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RESPONDING TO COVID-19 CLAIMS IN VIRGINIA – UPDATED 09/14/2021

Since the start of the COVID-19 pandemic in 2020, providing guidance on how to respond to employee claims involving the disease has been an ever-evolving practice. July 1, 2021 saw a COVID-19 presumption become law, with retroactive effect. Additionally, the Department of Labor, and the Virginia Department of Health also have reporting requirements that employers must observe. What follows is step-by-step guidance to the evaluation of a COVID-19 workers' compensation claim, and a brief reporting guideline for employers to ensure compliance with state regulations.

Upon receipt of a COVID-19 claim, consider the following issues:

1) Is the employee in question a beneficiary of the COVID-19 presumption?

Virginia Code §65.2-402.1(B) may provide a if your claimant is a health care provider, firefighter or law enforcement/corrections officer.

- A) Health Care Providers (2 elements to establish they receive the presumption)
 - i) Are they a health care provider as defined in § [8.01-581.1](#)? (simply put, the definition covers any sort of healthcare provider who requires a license)
 - ii) As part of their employment, is the employee " directly involved in diagnosing or treating persons known or suspected to have COVID-19"?
- B) Firefighters, Law Enforcement, Corrections (1 element)
 - i) firefighter, as defined in § [65.2-102](#); (ii) law-enforcement officer, as defined in § [9.1-101](#); (iii) correctional officer, as defined in § [53.1-1](#); or (iv) regional jail officer

2) Is there an established COVID Diagnosis?

- A) "the COVID-19 virus shall be established by a positive diagnostic test for COVID-19, an incubation period consistent with COVID-19, **and** signs and symptoms of COVID-19 that require medical treatment."

3) If the other conditions for the presumption exist, did death or disability occur within the effective dates of the presumption?

The presumption statute only applies to death or disability occurring between March 12, 2020 and December 31, 2021, and where:

- a. Prior to July 1, 2020, the claimant received a positive diagnosis of COVID-19 from a licensed physician, nurse practitioner, or physician assistant after either (i) a presumptive positive test or a laboratory-confirmed test for COVID-19 and presenting with signs and symptoms of COVID-19 that required medical treatment, or (ii) presenting with signs and symptoms of COVID-19 that required medical treatment absent a presumptive positive test or a laboratory-confirmed test for COVID-19; or
- b. On or after July 1, 2020, and prior to December 31, 2021, the claimant received a positive diagnosis of COVID-19 from a licensed physician, nurse practitioner, or physician assistant after a presumptive positive test or a laboratory-confirmed test for COVID-19 and presented with signs and symptoms of COVID-19 that required medical treatment.

If the employee establishes the presumption, the burden shifts to the employer to establish by preponderance of the evidence that the cause of the COVID-19 infection was not work-related.

HOWEVER, if the employer has offered the employee a COVID-19 vaccine, and the employee has refused the vaccine without a valid medical excuse, the presumption does not apply.

In most instances, a claim involving a presumption is probably going to result in an award for benefits. As the employer has the burden to establish that the COVID-19 infection resulted from a non-work source in a presumption claim, the most defensible claims will come where there is a clear alternative source of infection, such as a family member, or an outbreak within the employee's social circle.

4) If an employee is not entitled to the presumption, is the COVID-19 claim an occupational disease or an ordinary disease of life?

Any COVID-19 claim where the employee is not entitled to the presumption should be denied, unless there is clear and convincing evidence that the claimant contracted COVID-19 at work and not from any other source.

COVID-19 is an ordinary disease of life in virtually all claims not covered by the presumption. By enacting a presumption of compensability for a few types of employees, the General Assembly has shown what occupations it deems to be at particular risk of COVID-19. For any other occupation, therefore, we expect COVID-19 to be considered an ordinary disease of life. In ordinary disease of life cases, the evidentiary burden on a claimant is so high, that it is virtually impossible to envision a COVID-19 claim that would be accepted.

5) Are employers responsible to pay for missed time due to quarantine periods following possible COVID-19 exposure?

Nothing in the Virginia Workers' Compensation Act requires that an employer pay for lost time for quarantining due to possible COVID-19 infection. Whether an individual employer chooses to do so as a benefit to its employees is purely a business decision and not a requirement of the Virginia Workers' Compensation Act.

6) What other reporting requirements do employers have when notified of a COVID-19 positive employee?

Both the Virginia Department of Health and the Virginia Department of Labor and Industry must be notified within 24 hours, when an employer becomes aware that two or more of its employees have tested positive for COVID-19 within a 24-hour period. (these are revised requirements effective September 8, 2021- VDH previously required reporting every positive case, and VA DOLI required reporting for 3 or more positive tests within 14 days)

Reporting can be done through the online portal:

<https://redcap.vdh.virginia.gov/redcap/surveys/?s=LRHNP89XPK>

Virginia's final regulation regarding COVID-19 protocols for employers includes additional requirements (mask guidelines, sanitizing and social distance policies, etc.) and can be found here:

<https://www.doli.virginia.gov/wp-content/uploads/2021/09/VOSH-standard-clean-version-09.7.21.pdf>