I. Exposure v. Alleged Exposure – ILLINOIS

- ***Are we to handle claims for alleged and actual exposure to COVID-19 just the same as any claim for workers' compensation benefits?***

The answer is generally, yes. We will be looking at these on a case-by-case basis, but keeping in mind that Covid-19 is "just another infectious" disease (a new and deadly one, but still an infectious disease) even if we know nothing about it. This means we will be treating our defense analysis just the same as if someone made a claim for MRSA or hepatitis exposure due to work. The rampant spread of this virus that we do not yet clearly understand how it is transmitted, will make it unique and different from those other infectious diseases, but the legal analysis will be very similar.

For those COVID-19 exposure claims that are proven compensable, we will then simply be handling them the same has handling any other infectious disease claim where the claimant will need to prove medically related, reasonable and necessary medical expenses, temporary disability and permanent disability claims. We are still learning a lot about this thing, so the "permanent" disability remains a question and will very likely vary from individual to individual. We can imagine awards for PPD ranging vastly from zero (no confirmed diagnosis or only mild symptoms with no hospitalization) to death. But we will need to evaluate each of these case-by-case.

- ***Do employees have to prove that they were exposed at work? Not exposed elsewhere? Does it matter what the claimant does?***

Alleged claims for benefits, either under the Workers' Compensation Act or the Occupational Diseases Act, still require the same burden of proof for any claim for alleged exposure to an infectious disease. We should plan initially on handling these on a case-by-case basis requiring the same medical documented proof of exposure and causation as we do in any other case.

We anticipate several claims in the near future, and those claims by our first responders and "front-line medical" personnel, both generally seen at greater risk for exposure, will be easiest to prove. First, those medical providers and first responders are knowingly (for the most part) being exposed to varying degrees to the COVID-19 on what may be a daily basis. Additionally, at this time society sees them as our front line "soldiers" in this war against COVID-19, so they will receive a very empathetic and liberal view of their claims presented to the IWCC. As for other employees, they will need to prove that they were exposed due to a risk incidental to the employment. This becomes more difficult as this virus spreads wider and wider. We will argue that employees in general, are not exposed to any greater risk than the general public.

- ***If one of our employees contract it, should we fill out a Form 45 and look at it on a case by case basis?***

For now, yes you should plan on filling out a Form 45 if you receive anyone reportedly diagnosed with the condition and claiming it is from an alleged exposure at work. The completion of a Form 45 is not an admission on the part of the Employer, but it will trigger an investigation into the claim.

- ***What if an employee suspects they have been exposed at work, but it is not yet known?***

Similarly, any claims for employees who *may have been exposed and are sent home on a 14-day self-quarantine*, should at a minimum be reported as "incident only" reports just to document the alleged exposure and approximate date for same. In those cases, you may not even have an actual exposure or even a positive diagnosis, but in an exercise of caution, are sending the employee home.

- ***The Illinois Workers' Compensation Act and the Occupational Diseases Act provides a "rebuttable presumption" of causal connection between an exposure and a diagnosed respiratory illness or disease for firemen, paramedics and EMT's. Is this applicable for COVID-19 claims?***

Because COVID-19 is technically a respiratory illness, we anticipate the Illinois Workers' Compensation Commission *will apply* the "rebuttable presumption" afforded those persons for claims of alleged exposure to COVID-19 and the resulting condition from same. Again, this is a new illness and the science of it continues to evolve, but there seems presently little question that it infects the respiratory system. This rebuttable presumption simply means that the burden then lies upon the employer to disprove the exposure or disprove the condition is medically caused by COVID-19.

- ***Would the Employer have to cover employees as w/c if an employee in a department was diagnosed with the virus and then later several other employees were diagnosed?***

Unlikely, unless the employee can show that they were exposed to someone that was diagnosed and contracted it from that exposure AND at a higher risk than the general public for said exposure (i.e. EMT's, medical providers and nursing home caregivers come to mind as those with the better chance of proving likely exposure due to the work they do). The general employees are probably more likely exposed just being out in public than in the work environment. However, it is recommended anyone who is ill and possibly carrying the virus be told to remain home until better or confirmed to actually don't have it.

- ***With this actually being a pandemic how are we really to know the other employees were actually exposed only by the employee originally diagnosed?***

You are not going to know. The fact it is a pandemic means basically it has spread to several regions of the world and is a world health concern – implying risk of exposure to all persons is increased. If anything, the pandemic declaration is a defense to exposure to one or two persons at work.

- ***If an employee was diagnosed with the virus and came to work symptomatic, and we decide we should send them home as soon as we realized they may have the virus. Later other employees and their family members are diagnosed with the virus and someone actually become very ill or even dies. Can the employer be sued by the family for what they felt was our negligence?***

While every case will have to rest on its own facts, it would be quite a stretch to put civil liability on any employer that exercises reasonable measures given the limited knowledge we have of this virus and the somewhat vague, changing and sometimes conflicting instructions coming from the CDC and WHO. The key to the fact-scenario above is that "we send them home as soon as we realized…" This is the reasonable measure that makes for a good defense. It would be another safe measure to put out a written instruction and at least a short-term "COVID-19" policy that employees who are feeling ill should consider the welfare of others by remaining home until the employee can confirm they are not infected with COVID-19. You cannot prophylactically force employees with the sniffles or other illnesses to stay home just because you think it possible they are infected with the virus, and it really is on all of us to exercise proper self-containment when we believe it is necessary.

- ***What about areas where we have to have people continue to work until they are symptomatic or diagnosed (police, fire, solid waste)?***

The answer above is still the same. Individuals should be advised to monitor their own health – some may actually carry the virus and not know it because they have no symptoms. Others that develop symptoms should prevent spread by self-quarantining. Each person should be asked to be responsible for monitoring their own health, and if they know they've been exposed, even with known symptoms, they should consider it best to self-quarantine to make sure they do not have it and do not spread it during the incubation period.

- ***We are an "essential" business and have areas where we cannot work from home. We have to have employees here, so we cannot completely shut our doors. Are we liable for employees if they come in contact and later become ill? In this scenario, would it be worker's comp if it isn't general liability?***

In answer to both questions, this is true that we have some essential jobs, particularly in the public sector (police, fire, etc.), that may be severely impacted by this. Not only

are our first responders perhaps (arguably but not certain) at an increased risk for exposure, we need them to keep them working – you cannot shutdown police and fire. For all other employment, there will be potential exposure for liability if employees at an “essential” business contract the virus. We will be evaluating each of these situations on a case-by-case basis as we do with any infectious disease claim. We suspect these would be WC or Occupational Disease Act claims, not general liability, but again we will need to evaluate each situation as it arises.

- **OTHER STATES:**

In general, **Ohio**, **Wisconsin** and **Iowa** are similar the above approach. If you have any specific questions about this topic referable to any of those states, please contact us.

In **Missouri**, a compensable workers' compensation case is ether an occurrence of an accident or an occupational disease involving repeated traumatic exposure or prolonged exposure to toxic chemical or biologic agents. Section 287.020.2 describes an accident 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.” Furthermore, a sudden exposure to some caustic substance or toxic fumes can be found to be an accident. With COVID-19, it may or may not be possible to point to one single event. If one event can be found, this will likely be found to be an accident. If a single event can not be described, this would more likely be an occupational disease. Section 287.067.1 describes an occupational disease as “an identifiable disease arising with or without human fault out of and in the course of the employment” It further states that “ordinary diseases of life to which the general public is exposed outside of the employee shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section.” The occupational exposure must satisfy the prevailing factor test in that the exposure must be the prevailing factor causing the medical condition and disability.

From what we know about COVID-19, it appears to be an ordinary disease of life to which the general public is exposed and therefore, the development of COVID-19 would not likely to be found to be compensable. But if the employment increases the risk of exposure, Section 287.067.7 states that “Any employee who is exposed to and contracts any contagious or communicable disease arising out and in the course of his or her employment shall be eligible for benefits under this chapter as an occupational disease.” This would likely be relevant with claimants working as first responders or in the medical field.

Therefore, it appears that a claimant may pursue an accident theory if a single event can be alleged or an occupational disease if the employment increases the possibility of exposure and no single event can be alleged. The burden of showing a prevailing factor remains.