



Coronavirus (COVID-19) Workers' Compensation and OSHA Advisory

March 19, 2020

The Coronavirus (COVID-19) continues to spread throughout the United States, resulting in both government and self-imposed quarantines. In addition, many organizations have been forced to shut down operations or mandate remote working arrangements to contain the virus. As a result of these unprecedented times, many new questions have been raised concerning employer responsibilities to their employees and potential Workers' Compensation ramifications.

Workers' Compensation Claims Presented after a Positive COVID-19 Diagnosis

Ordinarily, an employee's injury or illness is compensable under Workers' Compensation if it "arises out of and in the course of employment." That said, we find ourselves in extraordinary times as the Coronavirus and its impact on employers and employees unfolds. Legal experts have previously expounded on whether communicable and contagious diseases are compensable, noting that Workers' Compensation statutes are not intended to cover these types of claims. However, every state/jurisdiction has its own Workers' Compensation laws and criteria for defining compensability, with each state defining and addressing occupational disease and illness differently. In addition, many states apply different regulations to different types of disease exposure.

Employees typically have the burden of proving that their injury or illness is work related - that it arose out of (what the employee was doing at the time of the injury/illness) and in the course of employment (when the injury/illness happened). The burden of proving that the Coronavirus was contracted at work, versus a public venue or activity, will be difficult to overcome. Especially in light of the incubation period of many contagious diseases and the fact so much is still unknown about the Coronavirus.

One possible exception to this heavy burden, includes those employees who may have a high exposure to the COVID-19 virus due to their employment (i.e. health care workers) or their employment places them in high risk areas (i.e. first responders that are exposed to the virus during a routine call). COVID-19 claims could potentially be

found compensable if an employee can prove they contracted the virus during the course of their employment and/or if their job duties place them at a higher risk of becoming infected as compared to the general public. Every claim is unique and will be evaluated on its own set of facts, as well as on the state's Workers' Compensation laws to determine compensability.

As the outbreak continues to spread, employers should have a process for assessing their risk, including an early and thorough investigation of Workers' Compensation claims. In addition, employers who are not in high risk industries can potentially avoid or limit their exposure to COVID-19 Workers' Compensation claims by establishing policies, allowing employees to work from remote locations or by suspending operations until the threat of the virus is removed.

COVID-19 Workers' Compensation Claims Presented After or During an Employee Quarantine

Simply being exposed or quarantined as a result of the disease will usually not rise to the level of a compensable claim, however each claim should be examined on a case-by-case basis given jurisdictional nuances in state Workers' Compensation statutes.

As it relates to quarantined employees, they have a higher compensability threshold to meet than if they were actually diagnosed with COVID-19. Given that they may never develop the virus, one might question whether they have actually sustained a compensable injury or illness.

Some factors that may impact the compensability analysis of a quarantined employee are:

- Was the employee quarantined in a medical facility or self-quarantined at home?
- Was the employee quarantined due to alleged exposure at work?
- Did the employee ultimately test positive for the disease and if so, was a causal connection made to his/her employment?

Similar to our earlier analysis, if a quarantined employee is ultimately diagnosed with the virus, pinpointing where/how the employee contracted the virus is likely the most difficult hurdle to overcome as the assumption would be that the exposure occurred in the wider community.

Again, exceptions may be made depending on the state's Workers' Compensation laws for those employees at higher risk, such as healthcare workers or first responders who are quarantined because of a COVID-19 exposure.

Workers' Compensation Claims and Compensability for Employees Working Remotely

Many businesses are providing employees with the option to work from home, with others issuing a mandate in order to control and prevent the ongoing spread of the virus. However, telecommuting is not a new or unique concept as it pertains to businesses managing their operations, reducing overhead, and attracting talent. Given the frequency and continued increase in telecommuting by employees over the last 5-10 years, the issue of Workers' Compensation claims and specifically compensability has been addressed and decided by Workers' Compensation boards and the courts on many occasions.

Allowing employees to work remotely will change an employer's Workers' Compensation risk and exposure, given the lack of control over the employees' home working environment and office set-up. However courts have found that the lack of control over the conditions of an employee's home office is irrelevant to determining compensability and as long as the employee can show they were acting in the interest of the employer, again demonstrating that the injury "arose out of and in the course of employment," they would be eligible for Workers' Compensation benefits. As previously noted, the burden of proof is on the employee, however the courts have addressed the issue of compensability as it relates to telecommuting, noting that the employer is responsible for ensuring the same safe work environment for employees working remotely as for those employees who work at the employer's premises.

There are a number of practical steps that an employer can take to navigate the challenges of a remote staff and manage their Workers' Compensation exposures:

1. Establish consistent and defined working hours with reporting and/or milestones.
2. Conduct remote check-ins with the employee on a regular and scheduled basis.
3. Designate a defined work area. An employer can attempt to enact check-ins, geo-tracking, equipment tracking, or other milestone reporting that proves where their employee is working.
4. Ensure a safe working area with a work-from-home safety survey, lighting and ventilation requirements and an ergonomically correct desk set up with a computer and printer. An employee can provide a photo of the work area and follow up records periodically.

5. Specific claim reporting protocol to ensure timely and thorough claim reporting and medical management.
6. Review return-to-work practices and activities to address unique challenges related to a remote worker.
 - https://www.usi.com/content/downloads/Telecommuting_Policy_and_Procedure_Covid-19_R1.pdf
 - https://www.usi.com/content/downloads/Work_from_Home_Guide_for_Employees_R1.pdf

OSHA Reporting Requirements Relating to COVID-19

The Occupational Safety and Health Act (OSHA) has affirmed that any incidents of employees contracting the Coronavirus at work are recordable illnesses, subject to the same rules and failure-to-record fines as other workplace injuries and illnesses. This provision relates to the most obvious situation of first responders and healthcare workers that are exposed to COVID-19 during their normal work and work environment. However, when it is not clear whether the employee's illness is work-related or occurred in the work environment (i.e. retail, office, or manufacturing employees) the need to report falls into a gray area. In those circumstances, the employer must evaluate whether "an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness." In the absence of a clear determination, the employer should make a good faith effort to determine recordability.

OSHA has also developed a general duty clause requiring employers to provide a safe workplace for employees, including the creation of an infectious

disease preparedness and response plan, implementing basic infection prevention measures and developing policies for the identification and isolation of ill individuals.

A separate guideline for requiring personal protective equipment for the possibility of respiratory exposures is also being required of employers.

- <https://www.usi.com/content/downloads/OSHA Corona.pdf>

How Can USI Assist

We strongly encourage employers to report all losses to their insurance carriers upon receipt of notice. Each claim and the eligibility for Workers' Compensation benefits will be evaluated based on the individual facts of the claim and the relevant state laws.

For additional resources in creating a preparedness and response plan, please see our two previous advisories on Response and Risk Mitigation.

- [Coronavirus \(COVID-19\) FAQ](#)
- [COVID-19 Preparedness and Risk Mitigation Resource Guide](#)

Helpful Resources

For additional resources, tools, information, and links, please visit our **Coronavirus (COVID-19) page**:

www.usi.com/public-health-emergencies