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COVID-19 Expected to Create a Tidal Wave of Workers' Compensation Claims: Is Your Business Ready for the Tsunami?

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When managing the 2019 novel Coronavirus (COVID-19) pandemic, employers who are already navigating the ever-changing landscape of federal, state, and local laws frequently overlook the potential liability and costs associated with increasingly complex workers' compensation claims. The number of workers' compensation claims are expected to balloon exponentially, thanks in no small part to COVID-19. Workers' compensation claims can implicate a host of other laws, including federal and state employment and discrimination laws as well as the Occupational Health and Safety Act of 1970 (OSHA). Employers are already beginning to see a host of new claims associated with diagnosed cases of COVID-19 purportedly from workplace exposure.

The COVID-19 pandemic has created countless challenges for businesses across the country. One growing challenge involves workers' compensation claims. Does workers' compensation insurance cover workers infected with the virus who subsequently make a claim for workers' compensation benefits? The answer to that question is uncertain, and law in this area is quickly being formed in response to COVID-19 trends. The amount of benefits paid in a workers' compensation claim for an employee who undergoes lengthy medical treatment and/or who ultimately perishes from COVID-19 can be upwards of \$1 million per claim, depending on the state landscape and available benefits.

Generally, ordinary infections such as a cold or flu are not compensable workers' compensation injuries. Although each state has its own statutory scheme and exceptions to this rule, where the employer increases the risk of contraction of a particular illness like COVID-19, workers' compensation agencies may deem an employee's exposure compensable. People with relatively safe jobs, such as grocery store clerks, are now on the frontlines of the COVID-19 pandemic. Because of this, some states are now taking affirmative action to extend workers' compensation coverage to essential workers, first responders, prison/jail officials, and health care workers impacted by COVID-19. Many states are using their executive and legislative powers to amend laws to mandate that workers who contract COVID-19 are deemed to have a work-related injury so their claims are covered under workers' compensation. Some jurisdictions are enacting amendments to their state codes to provide employees who file workers' compensation claims a presumption that contraction of COVID-19 is work-related. In these limited contexts, employees' evidentiary burdens are decreased, making it easier for workers to obtain workers' compensation benefits –medical, monetary, and otherwise.

An increase in possible compensable and covered workers' compensation claims will almost certainly mean an increase in insurance premiums in the near future, impacting all businesses. The presumption that COVID-19 was contracted at work is most obvious in the medical professional and health care settings when an employee who contracts the disease works in health care and has treated coronavirus patients but has had no known exposure outside of work. Exposure in other professions, however, is often not clear cut. One example is an employee in a manufacturing facility who contracts COVID-19. We know that a couple of the employee's co-workers also tested positive for COVID-19, but the employee's family members also had the virus around the same time frame as the employee. Did the employee contract the disease at work or at home? How do you know? And how do you effectively deny the claim or obtain proof without being subjected to possible penalties through the administrative system?

When an injury/illness arises, the employee must report the circumstances to the employer. Typically, the employer has an affirmative duty to report the injury/illness to the administrative agency in the jurisdiction where the injury took place by timely filing a report of the injury/illness. Non-compliance, by the employee or employer, can result in stiff statutory penalties, including the forfeiture of arguing compensability of the claim. It is imperative, then, that the employer immediately inform counsel of the circumstances of the alleged illness/injury and take necessary steps to protect its interests. Compared to other types of employment law claims, workers' compensation claims move at the speed of light. This means that time is of the essence and is critical in determining what approach your company will take and how each COVID-19 claim is handled and investigated.

Accordingly, frontline and health care industry employers should be especially vigilant in compliance with workers' compensation requirements. Failure to do so could result in unnecessary loss. Akin to OSHA claims, some workers' compensation claims may be preventable with proper training, an understanding of the issues, and a laser focus on employee health, well-being, and safety. Below are suggestions to consider as your business considers preparation of an OSHA and Workers' Compensation Preparation and Response Plan. As workers' compensation statutes are generally state specific, there is no one size fits all plan. Still, the below-referenced suggestions are designed to address global concerns that potential workers' compensation claims create. By incorporating one or more of these suggestions into a tailored plan, your business can be as prepared as possible to handle the complications associated with COVID-19.

- With assistance of counsel, stay up-to-date on guidance from federal, state, or local health agencies that impact workers' compensation and consider how to incorporate those recommendations, requirements, and resources into workplace-specific plans. Plans should consider levels of risk associated with various employment positions at different worksites.
- Maintain familiarity with your state's changing workers' compensation landscape and if any specific guidance for COVID-19 has been passed or suggested.
- If one does not already exist, develop an infectious disease preparedness and response plan to guide protective actions against COVID-19. This may require consultation with professionals who specialize in such fields.
- Implement good hygiene and infection control practices as appropriate.
- Review and revise applicable workers' compensation policies and procedures for prompt identification, reporting, and investigation of COVID-19 claims.
- Develop policies and procedures to immediately isolate employees or patrons who have signs and/or symptoms of COVID-19 and train employees to routinely implement them.
- Clearly communicate such workplace flexibilities and protections to all employees.
- In the event an employee reports COVID-19 exposure:
 - Mention COVID-19 in the accident description and consider whether additional OSHA/workers' compensation documentation should be completed;
 - Determine if the worker had contact with a person known to be infected with COVID-19;
 - If so, include when and where that contact occurred in filed documentation;
 - Confirm when symptoms of COVID-19 began and whether the employee has actually tested positive;
 - Advise whether the worker or any member of the immediate family recently travelled to any high-risk areas;
 - Determine if immediate family members are currently showing similar symptoms;
 - Ask what other employees the worker may have had recent close contact with; and
 - Complete and file the mandatory first report of illness/injury with your respective workers' compensation agency, if applicable. Even if the employee does not seek benefits associated with his/her exposure, you want to ensure your business is protected by maintaining a record that

reflects prompt recognition and implementation of policies to keep your workforce safe with reduced exposure to COVID-19.

Whatever actions employers decide to take regarding individual claims, it is paramount that they consult workers' compensation attorneys in their jurisdictions to ensure they understand their obligations in the event COVID-19 surfaces in their workplaces. Workers' compensation claims involving COVID-19 have the potential to grow into large liabilities for companies, including the filing of discrimination, other employment law, or OSHA claims. Workers' compensation claims should not be looked at only from the workers' compensation insurance perspective, and employers should take comprehensive looks at implications stemming from employees who contract COVID-19 in order to best minimize financial losses.

Attorneys at Baker Donelson regularly manage and litigate workers' compensation claims in multiple jurisdictions and are available to assist you and your business. If you have any questions, please contact one of the authors or any member of Baker Donelson's [Labor & Employment Team](#). Also, visit the [Coronavirus \(COVID-19\): What You Need to Know](#) page on our website.