVID-19 is a transitory condition and therefore not a disability for purposes of the ADA. However, if an employee develops complications from COVID-19, an employee could make an argument that the ADA is implicated if the virus substantially limited a major life activity, such as breathing. Moreover, if an employer "regards" an employee with COVID-19 as being disabled, that could trigger ADA coverage.

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| | 7. Can an employer take an employee's temperature at work to determine whether they might be infected?<br><br>Generally speaking, the ADA places restrictions on the inquiries that an employer can make into an employee's medical status, and the EEOC considers taking an employee's temperature to be a medical examination under the ADA. The ADA prohibits employers from requiring medical examinations and making disability-related inquiries unless (1) the employer can show that the inquiry or exam is job-related and consistent with business necessity, or (2) the employer has a reasonable belief that the employee poses a "direct threat" to the health or safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation.<br>On March 18, 2020, the EEOC gave employers the green light to take employees' temperatures in an effort to ward off the spread of the coronavirus. Not all carriers of the virus have symptoms or a fever, so the efficacy of taking temperatures may be limited.<br><br>8. Can an employee refuse to come to work because of fear of infection?<br><br>Employees are only entitled to refuse to work if they believe they are in imminent danger. Section 13(a) of the Occupational Safety and Health Act (OSH Act) defines "imminent danger" to include "any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act."<br><br>OSHA discusses imminent danger as where there is "threat of death or serious physical harm," or a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency. The threat must be immediate or imminent, which means that an employee must believe that death or serious physical harm could occur within a short time, for example, before OSHA could investigate the problem.<br><br>For most employment situations, COVID-19 should not pose an imminent danger sufficient to satisfy OSHA's test for refusal to work. However, COVID-19 may be a sufficient basis for an employee to refuse some work related assignments, such as international travel. |
| Delaware | 19 Del. C. 2301 defines compensable "occupational diseases" as all diseases arising out of and in the course of employment, only when the exposure stated in connection therewith, has occurred during employment. In Anderson v. General Motors, Corp., 442 A.2d 1359 (Del. 1982), the Delaware Supreme Court elaborated that for an ailment or disease to be found a compensable occupational disease, evidence is required that: (1) the employer's working conditions produced the ailment; (2) as a natural incident of the employee's occupation; and (3) in such a manner as to attach to that occupation a hazard distinct from and greater than the hazard attending employment in general. An ailment does not become an occupational disease simply because it is contracted on the employer's premises. It must be one which is commonly regarded as natural to, inhering in, incident and concomitant of, the work in question. In short, whether coronavirus infection is compensable under Delaware workers' compensation law is a highly fact specific inquiry as well as dependent upon science and medicine that is only in the earliest stages of development at this time. Therefore, it is our recommendation that any such allegation be handled very carefully and with involvement of defense legal counsel.<br><br>Delaware Code Title 19 Section 2301<br><br>(4) "Compensable occupational diseases" includes all occupational diseases arising out of and in the course of employment only when the exposure stated in connection therewith has occurred during employment.<br><br>(21)"Willful self-exposure to occupational diseases" includes:<br>a. Failure or omission to observe such rules and regulations as may be promulgated |

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| | and posted in the plant bythe employer tending to the prevention of occupational diseases; and<br><br>b. Failure or omission to truthfully state to the best of the employee's knowledge, in answer to inquiry made by the employer, the location, duration and nature of previous employment of the employee in which the employee wasexposed to any occupational diseases.<br><br>Section 2342 Notice of occupational disease; time of; failure to give.<br><br>Unless the employer during the continuance of the employment has actual knowledge that the employee has contracted a compensable occupational disease or unless the employee, or someone in the employee's behalf, or some of the employee's dependents, or someone on their behalf, gives the employer written notice or claim that the employee has contracted 1 of the compensable occupational diseases, which notice to be effective shall be given within a period of 6 months after the date on which the employee first acquired such knowledge that the disability was, could have been caused or had resulted from the employee's employment, no compensation shall be payable on account of the death or disability by occupational disease of such employee.<br><br>Section 2361 Limitation periods for claims.<br><br>(d) All claims for compensation for compensable occupational disease or for an ionizing radiation injury shallbe forever barred unless a petition is filed in duplicate with the Department within 1 year after the date on which the employee first acquired such knowledge that the disability was or could have been caused or had resulted from employment. In case of death, all claims for compensation for compensable occupational disease or for an ionizing radiation injury shall be forever barred unless a petition is filed in duplicate with the Department within 1 year after the date on which the person or persons entitled to file such claims know, or by the exercise of reasonable diligence should know, the possible relationship of the death to the employment. |
| Florida | Historically in Florida colds, flu and similar illnesses have been treated as ordinary diseases of life to which the general public are exposed and are not compensable. The first obstacle a claimant would face is a higher burden of proof in seeking compensability for a Covid -19 illness. F.S. 440.09(1) states that "cases involving occupational disease or repetitive exposure, both causation and sufficient exposure to support causation must be proven by clear and convincing evidence." In addition to this heightened burden of proof the statute states: "an exposure to a toxic substance, including, but not limited to, fungus or mold, is not an injury by accident arising out of employment unless there is clear and convincing evidence establishing that exposure to the specific substance involved, at the levels to which the employee was exposed can cause the injury or disease sustained by the employee."<br><br>In two decisions issued by the First District Court of Appeal in late 2019 (School District of Indian River v. Cruce 1D17- 3342 and City of Titusville v. Taylor 1D17-3814) it was noted that the burden of proof in exposure cases is almost insurmountable and that the direct proof of the level of exposure is often not available. In a concurrence it was questioned whether workers compensation remained a viable alternative to the tort system in these types of cases.<br><br>However, a claimant in a health care field or similar employment may have an easier case to prove under an occupational disease theory. It is the nature of the employment which allows a claimant to proceed under this theory and it is therefore one of the critical inquiries. It is defined in F.S. 440.151(1)(a) as an "occupation in which the employee was so engaged there is attached a particular hazard of such disease that distinguishes it from the usual run of occupations, or the incidence of such disease is substantially higher in the occupation in which the employee was so engaged than in the usual run of occupations." In a memo issued by Florida's Chief Financial Officer Jimmy Patronis, who oversees the Department of Insurance, he reminded insurers that first responders, health care workers and others who contract Covid- 19 due to work related exposure should receive workers' compensation benefits under the workers compensationstatute.<br>It can be expected that the Florida Legislature will likely introduce remedial legislation perhaps reducing the burden of proof for Covid-19 illness or perhaps creating a rebuttable presumption of compensability. |

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| Georgia | COVID 19 Compensability in Georgia requires the injured worker to satisfy all elements of an Occupational Disease Claim. All Claimants petitioning for benefits for an occupational disease must prove the following: (1) a direct causal connection between the conditions under which the work is performed and the disease; (2) that the disease followed as a natural incident of exposure by reason of the employment; (3) that the disease is not of a character to which the employee may have substantial exposure outside of employment; (4) that the disease is not an ordinary disease of life to which the general public is exposed; (5) that the disease must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence.<br><br>COVID 19 is not only an ordinary disease to which the general public is exposed, it is one of the most extensive viral contagions that the global population has experienced in a lifetime. For most of Georgia's workers, COVID 19 based claims would be non-compensable due to the hurdles involved in meeting all 5 elements of the Occupation Disease claim. However, it is very likely that an employee in the Health field and first responders could pursue claims that would satisfy the elements above simply based on the extensive exposures in their line of work. That said, all COVID 19 cases should be addressed subjectively as each Claimant will present with a different variation of exposure events personal to them. |
| Illinois | **Question:** Will Coronavirus cases be considered compensable and covered by the Illinois Workers' Compensation and Occupational Diseases Acts?<br><br>**Answer:** The Illinois Workers' Compensation and Occupational Diseases Acts are statutes that create a system of benefits for employees that suffer work-related injuries. In order for an injury to be compensable, an employee must have suffered an accident/exposure which arose out of and in the course of his employment. Under Illinois law, it is insufficient for an employee to prove that his accident simply occurred at work for the case to be found compensable. In addition, an employee must prove that the accident was the result of a risk inherent in the workplace. The accident at work is generally not compensable if the risk of injury is common to the general public. Caterpillar Tractor Co. v. Industrial Comm'n, 129 Ill.2d 52, 133 Ill.Dec. 454, 541 N.E.2d 665 (1989).<br><br>The Illinois Occupational Diseases Act states, "The term "occupational disease" means a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public." 820 ILCS 310/1(d).<br><br>The question is whether the Coronavirus disease if contracted by an employee would be compensable under the Illinois Workers' Compensation and Occupational Diseases Acts. The Coronavirus disease (COVID-19) was first detected in Wuhan, China in December 2019. It is contagious via human to human contact.<br><br>Therefore, this is not an exposure peculiar to an employer or an employer's workplace. This is a worldwide health condition/crisis which affects potentially all members of the general public. This exposure is therefore not unique or specific to any particular employer. Therefore, as a general rule, we would not expect cases involving the Coronavirus to be compensable in Illinois.<br><br>Certainly, there could be exceptions to this rule. Traveling employees who are sent to areas of high exposure to the virus could prove a compensable workers' compensation claim. See Omron Electronics v. Illinois Workers' Compensation Commission, 2014 IL App. (1st) 130766WC, 387 Ill. Dec. 74, 21 N.E.3d 1245 2014 Ill. App. Lexis 793 (2014).<br><br>Further, we would anticipate compensable claims involving health care workers in the event they face direct exposure and/or greater exposure to patients with the disease than members of the general public. However, strict proof of an actual increased risk will be required. See Spurling v. Industrial Commission, 129 Ill. 2d 416, 135 Ill. Dec. 794, 544 NE 2d 290 (1989).<br><br>The more difficult questions will be whether employees who regularly have in person contact with high volumes of the general public will be considered at greater risk than employees who do not generally interact with the general public. Theoretically, the type of employee that may attempt to |

raise such a claim could include: retail sales, cashiers, train conductor, restaurant employees, etc.

It is possible that those employees could be covered under workers' compensation but it is highly unlikely. Strict proof would be required. Illinois courts have been reluctant to grant compensability in cases like these and there is nothing in the Illinois statute nor Illinois case law which would encourage either the Commission or Courts to grant compensation except in cases of clear increased risk (i.e. health care professionals).

Cases involving the Coronavirus would more likely appear to be personal conditions and not work related. Recent medical reports have stated that this particular virus is somewhat more contagious than the average flu in terms of its ability to spread from one person to another. Further, the number of cases will grow over time, making the exact source of the exposure much more challenging to identify. Thus, the likelihood of a determination that an individual is at increased risk of developing the condition due to exposure to members of public while working is unlikely. Neither Illinois statutes nor Illinois case law would tend to favor a finding of compensability in these types of cases absent special circumstances or direct proof.

The Illinois Workers' Compensation and Occupational Diseases Acts contains a rebuttable presumption ofcompensability in favor of firefighters, emergency medical technicians and paramedics for certain conditions of ill-being. In Section 6(f) of the Workers' Compensation Act, it provides in essence that any condition or impairment of the health of an employee employed as a firefighter, EMT or paramedic which results directly or indirectly from any blood born pathogen, lung or respiratory disease or condition, heart or vascular disease or condition, hypertension, tuberculosis or cancer resulting in any disability to the employee shall be rebuttably presumed to arise out of and in the course of the employee's work duties. This only applies to employees on the job for more than five years.

This section of the Act may create different potential liability for employers of firefighters, EMTs and paramedics. Arguably, a Coronavirus infection would be considered to be a respiratory disease or condition for which a rebuttable presumption would be created.

**It is important to reiterate that Illinois is not a positional risk state**. The positional risk doctrine is a principle which holds that an injury arises out of employment if the injured worker's employment required the worker to be at the place where the injury occurred at the time it occurred.

In order for a claim to be compensable in Illinois, the claimant must show a risk inherent in the employment rather than simply an injury while at work. Certainly, cases involving viral conditions which are spread worldwide would not be generally considered unique to the employment in Illinois.

Certainly, employers would be encouraged to protect their employees and prevent the spread of the disease. Employers should regularly consult the CDC website for updated information and recommendations. See www.cdc.gov/coronavirus/2019-nCoV. The current recommended strategies include:

1. Actively encouraging sick employees to stay home;
2. Separating sick employees from other employees;
3. Emphasize staying home when sick, respiratory etiquette and hand hygiene by all employees;
4. Avoid unnecessary physical contact(i.e. handshakes)
5. Perform routine environmental cleaning;
6. Advise employees before traveling to take preventative steps.

In addition to the above precautions, we would make the following recommendations to limit your potential workers' compensation exposure:

1. Staff employees based on actual need;
2. Allow non essential employees to take voluntary leaves without pay;
3. Allow employees to work at home if feasible;
4. Consider expanding your actual working hours and then spread out the employees

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| | during the expanded working hours;<br>5. Limit the number of employees using elevator at any given time;<br>6. Try to make sure that employees' workstations are at least six feet apart.<br><br>Robert E. Maciorowski Rusin & Maciorowski, Ltd. rmaciorowski@rusinlaw.com 312-454-5135 |
| Indiana | COVID-19: WHAT EMPLOYERS CAN DO AND POTENTIAL WORKERS' COMPENSATION LIABILITY<br>Workers' Compensation FAQs<br><br>The issues presented by this novel pandemic are grounded in Chapter 7 of the Indiana Worker's Compensation Act, Occupational Diseases. Indiana is and has always been dependent on fact specific analysis of individual cases and we anticipate the same will be true of cases which arise in the pandemic caused by COVID-19.<br><br>Is an Illness Caused by COVID-19 a Compensable Workers' Compensation Claim?<br>The Indiana Occupational Diseases Act is designed to compensate an employee for disability resulting only from adisease incidental to the character of the business in which the work takes place and having its origin in a risk connected with the employment. It excludes from the protection of the Act employees suffering from diseases arising out of a hazard to which the employee would have been equally exposed outside of the employment (ordinary diseases of life) and independent of the relation of employer and employee. Ordinary diseases of life to which the general public is exposed outside of the employment are not compensable except where such diseases follow as an incident of an occupational disease.<br><br>Proof of an employment caused occupational disease requires the employee prove the following:<br><br>i. Disabled (when employee was unable to earn full wages) by the disease;<br><br>ii. Disease arose out of the employment (apparent to the rational mind, upon consideration of all of the circumstances, a direct causal connection between the conditions under which the work is performed and the occupational disease;<br><br>iii. Disease is not an ordinary disease of life to which the general public is exposed (except where such disease follows as an incident of an occupational disease).<br><br>iv. The disease must be incidental to the character of the business, and not independent of the relation of employer and employee. It must appear to have had its origin in a risk connected with the employment and to haveflowed from that source as rational consequence. *Indiana Code 22-3-7-10*.<br><br>Do We Owe TTD to an Employee, not at MMI<br>Working Modified Duty, When Our Workplace Closes by Government Mandate?<br><br>Yes per current case law. If an employee is unable to work at the same or similar employment due to disability or work restrictions from a work related injury, that employee is entitled temporary total disability unless work is made available within those restrictions by the employer. (TTD)<br><br>*Indiana Code 22-3-3-7 (a)*<br>We recognize that the COVID-19 pandemic presents a scenario not previously encountered. The case law generally holds that if there is no light duty work available and if the light duty restrictions prevent the employee from locating alternate employment of the same or similar nature, there is liability for TTD benefits. It is yet to be seen whether this same body of case law will be generally applies to Government mandated closures. An assessment of liability for TTD benefits could prove to be fact specific in these scenarios.<br><br>Temporary Disability and an Employee Working Modified Duty - Who Elects to Stay Home While the Workplace Remains Open?There is a basis to dispute liability for TTD benefits if an employee has not reached MMI and has light duty restrictions that can be accommodated by the employer, but the employee chooses not to work. |

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| | **Do We Owe TTD if an IME or Prescribed Medical Treatment is Delayed?**<br><br>TTD is owed while an employee is disabled on account of injuries and may not be terminated during that time unless the employee refuses a medical examination. If the delay is not the fault of the employee the Board would not be expected to find TTD is owed.<br><br>**What Can We Do to Mitigate Workers' Compensation Claims?**<br><br>Hold the employee to the statutory standard recited in I.C. 22-3-7-10. Presumptive Employees Not Designated in Indiana<br><br>Indiana does not have a first responder/health care worker presumption in place as some states do. Without that, it seems improbable an employee will be able to prove work relatedness given current public involvement in COVID 19 exposure, although the Board has expressed that certain industries, such as front line health care workers, may be at a higher risk of infection which could make it easier to prove compensability.<br><br>Diana Wann is an attorney with Wiedner & McAuliffe and is the Indiana member of National Workers Compensation Defense Network. Her practice is exclusively committed to the defense of employers in workers compensation injury and occupational disease claims. She can be reached at 317-695-0552 or dlwann@wmlaw.com |
| Iowa | By Alison Stewart and Steve Durick<br>**1. Is a positive COVID-19 diagnosis a compensable work injury?**<br>In Iowa there is not a black and white answer about compensability relating to the coronavirus. These claims must be evaluated on a case by case basis.<br><br>Iowa is a combination between positional risk (were they at work when it happened?) and increased risk (did work increase the odds of the injury?). Thus, it would be possible for the worker to establish a causal relationship if the worker could prove they were exposed to COVID-19 at work. In parts of the state where there is community spread, however, it would be more difficult for a worker to establish the work caused the infection when the worker could have caught it elsewhere in the community. Healthcare workers would be an exception to this analysis, most likely. It would likely be easier for a healthcare worker to establish a causal link, depending on their field. In many ways this virus, because of its ubiquitous nature, is not unlike the common cold or flu in the context of compensability. As the virus continues to spread, it will become more and more difficult to determine its source. Again, these cases should be analyzed on a case by case basis. Peddicord Wharton attorneys are happy to discuss these cases with you at any time.<br>More simply, the employee will have to provide a positive test result and a clear link between work and their exposure.<br>**2. What is the interplay between COVID-19 and the Occupational Disease Statute?**<br>Chapter 85A, the occupational disease chapter, is applied infrequently in Iowa. Claimants typically bring actions under Chapter 85 whenever possible.<br>We typically see these claims generate from a long-standing exposure to something over time. Historically, there was a list of qualifying diseases, but that list no longer exists. To qualify as an occupational disease, according to Iowa Code section 85A.8, the following requirements must be present:<br>• Arise out of and in the course of employment.<br>• Direct causal connection with the employment.<br>• Followed as a natural incident from an injurious exposure occasioned by the nature of the work.<br>• Incidental to the character of the business, occupation or process in which the employee was employed and not independent of the employment.<br>• Appear to have its origin in a risk connected with the employment and to have resulted from that source as an incident and rational consequence.<br><br>Note, a disease which follows from a hazard to which an employee has or would have been equally exposed outside of said occupation is not compensable as an occupational disease. The compensability analysis for an alleged occupational disease is really no different than the traditional compensability analysis described above in the COVID-19 context. |

According to the Iowa Practice Series on Workers Compensation, the use of the term "date of injury" is not appropriate in the context of occupational disease because there is no "injury" suffered. 15 Lawyer & Lawyer, Iowa Practice Series: Workers Compensation, 18:4 (2019-2020). Disablement is the term used. *Id.* Iowa Code section 85A.4, explains that the "event or condition where an employee becomes actually incapacitated from performing the employee's work or from earning equal wages in other suitable employment because of an occupational disease."

In short, we do not expect Claimants to pursue work related COVID-19 claims as an occupational disease. More likely the claim would be brought under chapter 85 with Claimant needing to prove causation as they would with any work injury in Iowa regardless of whether the claim is brought under Chapter 85 or 85A.

**3. What about a claim for psychiatric injury where the worker has either contracted COVID-19 as a result of a work exposure, or is merely fearful of contracting the virus?**

In Iowa, if an injured employee sustains a compensable physical injury and subsequently develops a psychological injury (i.e. anxiety, depression, etc.), such a psychological injury is deemed a compensable injury as well as long as it is causally related to the physical injury. These types of injuries in Iowa are classified as "physical-mental" injuries. The psychological injury can be a new injury (no prior psychological history) or be an aggravation of a pre-existing/underlying mental condition/injury. In the current situation involving Covid-19, if an injured worker is determined to have contracted Covid-19 at the work place and subsequently develops a psychological injury as a result (or experiences an aggravation of an underlying mental condition), the psychological injury will be deemed to be a compensable injury.

Iowa also recognizes "non-traumatic" mental injuries as being compensable – although the burden of proof is quite difficult. *See Dunlavey v. Economy Fire & Casualty Co.*, 526 N.W.2d 845 (Iowa 1995). These injuries in Iowa in are classified as "mental-mental" injuries. In "mental-mental" injuries, the mental injury is not preceded by a "physical" injury. To prove a "mental-mental" injury, the injured employee must establish both medical and legal causation. Legal causation requires the injured employee prove that the mental injury was proximately caused by workplace stress of greater magnitude than day-to-day mental stress experienced by other workers employed in the same or similar jobs, regardless of their employer. In other words, the injured employee must establish that his or her stress is not common to other employees in similar work (from an objective standpoint). This is a very difficult burden of proof to carry for the injured worker. Additionally, the injured worker must also establish medical causation which will require expert medical testimony. In the current situation involving COVID-19 – and specifically where an injured worker has developed a psychological injury due to fear of contracting COVID-19 – the injured worker will be required to prove that his or her mental injury was "caused by workplace stress of greater magnitude than day-to-day mental stress experienced by other workers employed in the same or similar jobs. . ." The injured worker will be required to prove that his or her stress in that regard is not common to other employees in similar work – which will be very difficult, if not impossible to do, under this current COVID-19 situation.

**4. What is the appropriate benefit commencement date for compensable COVID-19 claims?**

If the employee is taken off work by a medical professional for a presumed case of COVID-19 before having a positive test result, the appropriate commencement date would be the fourth date of disability (after the waiting period). If lost time continues beyond the 14th day, the compensation during the third week must be increased to include the three-day waiting period. IOWA CODE § 85.32 (2019). It is appropriate to wait to commence benefits until a positive test result is ascertained, but the worker should then be brought current on benefit entitlement at that time.

**5. How do COVID-19 related shutdowns or layoffs impact temporary benefit entitlement for non-COVID-10 related claims?**

If an injured worker is off work or on restrictions and a suitable offer of employment cannot be made (which is the case if the employer is closed or shut down), then temporary benefits are owed.

Support for this can be found here:

Iowa Code section 85.33(3) states that the employer shall pay to an employee for an injury producing TTD, weekly compensation benefits until:

- the employee has returned to work or
- is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Likewise, Iowa Code section 85.34 states that healing period is owed until:

- the employee has returned to work,

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| | ▪ is put at MMI,<br>▪ or it's medically indicated that the employee can return to substantially similar employment<br><br>Relating to TPD benefits, Iowa Code 85.33(2) says TPD are owed when an employee is not capable of returning to substantially similar employment but is able to perform other work consistent with the employee's disability.<br>The only exception to these entitlements is where suitable work is offered and refused. Iowa Code section 85.33(3)(a) instructs that if an employer offers an employee suitable work and that worker refuses, then temporary benefits are not owed.<br>**6. Do we expect to see longer periods of temporary benefit entitlement for non-COVID-19 claims because of the impact of COVID-19?**<br>It's possible because some providers have been suspended non-essential medical treatment. In addition, other companies have either had to shut down because of a positive case or have been subjected to a government shutdown. As discussed above, if an injured worker is off work or on restrictions and a suitable offer of employment cannot be made (which is the case if the employer is closed or shut down), then temporary benefits are owed.<br>**7. Will there be any permanent benefit entitlement as a result of a compensable COVID-19 claim?**<br>We do not know the answer to this question yet, but similar to other injuries in Iowa, Claimant would have to have sustained permanent damage as a result of the illness.<br>**NOTICE TO THE PUBLIC**<br>*The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise. This disclosure is required by rule of the Supreme Court of Iowa.*<br>*Peddicord Wharton Legal Updates are intended to provide information on current developments in legislation impacting our clients. Readers should not rely solely upon this information as legal advice. Peddicord Wharton attorneys would be pleased to answer any questions you may have about this update.*<br> |
| Kentucky | **Jones Howard Law, PLLC**<br>**H. Douglas Jones, Esq. – djones@joneshowardlaw.com**<br>**Margaret J. Menefee, Esq. – mmenefee@joneshowardlaw.com**<br><br>Communicable disease cases require a very fact specific analysis. The definition of a compensable injury under Kentucky workers' compensation law excludes communicable diseases "unless the risk of contracting the disease is increased by the nature of the employment."[1] Unlike some other jurisdictions, in Kentucky the employee does not necessarily have to show the disease was contracted during employment.[2] Communicable disease cases such as COVID-19 are compensable if the risk of acquiring the disease is greater for the employee than it is for the general public.[3]<br>Obviously the risk of contracting COVID-19 is higher for medical professionals and first responders than the public at large.[4] On March 13th, 2020, Kentucky Employers Mutual Insurance Co. (KEMI) acknowledged this heightened risk, and in addition to compensation for losses resulting from contracting COVID-19, announced it would also pay wage-replacement benefits for any first responder or employee in the medical field who is quarantined due to direct exposure to a person diagnosed with COVID-19.[5]<br>In other professions it will be more difficult for the employee to show the risk of contracting COVID-19 was higher due to his/her employment versus the risk to the general public. This is especially true the more widespread the disease becomes. Again this will be a very fact specific analysis conducted on a case by case basis.<br>In order to protect your business and employees it is extremely important to minimize the risk of COVID-19 by following any and all state or local orders, mandates and advisories. On March 25th, 2020, Kentucky Governor Andy Beshear issued an Executive Order closing all nonlife-sustaining businesses, except as needed to conduct Minimum Basic Operations, as defined in the order.[6]<br>Certain enumerated businesses are permitted to remain open, but are required "to the extent practicable" to abide by the following: |

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| | 1. ensuring a distance of 6 feet between employees and customers;<br>2. ensuring employees practice appropriate hygiene measures' including regular, thorough hand washing or access to hand sanitizer;<br>3. regularly cleaning and disinfecting frequently touched objects and surfaces;<br>4. permitting employees to work from home where feasible; and<br>5. identifying sick employees and asking them to leave the premises (strongly encouraged to offer paid leave).<br><br>In addition, public-facing businesses that remain open must post a flyer per Order of the Cabinet of Health and Human Services.[7]<br>The Kentucky Department of Workers' Claims (DWC) has cancelled in-person proceedings and relaxed the rules for taking remote depositions.[8] The DWC has also published guidance promoting the use of telehealth and telephysical therapy when appropriate for the treatment of workplace injuries and occupational disease.[9]<br><br>_____<br>[1] KRS 342.0011(1)<br>[2] *Dealers Transport Co. v. Thompson*, 593 S.W.2d 84 (Ky. Ct. App. 1979)(death from pneumonia was compensable without showing infection was acquired at work because the dock worker was working out in cold damp conditions and more susceptible than the general population).<br>[3] See *id.*<br>[4] Covid-19 may also fall under the compensable category of "occupational disease" for those in the medical field. See KRS 342.0011(2)(a disease arising out of and in the course of employment). However, occupational disease cases require proof that the disease was actually caused by the employment. See KRS 342.0011(3).<br>[5] See https://www.insurancejournal.com/news/national/2020/03/17/561278.htm.<br>[6] See https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf. Prior orders remain in effect and are listed as follows:<br>The Governor first issued an order declaring a state of emergency due to confirmed COVID-19 cases on March 6th, 2020. See https://governor.ky.gov/attachments/20200306_Executive-Order_2020-215.pdf.<br>On March 16th, the Cabinet for Health and Family Services (CHFS) banned on-site consumption of food and beverages. See https://governor.ky.gov/attachments/20200316_Order_Restaurant-Closure.pdf.<br>On March 17th, CHFS closed all public-facing businesses that could not comply with CDC distancing guidelines. See https://kbc.ky.gov/PublishingImages/Lists/Alerts/AllItems/452118068-Governor-Andy-Beshear-s-executive-order-to-close-public-facing- businesses.pdf.<br>On March 22nd, all non life-sustaining retail businesses were ordered to close (list of life-sustaining retail businesses included). See https://governor.ky.gov/attachments/20200322_Executive-Order_2020-246_Retail.pdf.<br>[7] Attached to March 17th CHFS order. See https://kbc.ky.gov/PublishingImages/Lists/Alerts/AllItems/452118068-Governor-Andy-Beshear-s-executive-order-to-close-public-facing-businesses.pdf.<br>[8] See https://labor.ky.gov/Documents/Workers%20Compensation%20Hearings%20Canceled.pdf; see also https://labor.ky.gov/Documents/Workers%20Compensation%20Hearings%20Canceled.pdf.<br>[9] See https://labor.ky.gov/Documents/Telehealth%20COVID-19.pdf (the injured worker may decline participation in telehealth treatment and medical payment obligors must reimburse providers for telehealth treatment provided. |
| Maine | Should Employers Recognize COVID-19 As A Work-Related Injury? |

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| | While we know that everyone is being bombarded with COVID-19 recommendations, advice, news, and data, one area that appears to have been overlooked is the question of whether COVID-19 infection, if acquired at work and due to the work performed, might result in a workers' compensation injury. In Maine, it is likely that, if the employee can show a causal connection between work and the illness, it will be found to be a work-related injury.<br><br>Generally, in order for an injury or illness to be work-related, the condition must both "arise out of" and "in the course of" employment. Simply put, the condition must have its source in the employment and not in something else, and be due to the activities or tasks carried out in the employment or immediately attendant thereto. The easy example is that of a health care worker who contracts an illness at work, due to caring for patients. In that case, the illness is more likely to be found to fall within the occupational illness provisions of the state workers' compensation act, if it meets the definition of illness under that provision of the law. Therefore, if an employee can credibly demonstrate that he or she contracted COVID-19 at work, and as long has the employee was performing functions related to his or her work during the time of exposure, it is likely that the illness will be found to be work-related under either the "injury or illness" provisions of the ordinary Act or the occupational disease provisions.<br><br>Over the years, there have been successful cases in various jurisdictions establishing a number of diseases found in the general population as work-related illnesses, when the factual evidence demonstrated that the exposure took placeat work, due to work. Examples include a lab technician in North Carolina who tested positive for serum hepatitis after testing samples; corrections officers in Connecticut who tested positive for HIV exposure after treating prisoners with the disease in the infirmary; a dental hygienist in Massachusetts who contracted hepatitis C through her work, in the early 1980s, with dental patients before gloving and masking was the standard workplace protection in the dental practice; and the hospital nurse in Maine who tested positive for tuberculosis exposure after treating a patient with that disease for several weeks. Additionally, Maine has routinely found mold exposure illnesses, as well as "sick building syndrome" to be work-related injuries. The employee needs to only come forward with evidence suggesting a connection to the work to meet his or her initial burden of proof, shifting the burden to the employer to disprove the work connection, no easy feat. This is especially true given the protected nature of health care information, as without knowledge and evidence that the employee was exposed somewhere other than work, an employer is going to be challenged to meet its burden to disprove the work-relatedness of the illness.<br><br>Another common issue that may arise in these situations is the employee who is traveling for work and comesinto contact with a person infected with the COVID-19 virus. While in most cases, that is likely to result in an accepted work- related injury claim, if the employee suffered the exposure while on a "personal errand", such as a trip to Dollywood while on business in Tennessee, the illness may not be deemed work-related.<br><br>It is important to distinguish employees who simply do not feel comfortable coming into work due to the pandemic. Those employees have not suffered any work-related exposure; they simply fear one. In that case, the fear should not result in a mental stress injury, but employers should be aware of the standard of proof applicable to that type of claim. In Maine, the standard is an objective one for mental stress injuries, so an employee would be challenged to prove that his subjective fear, absent more, could support the emotional turmoil as work-related.<br><br>A prudent employer should plan to communicate their commitment to the health and safety of their employees, while at the same time encouraging any employee who suspects that he or she may have contracted COVID-19 through a work exposure to report the illness so that his or her rights under the workers' compensation system may be fully protected. Be mindful that each case is fact specific, so if in doubt, please contact your legal team to determine the best way to handle the situation.<br><br>If you have any questions or concerns regarding the information set out above and how COVID-19 might impact your organization from a HR perspective, please contact **Elizabeth Connellan Smith** or another member of **Verrill's Labor and Employment Group.** |
| Michigan | The ongoing COVID-19 pandemic has led to significant uncertainty among employers, employees, insurance carriers, and third-party administrators as to the effect that COVID-19 is having – and will continue to have – upon the workers' compensation system in the State of Michigan. While we recognize that the COVID-19 crisis remains a fluid and ever- changing situation, the attorneys at Charfoos Reiter |

Hébert, P.C. have prepared a comprehensive and informative update which we believe addresses the most currently pressing issues for employers/carriers and provides our recommendations for the continued administration and defense of Michigan workers' compensation claims.

On March 16, 2020, the Michigan Workers' Disability Compensation Agency formally suspended all in-person hearings for the next five weeks, or until April 20, 2020. It is our understanding that the current restrictions as to in-person hearings may be subject to additional extension, pending further assessment by the Workers' Disability Compensation Agency as to the ongoing public health emergency. In the meantime, however, the Board of Magistrates has issued a blanket adjournment for all hearings that were previously scheduled during this period of closure and distributed new dates for each Magistrate's docket. We will advise clients of the rescheduled hearing dates accordingly.

During the period while in-person hearings remain suspended, the Board of Magistrates is still conducting Redemption Hearings and Facilitation Hearings via telephone. We encourage our clients to continue extending settlement authority on cases that are ripe for Redemption, as plaintiffs and their attorneys may be more amenable to resolving claims via lump sum agreements during these trying and uncertain economic times.

On March 18, 2020, Michigan Governor Gretchen Whitmer enacted Emergency Administrative Rules for the Workers' Disability Compensation Agency relative to all "first response employees," as the Workers' Disability Compensation Agency has deemed those individuals to be the most susceptible to COVID-19 exposure within the course and scope of their employment. These Emergency Rules were subsequently amended on March 30, 2020. The Emergency Rules currently define a "first response employee" quite broadly, including almost every health care provider working in a health care organization/agency/facility, as well as any person working as a paid or on-call police officer, fire fighter, EMT, volunteer or civil defense worker, as well as state correctional and local corrections officers.

Under the Emergency Rules promulgated on March 18, 2020, a "first response employee" is automatically presumed to have suffered a compensable Personal Injury arising out of and in the course of their employment if that employee meets ONE of the following criteria:

- The employee is quarantined at the direction of the employer due to confirmed or suspected COVID- 19 exposure;
- The employee receives a COVID-19 diagnosis from a physician;
- The employee receives a presumptive positive COVID-19 test; OR
- The employee receives a laboratory confirmed COVID-19 diagnosis.

The Emergency Rules, at that time, did not differentiate between occupational and non-occupational COVID-19 exposure. Thus, all "first response employees" who met one of the above criteria would have been able to successfully establish a compensable work-related Personal Injury arising out of and in the course of their employment, regardless of any epidemiological source information which may suggest a non-occupational exposure.

The March 30, 2020 amendment to this Emergency Rules, however, changed the causation analysis to one more akin to a rebuttable presumption analysis. Although compensability is still presumed for "first response employees," the employer/carrier is able to rebut this presumption with proof that leads a "denial based on specific facts demonstrating that the first response employee was not exposed to COVID-19 at work."

On March 24, 2020, Governor Whitmer enacted Executive Order No. 2020-21, which required all Michigan residents to remain at home or at their place of residence through April 13, 2020. The Governor's "Stay Home, Stay Safe" Order specifically excluded any individuals whose work has been deemed necessary to sustain/protect life or to conduct minimum business operations. However, all other residents have been prohibited from engaging in employment activities outside of the home while the Order remains in effect.

Although the "Stay Home, Stay Safe" Order does allow a Michigan resident to leave his/her home for regularly scheduled medical appointments, we believe that it would be reasonable for a workers'

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| | compensation claimant to cancel/postpone/reschedule a pending medical appointment, given the current quarantine situation and the social distancing guidelines/recommendations from the Centers for Disease Control. We do not recommend utilizing this situation as a basis to dispute ongoing medical or wage loss benefits. We would also suggest the postponement and rescheduling of any currently pending independent medical evaluations.<br><br>Many of our clients have inquired regarding the question of wage loss benefits for claimants who were previously being accommodated in a favored work position with light duty restrictions and are now unable to work due to COVID-19 closures. Pursuant to Section 301(9)(e) of the Michigan Workers' Disability Compensation Act, if an individual has been employed in a favored capacity for fewer than 100 weeks and loses his/her job through no fault of his/her own, that individual is entitled to a resumption of workers' compensation benefits based upon the wages established at the time of the alleged work injury. Thus, we recommend that employers/carriers resume payment of wage loss compensation during any period when the employer is unable to accommodate light duty restrictions as a result of issues related to COVID-19.<br><br>On April 24, 2020 Governor Witmer has extended the Stay/Stay Safe Order through May 15, 2020. In person Workers' Compensation hearings will be suspended through May 15, 2020 at the earliest as well.<br><br>Michigan employers should prepare for an influx of workers' compensation claims related to the COVID-19 pandemic. The attorneys at Charfoos Reiter Hébert, P.C. remain available at any time to consult regarding any questions or concerns that employers or carriers may have as to this rapidly evolving situation. |
| Minnesota | Infectious diseases such as COVID-19 can be compensable in Minnesota as either a personal injury or occupational disease in certain situations. CWK attorney Whitney Teel did a deep dive into the issue during the H1N1 outbreak in 2009, and the caselaw is applicable to the current COVID-19 outbreak.<br><br>The quick answer is that it is possible for COVID-19 to be a compensable workers' compensation injury in Minnesota, but as always, the burden of proof is on the Employee. With infectious diseases, such as polio, influenza, tuberculosis, or COVID-19, proving point of contraction is critical. Employers are encouraged to let their workers' compensation insurer know if an employee tests positive for COVID-19.<br><br>To read Whitney's research article on this topic, click the link below: https://cwk-law.com/wp-content/uploads/2020/03/COVID-19-Research.pdf |
| Missouri | It would be very difficult for a claimant to prove that he or she contracted COVID-19 under the theory of accident as an accident is defined as an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. §287.020.2.<br><br>However, COVID-19 could fall under the theory of an occupational disease which is defined as an identifiable disease arising with or without human fault, out of and in the course of employment. Ordinary diseases of life to which the general public is exposed outside of employment shall not be compensable except where the diseases follow as an incident of an occupational disease the. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. §287.067.1<br><br>Also, for an injury to be deemed compensable it cannot come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.<br>§287.020.3(2)(b) Therefore, in order for COVID-19 to be compensable it is likely that a claimant will have to work in the healthcare field, as they have a greater risk of coming into contact with the virus. In other words, a healthcare employee may be able to argue that they have a greater risk of exposure at work than in their normal nonemployment life.<br><br>**The Effect on Current Claims** –<br><br>COVID-19 will likely affect how claims are handled, as claimants that are treating may have a delay in that treatment due to doctor's offices closing or taking less patients in a day in order to limit possible |

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| | contact. Also surgeries could be delayed/postponed. Furthermore, a claimant may become symptomatic and unable to present to a doctor's office. Of course, if a claimant is off work or on restrictions that cannot be accommodated by the employer this could increase TTD exposure.<br><br>Furthermore, some employers are closing their doors due to temporary laws or by choice and therefore someemployees that were offered light-duty restrictions no longer have that option. Therefore, this would open the employer up to TTD exposure when there was none. |
| New Hampshire | **<u>COVID-19 & Workers' Compensation Exposure in New Hampshire</u>**<br><br>**I Possible Exposure to COVID-19**<br>Exposure alone is not technically an injury and is therefore not covered under the New Hampshire Workers' Compensation Statute (NH RSA 281-A)<br><br>There **may** be an exception for prophylaxis treatment for "**emergency response/public safety workers**."<br><br>NH RSA 281-A:23, VI-a provides, "All expenses associated with the medical evaluation and recommended post- exposure prophylaxis treatment for emergency response/public safety workers shall be paid by the employer's insurance carrier or third-party administrator. Such medical evaluation and prophylaxis treatment shall be provided without prejudice as to the issue of the causal relationship of any subsequently diagnosed bloodborne disease or airborne disease to the emergency response/public safety worker's work and without prejudice to the compensability of the bloodborne disease or airborne disease as an occupational disease or an accidental injuryfor the purposes of this chapter."<br><br>The statute defines "airborne disease" as "pathogenic microorganisms that may be discharged through respiratory secretions and can cause disease in humans through inhalation or contact with a mucous membrane. However, the definition is specifically limited to pertussis, meningococcal disease, and tuberculosis." NH RSA 281-A-2, I-aa<br><br>"Post-exposure prophylaxis" means "preventive medical treatment started after an identified critical exposure or unprotected exposure in order to prevent infection and the development of disease, in accordance with standards promulgated by the Centers for Disease Control and Prevention, United States Department of Health and Human Services." RSA 281-A:2, XIV-a<br><br>"Emergency response/public safety worker" means "call, volunteer, or regular firefighters; law enforcement officers certified under [NH]RSA 106-L; certified county corrections officers; emergency communication dispatchers; and rescue or ambulance workers including ambulance service, emergency medical personnel, first responder service, and volunteer personnel." NH RSA 281-A:2, V-c<br><br>**II Claimants Testing Positive for COVID-19**<br>Generally, requests for medical or indemnity benefits from a claimant who tests positive for COVID-19 should be denied, with the exception of healthcare workers, first responders, and the like, who are exposed to COVID-19 as a part of their job. This class of workers may be entitled to benefits under the "Occupational Disease" section of the New Hampshire Workers' Compensation Statute.<br><br>"Occupational disease" means "an injury arising out of and in the course of the employee's employment and due to causes and conditions characteristic of **and peculiar to the particular trade, occupation or employment**. It shall not include other diseases or death therefrom unless they are the direct result of an accidental injury arising out of or in the course of employment, nor shall it include either a disease which existed at commencement of the employment or a disease to which the last injurious exposure to its hazards occurred prior to August 31, 1947.<br>NH RSA 281-A:2, XIII<br><br>For employees who test positive for COVID-19, the initial analysis does not significantly differ from any other case. Did the injury arise out of and in the course of employment? |

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| | COVID-19 will likely be considered a "neutral risk." As such, a claimant must prove that their work presented a greater risk of exposure than the risk faced by the general public. Appeal of Margeson 162 N.H. 273 (2011). We anticipate employees will have difficulty meeting this burden. The exception, of course, will be employees whose job it is to treat and diagnose COVID-19. For this reason, we recommend a denial of most claims for COVID-19, with the exception of those exposed to increased risk of exposure to the virus as part of their job. Every case will require a detailed investigation.<br><br>**III COVID-19 Layoffs: Impact on Indemnity Benefits**<br>Where a claimant is on a fixed partial rate (TPD) at the time of a COVID-19 related layoff, the carrier should keep the claimant on the fixed partial rate. Any request by the claimant to reinstate TTD benefits should be denied. The basis for the denial is that carriers are not obligated to pay lost time benefits when the loss of earnings is not attributable an injury. Typical examples are retirement or a lay-off due to a downturn in the economy. Appeal of Gelinas 142 N.H. 250 (1997), citing Appeal of Normand 137, N.H. 617 (1993) (lost earning capacity due o general business conditions not compensable)<br><br>Likewise, where a claimant's wages vary from week to week at the time of a COVID-19 related layoff, the carrier should close out the varying rates partial and put the claimant on a fixed rate partial based on fair average of prior week's partial payments. Any request for reinstatement should be denied, with a Memo of Denial, filed within 21 days of any claim for TTD.<br><br>If a claimant has returned to work with light-duty restrictions, is earning their pre-injury wages, and is receiving no weekly indemnity payments, the carrier has the option of filing a Memo of Denial if the claimant requests reinstatement of TTD benefits. There are instances where voluntarily placing the claimant on TTD is appropriate. The parties may be able to agree to the Diminished Earning Capacity (DEC) Rate. However, obtaining approval from the NH Department of Labor is advised since the DEC Rate is an administrative remedy.<br><br>**IV Medical Treatment**<br><br>Voluntary medical payments are without prejudice payments in N.H.<br><br>**V Potential Increase in Home Injury Claims**<br>With more employees working remotely due to the COVID-19 virus, an increase in home injury claims can be expected. The usual inquiry regarding whether the injury occurred in the course of employment will need to be fully explored. This becomes more complex as people often work outside the standard 9 to 5 when at home.<br><br>A determination as to whether the injury is attributable to a risk of employment will also be required. If, for example, an employee is injured going down stairs because his printer is on a different floor than his work space, the claimant might establish that the injury was attributable to an employment risk if he was required him to go up and down stairs more often than the general public.<br><br>Since these cases are extremely fact dependent, obtaining a recorded statement, at the outset of the claim, regarding all facts surrounding the injury, can be very valuable. |
| New Jersey | Many clients have been calling and writing me with an array of scenarios in recent weeks regarding the relationship between absences from coronavirus and workers' compensation in New Jersey. Here is a small sample of some of the questions that I have received:<br><br>§ Question 1: What happens when an employer sends its employees home for several weeks out of a general concern for safety and for prevention of contagion? Must the employer pay workers' compensation benefits?<br><br>§ Answer: No, because there is no indication in this scenario of an injury or work-related illness generating the decision to send the employees home. The action is preventative in nature but not based on any specific work-related exposure. |

§ 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?

§ Answer: This absence is definitely covered by workers' compensation because both the employer and the employee are concerned about a possible work exposure that could lead to serious illness. Even if it turns out that the employee does not have the virus, the quarantine period would be covered under workers' compensation. The situation is similar to one in which an employee may have suffered a high level of lead exposure and is taken out of work for monitoring by his or her physician. After a number of weeks the physician indicates that there is no need to treat any illness. That medical conclusion certainly negates a permanency award but temporary disability benefits would still be owed.

§ Question 3: What if the State shuts down a company for a 30-day period and the company has to send everyone home for that period of time with no home work available. Does the employer owe workers' compensation benefits?

§ Answer: This is treated the same as question number one: there is no work injury to an employee so this is not workers' compensation.

§ Question 4: Consider a scenario where an employee is out on temporary disability benefits for a work-related leg injury in January 2020. The company then closes down for a month in March due to federal and state guidelines in response to the coronavirus and asks whether temporary disability benefits can be stopped? On the one hand, the employer might argue that this employee would not have been working anyway given the closure of the company and should therefore not receive temporary disability benefits. On the other hand, the employee would argue that he or she is still actively treating and is not yet at MMI. The employee would further argue that the closure of the office had nothing to do with the conduct of the injured worker. Should the employer stop temporary disability benefits in this situation?

§ Answer: This would not be advisable. There is a line of cases beginning with Cunningham v. Atlantic States which held that an employee who has a workers' compensation claim and who is fired for reasons other than the injury is not entitled to temporary disability benefits unless the employee can prove that he or she would have been working in another job but for the work injury. This practitioner does not believe the Cunningham line of cases applies to a situation like a temporary layoff due to a national crisis such as the coronavirus. It is highly likely that every Judge of Compensation would require the continued payment of temporary disability benefits until the injured employee should reach maximal medical improvement.

§ Question 5: What if an employee becomes worried that he has symptoms similar to that of the coronavirus and refuses to come to work? He quarantines himself 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, this is not workers' compensation because there is no proof of a work-related illness. Whether or not it turns out that the employee has the coronavirus, but there must be some proof under N.J.S.A. 34:15-31 that the illness is work related.

§ Question 6: 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 once again there is no proof of a work related illness. The HR Director's son may have been exposed in Italy and she may be at risk now, but that has nothing to do with work.

§ Question 7: What if two police officers alternate use of a patrol vehicle. On Monday, Officer Tynan 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 Tynan 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 benefits?

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| | § Answer: In all likelihood, yes she is probably entitled since scientific studies have demonstrated that the virus can survive on certain surfaces for more than 24 hours. Since there is potential work exposure from driving the patrol car, Officer Aiello's absence from work would be found by the judge to arise from her employment.<br><br>§ Question 8: 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?<br><br>§ Answer: This question focuses on the Thomas P. Canzanella Twenty First Century First Responders Protection Act, which became law on July 8, 2019. The law creates a presumption of compensability for those public safety workerswho are subjected to a potential exposure, including airborne exposures, to a serious communicable disease. The definition of a public safety worker includes police, fire, emergency squad personnel and many other categories of first responders, including "*any other nurse, basic or advanced medical technician responding to a catastrophic incident and directly involved and in contact with the public during such an incident*." Based on this law, the nurse would almost certainly receive workers' compensation benefits unless the employer could somehow rebut the presumption by showing perhaps that a close family member had the virus. It is important to note that It doesn't matter that the nurse cannot identify a specific person at work whom she cared for who was proven to have the virus.<br><br>§ Question 9: Given that tens of thousands of employees are now working from home in New Jersey due to state and federal guidelines, what if an employee gets injured at home and files a workers' compensation claim?<br><br>§ Answer: Case law in New Jersey is fairly sparse on home injuries, but it is clear that courts recognize certain home injuries as compensable when an employee is approved to work at home. At this very moment, perhaps a majority of New Jersey workers have been approved to work at home during this crisis. As with any other workers' compensation claim, the employee has to show that the injury occurred during the course of employment and arose from the employment. For example, if a teacher is teaching students at home online and reaches for a textbook, only to fall and fracture his arm, that would be a compensable injury, just as it would be in school. But if the teacher went out to get the mail and slipped on the driveway, fracturing his arm, the employer would properly deny that claim as not arising from work. Each case will be fact sensitive. Employers should designate the area where employees are approved to work, beit a home office or some other location.<br><br>These are just some of the many questions that readers have posed in recent weeks. We invite any and all scenarios from interested readers.<br><br>John H. Geaney, Esq., is an Executive Committee Member and a Shareholder in Capehart Scatchard's Workers' Compensation Group. Mr. Geaney concentrates his practice in the representation of employers, self-insured companies, third-party administrators, and insurance carriers in workers' compensation, the Americans with Disabilities Act and Family and Medical Leave Act. Should you have any questions or would like more information, please contact<br><br>Mr. Geaney at 856.914.2063 or by e-mail at jgeaney@capehart.com. |
| New York | As you know, the news cycle and financial markets have been heavily impacted by the spread of coronavirus (COVID-19) this year. COVID-19 is a respiratory illness caused by the virus "SARSCoV-2." Though originally detected in China, cases have now been identified in the United States and throughout the world. Community spread is advancing rapidly.<br><br>Analysis: General Claims of Occupational Exposure<br><br>Many of you have questions regarding whether the contracture of COVID-19 by an employee iscompensable in New York State. This paper will provide an analysis of relevant case law and Board decisions to assist in determining whether or not to controvert a claim for COVID-19, or whether, once controverted, a claim is likely to be established or disallowed. We also provide recommendations should |

you receive a claim, and links for instruction on preventative measures.

In New York, an employee must sustain an injury or illness in order to qualify for workers' compensation. Thus, mere exposure would not trigger an award. If an employer requires isolation or quarantine, this in and of itself would not give rise to a claim. Similarly, diagnostic testing would not be covered in the absence of an actual affliction.

However, contracting COVID-19 may be compensable. If evidence shows that the infection was acquired through employment, a claim may be established as an occupational disease or accidental injury.

An occupational disease is one resulting from the nature of employment and contracted therein. NY WCL §2(15). It derives from the line of work, as opposed to a feature unique to one particular place. Bryant v City of New York, 252 AD2d 777 (3d Dept 1998). Thus, an employee must establish a recognizable link between the affliction and some distinctive feature of the occupation. Yonkosky v Town of Hamburg, 158 AD3d 860, 861 (3d Dept 2018); Camby v System Freight, Inc., 105 AD3d 1237 (3d Dept 2013). If all employees of a class are subjected to a certain condition, and that condition results in the contraction of an infection, a claim for occupational disease may be established.

An accidental injury is one arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom. NY WCL §2(7). A claimant need not identify one traumatic occasion. Rather, "the symptoms of a claimant's accidental injury may have accrued gradually over a reasonably definite period of time so long as it can be demonstrated that the disability resulted from a special condition peculiar to his or her workplace." Farcasin v PDG, Inc., 286 AD2d 840 (3d Dept 2001); see Mazayoff v ACVL Companies, Inc., 53 AD3d 890, 891 (3d Dept 2008). We anticipate that most claims for COVID-19 will be presented as accidental exposure cases.

It is the claimant's burden to establish a causal relationship between the employment and the disability with competent medical evidence. Vito Sale v Helmsley-Spear Inc., 6 AD3d 999 (3d Dept 2004). An expert opinion need not be expressed with absolute or reasonable certainty, but speculation is insufficient. See Norton v North Syracuse Central School District, 59 AD3d 890, 891 (3d Dept 2009); Campus Crusade For Christ, Inc., 2019 WL 3980987 (WCB G1127099, decided 8/15/19). It must "be reasonably apparent that the expert meant to signify a probability as to the cause," and the opinion must be supported by a rational basis. Van Patten v Quandt's Wholesale Distributors, 198 AD2d 539 (3d Dept 1993). The Board determines witness credibility and resolves conflicting medical evidence.

The critical issue in any potential COVID-19 claim, whether based upon a theory of occupational disease, accidental injury, or both, will be proof regarding the source of exposure.

Key factors in established claims for illness due to viral or bacterial diseases include evidence that the source is endemic in the workplace, that the claimant had close contact due to the nature of the work with individuals diagnosed with the disease, that there was a plausible means of contraction and that the incubation period is consistent with an occupational onset. Under this criteria, and supported by credible medical evidence, cases of tuberculosis from working in close proximity to a symptomatic inmate, hepatitis developed by nurses, corrections officers and kitchen workers in employment with high incidence of the disease and plausible means of contraction, viral meningitis from daily contact with sick children, and mumps developed by a teacher where there was a schoolwide epidemic were deemed compensable. See Middleton v Coxsackie Correctional Facility, 38 NY2d 130 (1975)(hepatitis); Esposito v NYS Willowbrook State School, 46 AD2d 969 (3d Dept 1974)(hepatitis); McDonough v Whitney Point Central School, 15 AD2d 191 (3d Dept 1961)(mumps); Tutor Time, 2006 WL 3449459 (WCB 40401486, decided 11/1/06)(viral meningitis); NYS Dept. of Corrections, 2003 WL 22674511 (WCB 59800450, decided 10/31/03)(hepatitis); Saint Charles Hospital, 2003 WL 134461 (WCB 40101314, decided 1/8/03)(hepatitis).

Where the Board or courts have rejected these claims, there has often been a failure of proof that the claimant came into contact with an infected individual, the illness was common in the community, the incubation period did not match or there were other, equally plausible sources of infection outside of work. See Williams v Buffalo General Hospital, 28 AD2d 777 (3d Dept 1967) (tuberculosis); Nassau County Police Department, 2014 WL 1302155 (WCB G0337646, decided 3/26/14)(mycoplasma pneumonia); Upstate Cerebral Palsy, 2006 WL 2711148 (WCB 60504642, decided

9/8/06)(viral mononucleosis); Sugarloaf Union Free School, 1993 WL 498413 (WCB 59104416, decided 11/22/93)(hepatitis); University of Rochester & Sedgwick James of NY Inc., 1992 WL 115037 (WCB 78713480, decided 5/8/92)(viral meningitis).

Analysis: Claims Involving Business Travel
An employee infected with COVID-19 while traveling for work would have a potential claim.

Employment during a business trip continues until the "necessary travel is concluded." Davis v Newsweek Magazine, 305 NY 20, 25 (1953). Coverage may "include risks arising out of the inherent nature of the place to which the employment takes the employee, without regard to the particular circumstances in which the injury occurred." Id.; Occupational Safety and Enviro, 2001 WL 998485, p. 3 (WCB 89816805, decided 2/5/01).

Employees who are directed to perform a "special errand" or work-related assignment may also establish a claim based upon afflictions sustained during the course of the requisite travel. See Neacosia v New York Power Authority, 85 NY2d 471 (1995).

Many employers will be instructing employees to work from home, which will effectively transform the domicile into a temporary workplace. As a result, you may see claims for other types of injuries. These cases would demand careful investigation to distinguish between work-related and non-work-related accidents. Note that if a domicile has become part of the employment premises, this may expand the scope of potential claims to include travel between work and home. See Fine v SMC Microsystems Corporation, 75 NY2d 912 (1990); Hille v Gerald Records, 23 NY2d 135 (1968); Weimer v Wei-Munch Limited, 117 AD2d 846 (3d Dept 1986).

However, under all circumstances a claimant must still present competent medical evidence to demonstrate a nexus between the employment and the disease.

For example, in Spoerl v Armstrong Pumps, Inc., an employee fell ill while on a business trip to England and was diagnosed with a virus. 251 AD2d 915 (3d Dept 1998). He became unconscious during the flight home and died days later. Medical experts identified staphylococci bacteria, which is common in both the United States and England, as the cause of death. The claim was denied, however, because "it could not be determined when the infection entered decedent's bloodstream." Id. at 916. The "source of entry into decedent's body" and the "inception and progress of the disease" were not established with certainty, and doctors were "in conflict as to whether decedent contracted the infection before, during his trip or on the flight home from England." Id.

Summary
When circumstances demonstrate that an employee likely contracted COVID-19 in the course of employment and a mechanism of exposure can be identified, then a case may be compensable.

Compensability is most probable where the infection can be assigned to a specific source at work and where other means of exposure have been discredited. Note that an employee is not necessarily required to identify a specific individual as the source of infection, so long as evidence points to the workplace as a probable transmission vector. When the means of occupational exposure is reasonably evident, a claim may more easily be established. Certain employees such as healthcare personnel, police officers, firefighters, ambulance workers or EMTs who have discrete provable exposures could more readily show that a COVID-19 diagnosis was caused by their employment.

However, in light of variables such as the viral incubation period, rapid transmission rates and increasing pervasiveness, it may become difficult to reliably determine the source of infection. If medical evidence cannot establish how an employee fell ill, a COVID-19 claim may not be valid in the realm of workers' compensation, particularly as the disease becomes more ubiquitous in the community. Thus, circumstantial evidence and expert opinions regarding causation will be of great significance.

If an employee is required to travel to an area where COVID-19 is prevalent and develops the disease, a claim may be compensable. However, travel would not invariably preclude an argument as to the source of infection. Note that, as of March 10, 2020, 173 cases of COVID-19 have been confirmed statewide, with 36

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| | in New York City, 108 in Westchester County, 19 in Nassau County, 6 in Rockland County, 2 in Saratoga County, 1 in Suffolk County and 1 in Ulster County. Please review the CDC travel advisory linked below for more information.<br><br>Recommendations<br>Should you receive a COVID-19 claim, we recommend initiating a prompt investigation. Attempt to gather proof regarding the source of infection. Take statements from the claimant and potential witnesses. Identify any evidence of exposure in the workplace or elsewhere. Assess the current prevalence of COVID-19 in the community. Obtain the claimant's medical records. Contact the employer about any precautions taken to prevent the illness. You will then need to obtain a strong medical opinion regarding the source of exposure, considering factors such as contagion rate and incubation period.<br><br>If an employee exhibits symptoms of COVID-19, has sustained a specific exposure or has recently traveled to an area where COVID-19 is prevalent, we recommend that all employers take immediate steps to protect the workforce. While there is currently no vaccination or cure for COVID-19, research suggests that it is highly contagious. An ill or at-risk employee should be removed from the workplace and surfaces should be sterilized. You might consider formulating extended leave or sick-time policies.<br><br>The imposition of a mandatory quarantine for all employees would be a business decision requiring the consideration of several factors. If circumstances suggest that COVID-19 exposure is likelier in your workplace than elsewhere, we would anticipate potential claims and contemplate an appropriate prevention strategy. We advise all employers to seek input from their General Counsel and Labor Law attorneys before implementing any extensive measures.<br><br>We hope that the above proves useful to you in analyzing any claims for contracture of COVID19 you may receive. Most of these cases will be heavily fact-dependent and we would urge you to consult counsel to assist in determining compensability. If there are additional questions or concerns, please do not hesitate to contact Melanie M. Wojcik at (716) 854-1539 or David L. Snyder at (585) 568-8314.<br><br>It is important that all employers participate in the effort to limit transmission. Please visit the following sources for explicit instruction on how to do so.<br>For a COVID-19 general summary, please see: https://www.cdc.gov/coronavirus/2019-nCoV/summary.html.<br>For COVID-19 guidance to businesses and employers, please see:<br>https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html.<br><br>For COVID-19 industry-specific recommendations, please see: https://www.cdc.gov/coronavirus/2019-ncov/index.html.<br><br>For COVID-19 data issued by the United States Department of Labor Occupational Safety and Health Administration, please see: https://www.osha.gov/SLTC/covid-19/<br><br>For COVID-19 data issued by the World Health Organization, please see: https://www.who.int/news-room/q-a-detail/q-a- coronaviruses.<br><br>For COVID-19 data issued by the New York State Department of Health, please see:<br>https://www.health.ny.gov/diseases/communicable/coronavirus/.<br><br>For information specific to health personnel, please see: https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-risk- assesment-hcp.html. |
| North Carolina | **Written by: Bruce Hamilton and Tracey Jones**<br><br>**Brief overview of the legal analysis of COVID-19 workers' compensation exposure in North Carolina.**<br><br>COVID-19 cases must be handled and analyzed on a case-by-case basis; however, based upon the current statute and case law, it is unlikely that suspected COVID-19 or actual COVID-19 cases would be considered compensable under either an injury by accident or occupational disease claim theory in North Carolina. With respect to occupational disease claims, North Carolina is an increased risk state, not a positional risk state. Even if the employee can show some increased risk, they will need to prove that any disease they contract actually came from their employment as opposed to some other type |

of exposure outside of their employment. Because the legal analysis behind the compensability of a COVID-19 diagnosis is very fact specific, please contact one of our attorneys to discuss your scenario in more detail.

**How an increase in teleworking may affect workers' compensation claims in North Carolina.**

COVID-19 has reached North Carolina and is impacting our way of living and working every day. Many employers are relying on teleworking to keep their businesses up and running. With this change in location of work space, we are likely to see an increase in home-related injuries. Employees are allowed to work from home; however, they do not have 24/7 workers' compensation coverage the entire time they are at home. While many will be teleworking, they will also be engaging in personal activities during this unusual period of time. It is going to be very difficult to contradict the employee's account of when an injury occurred due to the very nature of teleworking.

**How do we know the claimant was actually engaging in work at the time of an injury?**

Any injuries at home will have to arise out of and in the course and scope of the employment. There is little case law in North Carolina dealing with injuries suffered by employees working remotely; however, these claims are no different from other claims in the level of proof required to establish a compensable injury by accident. Nonetheless, these claims will pose unique challenges for defendants when investigating the facts surrounding these alleged injuries. Defendants will need to thoroughly investigate the allegations and utilize recorded statements as quickly as possible before the employee retains representation. Questions should focus on the injured employee's activities at the time of the injury, as well as the normal routine they have developed while working remotely.

**An employee who is teleworking will still need to prove:**

1. An accident. Was there an interruption of the normal work routine?
    - Were they doing their normal job duties? Were they doing the job in their normal way and, other than the injury, did anything unusual occur?
    - Additional questions will need to be asked about the other activities they engage in while working remotely. What was their normal schedule and what other personal obligations did they have while working remotely? Who else was in the remote location and where were they located in the remote location?
2. Arising out of the employment. The accident has to have some causal connection to the employment. One area of inquiry is whether the employee has a dedicated work space at their remote location. If the injury does not occur in the work space, then additional questions need to be asked regarding the specific activity being conducted at the time of the injury.
3. In the course of employment. This prong looks at time, place and circumstance of the injury. By having employees work remotely, employers have shifted the location of the employee's work space, most likely to their home. We do not believe they would be considered traveling employees, which provides a much greater scope of coverage for course of employment issues. Nonetheless, other questions arise such as: When does employment begin? Normally, an employee is deemed to be in the course of their employment as soon as they are on the employer's premises. This is the "premises exception" to the coming and going rule. When does a remote employee's day start and end for workers' compensation purposes? Employers might want to consider establishing general work hours for employees who are teleworking. These are extraordinary times, so some flexibility is required, but general parameters on work hours is appropriate.

**Practice Tips:**

- Employers should set specific work hours for employees who are teleworking and have a system for checking in and out.

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| | • Adjusters should conduct recorded statements of any reported injuries at home as early as possible and get as much information as possible, including additional information regarding the employee's usual activities and schedule during this unusual period of time when they are teleworking.<br>o How did they set up their home office, what was their schedule on a typical day, did they engage in any other personal activities while working from home etc.?<br>• Carriers should review claims carefully and liberally use the Form 63 procedure for payment of medical bills without prejudice or use the Form 61 procedure when information is insufficient to accept or deny the claim.<br><br>During this time of uncertainty, our team is here for you. Please contact one of our workers' compensation attorneys if you have any questions or concerns. |
| Ohio | Ohio has received generally high marks for its initial response to the COVID crisis – schools were closed, non-essential businesses shuttered, safe distancing enforced, masks encouraged, and so forth. From a workers' compensation perspective, however, similar success is by no means assured owing to the unique features of the Ohio workers' compensation landscape. First and foremost, Ohio has no private workers' compensation insurance. Employers are either forced into the mandatory State Insurance Fund or, if an employer has more than five hundred (500) employees, it may choose to self-insure if certain requirements are met.<br><br>Absent insurance companies, day-to-day workers' compensation is controlled by two bureaucracies. The Ohio Bureau of Workers' Compensation (BWC) administers non-disputed claims. In practice this means a BWC Claims Examiner should make an initial determination of compensability. In an exemplary BWC "Frequently Asked Question," "If I contract COVID-19, is it a compensable workers' compensation claim?", the answer apparently is "maybe" ("…if you work in a job that poses a special hazard or risk and contract COVID-19 from the work exposure, BWC *could* allow your claim." (emphasis added). It is interesting to note that BWC is adopting "special hazard or risk," a test usually associated with course of employment issues. (A BWC sample form claim information report is attached.)<br><br>The second bureaucracy is the Industrial Commission of Ohio (IC) which allows or denies disputed claims through a formal hearing process. An Injured Worker or Employer dissatisfied with a BWC COVID determination would end up in front of such a tribunal. The law to be applied by an IC Hearing Officer is far from clear. First, Ohio Revised Code 4123.01 is applicable to an "accidental injury arising out of and in the course of employment." Yet there is also long forgotten case law pointing out: "…(I)t is certainly untenable to contend that contacting a virus is unusual and unexpected and therefore accidental." Phillips v. Borg Warner, 32 Ohio St.2d (1972).<br><br>O.R.C. 4123.01(F) contains the definition of an "unscheduled occupational disease": "…(A) disease contracted in the course of employment…the employment results in a hazard which distinguishes the employment in character from employment generally, and the employment creates a risk of contracting the disease in greater degree and in a different manner from the public in general." Finally, O.R.C. 4123.68 is the occupational disease statute itself. It has various provisions, some of which are only applicable to police and fire.<br><br>Allowance or denial decisions by the IC are appealable to the county courts of common pleas resulting in a full jury trial de novo. This is where any precedential decisions involving COVID can be expected to develop. As should be obvious from the foregoing discussion, this will likely be a matter of years.<br><br>Donald E. Lampert, Calfee, Halter & Griswold LLP, DLampert@Calfee.com<br><br>For more information on claims applications, visit or email Ohio's Bureau of Workers' Compensation at www.bwc.ohio.gov or bwccovid19@bwc.state.oh.us |
| Oklahoma | IS COVID-19 INFECTION COMPENSABLE UNDER OKLAHOMA LAW?<br><br>The Statute that defines "Occupational Disease" is Okla. Stat. Tit. 85A section 65. The definition is |

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| | found at 65 (D)(1) and states, "…any disease that results in disability or death and arising out of and in the course and scope of the occupation or employment of the employee or naturally follows or unavoidably results from an injury…" "…A causal connection between the occupation or employment and the occupational disease shall be established by a preponderance of the evidence."<br><br>Under 65 (D)(2) the Statute further states, "No compensation shall be payable for any contagious or infectious disease unless contracted in the course and scope of employment." 65 (D)(3) states, "No compensation shall be payable for any ordinary disease of life to which the general public is exposed."<br><br>It would be difficult for most employees to prove their exposure to Covid-19 occurred in the course and scope of their employment. A preponderance of the evidence standard would require the employee to establish the exact type of exposure with a person that has tested positive for the virus. They would also have to prove they had not been exposed anywhere other than thru their employment. The definition stated above creates a difficult hurdle for an employee to establish causation of Covid-19 thru their employment.<br><br>The only exception may be for first responders and healthcare professional. The employees that are battling the virus on the front lines may have a continuous exposure to the virus, and the Court is likely to grant the benefit of the doubt to that employee regarding the exposure. In Oklahoma, the Court gives a lot of deference to first responders, and we expect any cases involving police, firefighters, or healthcare professionals to be more likely to be found compensable depending on the facts of the claim. |
| Pennsylvania | In Pa., if the Covid-19 virus is contracted within the course and scope of employment, the Pa WCA and any judge considering its application would find a compensable injury if causation and disability are proven, which simply means the inability to perform the pre-injury job resulting in wage-loss producing disability.<br><br>This burden of proof is borne by the claimant requiring proof of the following elements:<br><br>1. Employer-employee relationship;<br>2. Proof that the virus was contracted while working, which might be the hardest element to prove here, asthis would also require proof that it could not have been contracted elsewhere;<br>3. Expert medical proof that the virus as contracted at work, again a very difficult burden to sustain based on community spread and other potential exposures at home, and in general; and,<br>4. Inability to perform the pre-injury job due to the viral pathology and related treatment preventing theemployee from working resulting in the employee sustaining wage loss;<br><br>While Pa. has not specifically enacted Covid-19 legislative amendments to its WCA, the institutional and administrative sense that we have from conversations with WCJs, is that burdens of proof likely will be diminished through this viral cycle, as WC will become another state directed safety net and that in general, given the widespread displacement being caused by the virus, that employers will have a very hard time winning or defending any petitions through this cycle, as WCJs will bend over backwards to give claimants/employees the benefit of the doubt, whereas employers will lose almost all of the petitions that they file challenging employees entitlement to compensation; this will also likely fuel more claims being mediated as opposed to litigated resulting in more claims, whether questionable or not, being settled and not decided on their merits.<br><br>It must also be noted that layoffs will generate clamant filed petitions dependent on the employees compensation status.<br><br>In an accepted claim, where the employer and insurer have accepted liability for the injury and disability, but the claimant has returned to restricted duty work, and is still receiving temporary partial disability because they have not been returned to their pre-injury wage status, and is laid off because of the employer is shuttering its operations due to state-issued shelter orders, an employer argument |

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| | exists that the loss of work is economically-driven, and not related to the work injury, in which case, there are multiple cases in Pa. that would conclude that the employee is not entitled but would be entitled to unemployment compensation, which does not compensate at the same level, in most cases, as WC compensation, here there will be pressure applied by the claimant's bar, by WCJs, and by the indirectly by he state to compensate wage loss through WC awards, again driving resolutions through settlements.<br><br>In general, Pa. would the same answers to the questions addressed by John Geaney as to compensability for viral claims.<br><br>---<br><br>Dear Clients:<br><br>We are continuing to monitor the Corona Virus (COVID-19) outbreak, and we want to take a moment to reach out and let you know that we are handling this developing situation at Connors O'Dell, as responsibly as possible, noting that our main priority is to insure the health and safety of our staff and our clients.<br><br>Safety being our top priority, we are implementing the following:<br><br>· We are taking every precaution possible, to include conducting extra cleanings of our offices, and frequently touched surfaces.<br><br>· We have implemented screening measures to insure the safety of our staff and clients, and we have postponedmost in-person appointments, and, to the extent available, are engaging in remote consultations and appointments.<br><br>· We have instructed our staff that if they are not feeling well or are still recovering from illness, we have askedthem to self-isolate, for the protection of all.<br><br>As of 3/16/20, we will also be working remotely for safety. In reliance upon CDC recommendations, we suggest the following:<br><br>· Wash your hands often with soap and water for at least 20 seconds.<br><br>· Always cover your mouth when coughing and sneezing.<br><br>· Maintain social distancing of 3 feet or more between yourself and other persons.<br><br>· Avoid touching your eyes, nose and mouth with unwashed hands.<br><br>· Clean and disinfect frequently used surfaces.<br><br>· Get medical attention early if you have a fever, cough, or difficulty breathing.<br><br>· Mild symptoms should seek medical care and stay home<br><br>until recovered, if possible. Please reference the CDC website for<br><br>the latest updates about the Corona Virus (COVID-19).<br><br>We remain vigilant in representing the interests of our clients in this challenging situation facing our communities. |
| South Dakota | Under South Dakota law, an "injury" is defined, in part, as "only injury arising out and in the course of the employment, and **does not include a disease in any form** except as it results from the injury." SDCL § 62-1-1(7). Thus, the argument is that COVID-19 is not an "injury" as defined by South Dakota law because it is a disease which is specifically excluded by the definition of injury. Given that it does not fit the definition of "injury", the next step requires looking at the occupational disease statutes under South Dakota law, analyzing whether COVID-19 is an occupational disease such that it would |

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| | bring it under the purview of the workers' compensation statutes.<br><br>The occupational disease statutes are found in Title 62, specifically SDCL 62-8. The definition of occupational disease is found at SDCL 62-8-1(6) which provides:<br><br>"Occupational disease," a disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment and includes any disease due or attributable to exposure to or contact with any radioactive material by an employee in the course of employment.'<br><br>How is that applied in practice? In *Sauder v. Parkview Care Center*, 2007 S.D. 103, 740 N.W.2d 878, the South Dakota Supreme Court quoted an earlier case from 1997, *Zoss v. United Building Centers, Inc*., 1997 S.D. 93, 566 N.W.2d 840, holding that before something may be classified as an occupational disease, the injury must be caused by a **distinctive feature** of the claimant's occupation, not by the environmental conditions of the claimant's workplace. The Court went on to say that unless the condition is intrinsic to an occupation, one does not suffer from an occupational disease.<br><br>In *Sauder*, an individual was exposed to mold in her workplace and claimed to have developed a condition as a result. In reaching its decision, the Court discussed that while the workplace may have exposed the woman to an environmental condition, it was not a distinctive feature of her occupation.<br><br>The Court addressed a similar situation in *Sauer v. Tiffany Laundry & Dry Cleaners*, 2001 S.D. 24, 622 N.W.2d 741, where the Court found that a laundry room worker did not prove that her rashes and breathing troubles were related to her work in a laundry room. Therefore, these cases have laid the framework by which COVID-19 claims would be analyzed under South Dakota law. This means that before someone could potentially receive workers' compensation benefits for COVID-19, the claimant would be required to prove that COVID-19 was something other than a disease to potentially argue it is an "injury" or, argue that it is a recognized risk for someone in their specific job and peculiar to their employment. Given the widespread nature of the virus and the fact that it has been officially recognized as a global pandemic warranting the declaration of a national emergency, that will prove highly improbable absent some legislative changes. |
| Tennessee | Effective April 13, 2021, Tennessee enacted a limited presumption for emergency rescue workers, which provides that an emergency rescue worker who suffers a condition or impairment that is caused by an infectious disease, is presumed to have a disability suffered in the line of duty, unless the contrary is shown by a preponderance of the evidence. To qualify, the "infectious disease" must be either the human immunodeficiency virus, the Hepatitis C virus, or one that has been recognized as a pandemic by the World Health Organization (WHO) or U.S. Centers for Disease Control and Prevention (CDC), and for which the Governor declared a state of emergency. For purposes of this presumption, the term "emergency rescue worker" is defined as any person employed full-time by the state or any political subdivision of the state, as a firefighter, paramedic, or emergency medical technician. This does not include any person employed by a public hospital. The worker must, prior to diagnosis, have tested negative for the infectious disease, and the worker may also be disqualified for refusal to take a medically accepted vaccine.<br>For any other employees who are not emergency rescue workers, in order to analyze the compensability of a workers' compensation claim arising from a COVID19 exposure under Tennessee law, we recommend a three-step analysis:<br>In order to analyze the compensability of a workers' compensation claim arising from a COVID19 exposure under Tennessee law, we recommend a three-step analysis:<br>1. Is there proof of an actual exposure in the workplace?<br><br>TCA § 50-6-102(14)(A) provides that an injury is compensable only if it is caused by a specific incident or set of incidents, and it is identifiable by time and place of occurrence. Simply having an employee with a positive diagnosis does not mean that the employee contracted COVID-19 at or because of work. There would need to be some factual proof that the person was exposed to the virus at work or because of work. With no actual exposure, the employee will not be able to prove a "specific incident" that is "identifiable by time and place of occurrence." Thus, employers analyzing such claims would need to determine whether the claimant had any contact with any coworkers or customers that have a positive diagnosis. |

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| | 2. If there was actual exposure at or because of work, compensability of a COVID-19 claim would have to pass the same standard as all Tennessee workers' compensation injuries – i.e. did the injury arise primarily out of the course and scope of employment?<br><br>TCA § 50-6-102(14)(A)-(C) provides that a compensable injury must arise primarily out of and in the course and scope of employment. In this context, "primarily" means that the employment contributed more than 50% in causing the injury, considering all other possible causes. Moreover, compensability must be shown "to a reasonable degree of medical certainty," meaning it is more likely than not, as opposed to speculation or possibility.<br>3. To help determine if a COVID-19 exposure arose "primarily" from work, the Tennessee workers' compensation law provides that exposure cases are only compensable if the employment exposed the employee to a greater risk of injury/exposure than a member of the general public.<br><br>For this element of the analysis, an employer must look at the claimant's specific job requirements and determine if the job made it more likely that the employee would contract COVID-19 compared to any other member of the general public. For instance, does the job require the employee to have contact with members of the public? More specifically, does the job make it more likely that the employee would have contact with individuals who have COVID-19? In this analysis, healthcare workers certainly have a greater risk of exposure than members of the general public, and therefore an exposure to COVID-19 would have a high likelihood of compensability for those types of workers. The same could be said for emergency responders like paramedics and EMT's. Moving down the continuum of employees with exposure, we must consider employees whose jobs necessarily involve direct contact with the public, such as retail and restaurant workers. Those individuals also arguably have a higher likelihood of contracting COVID-19 than other members of the general public. Therefore, their claims for COVID-19 exposure would have a better likelihood of compensability. However, what about factory workers who do not have exposure to the public? Arguably, those workers have no greater likelihood of contracting COVID-19 than anyone else. Therefore, we would have a better chance of arguing against a finding of compensability in those cases. The overarching principle is to consider whether COVID-19 might fairly be considered a risk inherent to working in a particular job. The more connection between that risk and the employment, the greater likelihood of compensability.<br>For more information, or if you have questions, please feel free to contact:<br>Fred Baker, Wimberly Lawson Wright Davis & Jones, 1420 Neal Street, Suite 201, P.O. Box 655, Cookeville, TN 38503 931-372-9123, fbaker@wimberlylawson.com |
| Texas | Texas Workers' Compensation in the Time of Corona<br><br>The global coronavirus pandemic has shut down much of the U.S. economy. Almost half of Americans are currently under stay-at-home orders issued by state and local authorities. The impact on the Texas workers' compensation system is significant. Benefits continue to be paid to injured workers but the delivery of medical benefits has been greatly impacted as has the dispute resolution system.<br><br>Like much of our lives right now, many claims are effectively in a holding pattern. Office visits, physical therapy sessions, elective surgeries, and other treatments and services have been canceled so injuries are not progressing to maximum medical improvement. A claimant's entitlement to temporary income benefits ends when the claimant reaches MMI. However, a doctor cannot certify MMI without an exam and those exams are being canceled.<br><br>The Division has also suspended all designated doctor and post-DD RME exams. In order to prevent first certifications of MMI/IR from becoming final, parties should still file DWC-32s and DWC-45s unless the Division provides guidance otherwise. The Division has also suspended the testing, training, and application requirements for designated doctor and MMI and IR re-certification.<br><br>The Division has suspended the work search requirements for supplemental income benefits. Claimants will not be required to demonstrate an active effort to obtain employment in order to be entitled to SIBs and their failure to do so will not be a basis for the carrier to dispute entitlement to SIBs. The Division has suspended field office walk-ins so claimants cannot meet with their ombudsmen in person. |

Benefit review conferences and some contested case hearings are now being conducted by phone. However, telephonic proceedings, and in particular telephonic CCHs, are never ideal. When witnesses appear by phone, it can be difficult to verify the witnesses' identity and that the witness is not being coached. The judge is also not able to observe the witnesses' demeanor, judge their credibility, or assess the claimant's injuries. None of this can be done by phone or frankly, even video.

There are also the technical problems caused by poor cell phone reception and speaker phones that cut in and out which can leave the participants talking over each other or unable to hear everything that's said. The parties and Division will need to decide which hearings may be conducted by phone and which should be continued taking all of these considerations into account. Like much of the current response to the corona virus, this decision-making process may involve a cost-benefit analysis and may evolve over time given the very fluid situation.

Commissioner Brown and her staff should be commended for their handling of the crisis thus far. The Division has worked rapidly to implement changes to facilitate the electronic exchange and filing of documents including electronic carrier representative boxes. Effective April 1, 2020, the Division will no longer accept hand-delivered documents from carriers and insurance carrier Austin representatives will no longer need couriers to physically pick up documents from the Division. There are likely to be some lasting positive effects from this crisis and this may be one of them.

The coronavirus outbreak Is not likely to lead a flood of workers' compensation claims. The coronavirus is an ordinary disease of life and the law is the same for the coronavirus as it is for other infectious respiratory diseases. Most coronavirus infections won't be compensable unless the employee's job creates a greater risk of exposure to the virus, for example, healthcare workers, or the injured worker can prove they contracted it at work and not somewhere else. The outbreak may result in fewer claims overall since there are fewer people working.

Many of the questions we've received about the coronavirus so far have to do with different scenarios involving payment of temporary income benefits when the claimant is not working because of a stay-at-home order or because they've been laid off. Each case will be fact-specific and the situation is very fluid at the moment. Please feel free to contact us if you're not sure about a particular case.

We remain committed to our clients during this time of uncertainty and are available to assist in any way we can. This is a trying time for all of us but we will get through it together.

For the latest coronavirus updates from the Division, click here (no hyperlink in word doc).


For Layoffs issue:
The question will be whether the employee's off work status is due to the work injury (as opposed to another reason). If the work injury is a cause of the inability to earn his/her pre-injury wages, then the employee may be able to show disability (and entitlement to TIBs). The work injury doesn't have to be the "sole" cause of the inability to earn pre-injury wages for an employee to be entitled to TIBs; it need only be "a" cause. It's a fact issue, and the employee holds the burden of proof. In the case of a worker who was back at modified duty work earning his/her pre-injury wages, we would argue that he does *not* have disability. This is because the reason for his off-work status is the layoff/business closure/quarantine, not his work injury. For cases in which the employee has returned to modified duty but is only earning partial wages, TIBs are likely due, at least the amount of partial TIBs that was being paid at the time of the business closure/layoff. Every case is different, however, and I urge your claims professionals to contact us if there is a question regarding whether TIBs are due for a particular claim.

For compensability:
An employee is entitled to compensation if they sustain an "injury" in the course and scope of employment. Under the Act, the term "injury" includes an occupational disease. Tex. Lab. Code §

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| | 401.011(26). An "occupational disease" means a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body. The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease. Tex. Lab. Code § 401.011(34). To establish an occupational disease, there must be probative evidence of a causal connection between the claimant's work and the disease; i.e., the disease must be indigenous to the work or present in an increased degree as compared with employment generally. To be a compensable injury, the employment must be a "producing cause" of the injury or occupational disease. The Texas Supreme Court has defined "producing cause" in the context of a workers' compensation case as "a substantial factor in bringing about an injury or death, without which the injury or death would not have occurred." Transcontinental Ins. Co. v. Crump, 330 S.W.3d 211 (Tex. 2010).The coronavirus is an ordinary disease of life, and most coronavirus infections won't be compensable unless the employee's job creates a greater risk of exposure to the virus (for example, healthcare workers), or the injured worker can prove they contracted it at work and not somewhere else. The employee has the burden of proof to establish compensability, and must do so with expert medical evidence.<br><br>Given the disease's scope is both constantly changing and unprecedented, proving it was contracted while on the job would be challenging, if not impossible. |
| Utah | Whether Coronavirus (Covid-19 ) Cases Will Be Compensable Claims Under The Utah Workers Compensation And/Or Occupational Disease Acts?<br><br>ANSWER:<br>The Covid-19 virus has suddenly disrupted the nation's workplaces. Employees, employers and compensation carriers are asking whether employees infected, with this virus, or even if not infected, if forced to stay and/or work at home, furloughed or quarantined under employer or mandated government stay at home orders will be able to recover benefits under workers compensation or occupational disease statutes. The answer largely depends on very specific facts. This virus is a collection of RNA genetic material that is invisible to the eye. It is spread from human to human in many ways including close contact with those who are sick, large gatherings, handshakes, sneezing, latent surface contact, dribbling noses and even in handling cash. The Utah Workers Compensation Act under §34A-2-401 provides in relevant part that an employee who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of the employee's employment, wherever such injury occurred, if the accident was not purposely self-inflicted shall be entitled to compensation and medical expenses from the employer and its insurance carrier. Covid-19 claims will most likely fit within the framework of Utah's Occupational Disease Act, which in Utah Code Ann. §34A-3-103 states "For purposes of this chapter, a compensable occupational disease means any disease or illness that arises out of and in the course of employment and is medically caused or aggravated by that employment." Both acts require medical causation.<br><br>The Coronavirus disease is a worldwide exposure not likely unique or specific to most employers and affects all members of the general public. It will be very difficult to prove just where a person contracted the virus. As a general rule it is doubtful that such claims will be compensable in Utah under either Act for lack of medical causation. Strict proof of where they were infected will be required and will be difficult to establish. However, First Responders, or Health Care Workers and those who are forced to work in close proximity to those known to be infected with the virus will have a much better opportunity to recover based on proof amounting to a likelihood of contagion at the workplace by being forced to work under such circumstances.<br><br>When employees are sent home by employers pursuant to safety concerns or due to mandated governmental stay at home orders employers would not likely be liable for workers comp or occupational disease benefits. However, if an employee is required to work at home due to the virus and happens to fall or sustain an injury by accident, we would expect that the injury will be covered under the Workers Comp Act.<br><br>Workers who have been injured by accident and are not at MMI, but have been returned to light duty work, who are thereafter forced to stay at home by either the employer or governmental stay at home orders, will likely be entitled to temporary total disability compensation while they are |

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| | furloughed. In that situation medical causation for their initial injury was already established. However, Companies who close for a 30-day period and send everyone home with no work available, even from home would not likely incur liability for workers comp benefits due to the absence of medical causation.<br><br>Workers who out of fear and precaution feel they have symptoms of the virus and elect to stay at home and quarantine themselves would not likely be entitled to workers comp or disease benefits, again due to lack of proof of a work-related illness.<br><br>More difficult questions as to compensability will arise as to those employees in employment such as food stores, restaurants, who have contact with a higher volume of the general public putting them at greater risk than other employment. All employers should be encouraged to protect their employees, by policies which avoid unnecessary physical contact such as handshakes, require those sick to stay at home, allow employees to take voluntary leave when necessary, and create workstations which are at least six feet apart.<br><br>Ford G. Scalley, Scalley Reading Bates Hansen & Rasmussen, bud@scalleyreading.net, (801)531-7870 |
| Vermont | While the burden of proof remains with the Claimant, Vermont is a mere contribution state which has adopted the positional risk doctrine. Thus the Claimant still needs to show that the virus was obtained at work as opposed to the environment, but if the Claimant shares a cubicle with an infected co-worker that might be an easier methodology to prove compensability. Whereas no coworkers have the virus, then it would be much more difficult to prove compensability. |
| West Virginia | With the surge of coronavirus cases across the United States, and in West Virginia, questions arise concerning compensability of work exposures. Are coronavirus claims compensable under West Virginia workers' compensation law? The answer depends on whether the coronavirus is considered an occupational disease under West Virginia law. If the employee is a public health or safety worker, the exposure to coronavirus may be compensable if the exposure occurred in the normal course of the employee's duties. An "ordinary disease of life" to which the general public is exposed outside the workplace is not compensable in West Virginia as an occupational disease.<br><br>According to its website, the Centers for Disease Control and Prevention is responding to a pandemic of respiratory disease spreading from person-to-person caused by a novel (new) coronavirus. The disease is named "coronavirus disease 2019" ("COVID-19") and poses a serious public health risk according to the CDC. According to the CDC, COVID-19 is caused by a coronavirus, which are a large family of viruses that are common in people and many different species of animals, including camels, cattle, cats, and bats.<br><br>In West Virginia, contracting COVID-19 in the course of and resulting from employment could be considered an accidental injury if the COVID-19 is contracted while the employee is engaged in work activities. The key issue is causation and whether the employee can prove a causal nexus between the employment and the exposure. Front-line health care providers and first responders are more likely to contract the virus with patient exposure. Contact tracing using CDC guidelines in the employment setting is very important to determine the source of the exposure from a compensability analysis.<br><br>In West Virginia, COVID-19 is not compensable as an occupational disease unless it is incurred in the course of and resulting from employment. W. Va. Code § 23-4-1(f). No ordinary disease of life to which the general public is exposed outside of the employment is compensable except when it follows as an incident of occupational disease. W. Va. Code § 23-4-1(f)(4). In other words, if an employee can prove by a preponderance of the evidence that the employee contracted coronavirus as a result of the employee's job duties rather than from general public exposure, the coronavirus will likely be considered work-related. An employee must show a direct causal connection between the conditions under which work is performed and coronavirus, and that it follows as a natural incident of the work. If the employee can show studies or research link coronavirus to a particular hazard of the workplace, a *prima facie* case of causation arises upon a showing the employee was exposed to the hazard and is suffering from the disease. The employer must then offer medical evidence to refute the employee's claim. *See Hoult v. Workers' Compensation Com'r*, 383 S.E.2d 516 (W.Va. 1989). An employee must actually contract coronavirus and have the virus when making a claim; a fear of eventually contracting coronavirus is not enough for a compensable claim. *See Marlin v. Bill Rich Construction, Inc.*, 482 S.E.2d 620 (W. Va. 1996). |

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| | For more information, contact Dill Battle (dbattle@spilmanlaw.com; 304-340-3823) or Charity Lawrence (clawrence@spilmanlaw.com; 304-720-4056) at Spilman Thomas & Battle, PLLC, and review web resourced on the COVID-19 Task Force page at https://www.spilmanlaw.com/covid19-resources. |
| Wisconsin | **Wisconsin Law Addressing Compensability Standards for Infectious Diseases and New First Responders Act**<br><br>Under existing Wisconsin worker's compensation law, in order for a COVID-19 claim to be found compensable, medical and factual evidence must be provided that documents by a "preponderance of the evidence" that the Employee contracted the COVID-19 virus while at work, as opposed to some other community source. *See Pfister & Vogel L. Co. v. Industrial Commission*, 194 Wis. 131, 133-34 (1928) and *Vilter Mfg. Co. v. Industrial Commission*, 192 Wis. 362, 366 (1927). This means that there are facts strong enough to prove the probability that the virus, parasite or bacteria claims arose out of employment. *Gmeiner v. Indus. Comm.*, 248 Wis. 1, 4 (1945). **We generally have to look at COVID-19 compensability on a case-by-case basis following an investigation of the relevant factual background**. *Gary Fontaine v. County of Brown*, WC Claim No. 2001-024872 (LIRC, June 27, 2007). In the absence of this preponderance of evidence, it cannot be concluded that that the Employee sustained an injury while performing services arising out of or incidental to employment, and the claim may be denied.<br><br>On April 15, 2020, Governor Tony Evers signed into law the COVID-19 Pandemic Relief Bill, AB-1038, 2019 Wisconsin Act 185. Under this Act, the Conditions of Liability for COVID-19 claims as it relates to **"First Responders"** only, was created. **Section 33 of the Act creates a new subsection to the Wisconsin Worker's Compensation Act, §102.03(6), Wis. Stats., Conditions of Liability.** *These are the pertinent highlights*:<br><br>• "First Responders" are defined as an employee or volunteer employee that provides fire-fighting, law enforcement, or medical treatment of COVID-19.<br><br>• "First Responders" must have regular, direct contact with, or are regularly in close proximity to, patients or members of the public requiring emergency services.<br><br>• The contact with patients or members of the public must occur within the scope of the "First Responders" work for the Employer.<br><br>• If the "First Responder" is exposed to persons with confirmed cases of COVID-19 in the course of employment, there is now a Rebuttable Presumption in favor of the employee that the COVID-19 injury is caused by the employment and is work-related.<br><br>• The "First Responders" injury must have occurred between March 12, 2020 and ending 30 days after termination of Governor Evers' Public Health Emergency Order under §323.10, by executive order 72. *Governor Evers' Order is still in effect.*<br><br>• The "First Responders" injury must be supported by a positive COVID-19 test or by a physician's opinion that the employee is suffering from a diagnosis of COVID-19.<br><br>• This is a rebuttable presumption. If the Employer or Insurer has credible evidence that the "First Responder" was exposed to COVID-19 outside of the work for the employer, the compensability of the claim may be challenged.<br><br>This change to Wisconsin worker's compensation law only applies to "First Responders" as defined in the Act. The change does not apply to all employees classified as "essential" during the crisis. The new law is a presumption that whenever a "first responder" on the front line of the State's COVID-19 response gets COVID-19, the injury is work-related. The burden is then on the Employer and Insurer to present credible factual evidence to rebut the new statutory presumption that the injury is work-related in order to deny liability for the claim.<br><br>There is a second addition to the Worker's Compensation Act created by *2019 Wisconsin Act 185*. Under existing worker's compensation law, there is an additional benefit of up to $13,000.00 available to an employee that sustains injury as a result of exposure in the workplace over a period of time to toxic or hazardous substances or conditions. *See generally, §102.565, Wis. Stats.* Under Governor Evers' newly- |

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| | enacted legislature on April 15, 2020, this additional benefit does not apply to a "First Responder" who claims presumed injury under the new *§102.03(6), Wis. Stats.*, discussed above.<br><br>*The full context of 2019 Wisconsin Act 185 can be found here:*<br>https://docs.legis.wisconsin.gov/2019/related/proposals/ab1038 |
| Wyoming | The definition of injury in Wyoming excludes "any illness or communicable disease unless the risk of contracting the illness or disease is increased by the nature of the employment." W.S. Sec. 27- 14-102(a)(xi)(A). Therefore, it is likely that a healthcare provider or similar worker who contracts Covid-19 could make a workers' compensation claim. It is still the claimant's burden to prove that the employment increased the risk, and that the illness can be fairly traced to the employment as a proximate cause. W.S. Sec. 27-14-603(a)(3). Under Williams v. State ex rel. Wyoming Workers' Compensation Div., 2 P.3d 543 (Wyo. 2000), testing for the virus would probably not be covered by workers' compensation.<br><br>If you have any questions about Wyoming workers' compensation related Covid-19 issues, please reach out to Doug Stratton, Doug.Stratton@Ritsema-Lyon.com or 970.204.4579. |

These materials contain general information, subject to change as more information becomes available. It does not constitute legal advice. The receipt of this information does not create an attorney-client relationship. For legal advice regarding fact and case-specific matters, please contact the NWCDN member state.