

## **Pennsylvania Workers' Compensation Alert**

### **Will Coronavirus Cases be Compensable Under the Pennsylvania Workers' Compensation Act and if so, How?**

The Coronavirus (officially Covid-19) is coming, according to the United States Centers for Disease Control, and the United States workforce faces this risk along with employees worldwide. If Pennsylvania employees become infected, become exposed without being infected, or develop psychological consequences from either situation, Pennsylvania employers could face wage loss claims, medical claims, testing claims, or claims for psychiatric services or disability. The question is, are any or all of these claims considered compensable under the Pennsylvania Workers' Compensation or Occupational Disease Acts? To date, and understandably, there have been no specific rulings on the issue. Therefore insurance carriers, third party administrators and risk managers must rely upon precedent, similar cases and relevant fact patterns to develop case management strategies, to address the issues as they arise, and to develop reasonable prevention strategies.

First, we will start with the occupational disease provisions of the Pennsylvania Workers' Compensation Act, as amended. In addition to "injuries," the Pennsylvania Workers' Compensation Act provides compensation for "diseases" that are occupational in nature. The Act enumerates specific diseases that have been associated with specific workplace exposures such as Black Lung, Asbestosis and Hepatitis. The Act provides a "rebuttable presumption," meaning that workplace exposure caused the enumerated disease, thereby eliminating workplace exposure as an element of proof to establish compensability. However, diseases not specifically enumerated may also benefit from the "rebuttable presumption" under the Act's catchall provision requiring only "proof of exposure" in an industry where the incidence of the disease is substantially higher than the general population. Keep in mind that unless the disease is enumerated or catchall allowing the rebuttable presumption, it is very hard to prove that generally communicable diseases come from a workplace exposure. This is why we do not typically see seasonal influenza workplace "injuries."

Covid-19 is not an enumerated disease under the Act. Also, because Covid-19 is so new, arguably, it will be nearly impossible to establish that the incidence of Covid-19 is substantially higher in any particular industry than in the general population. But of course, with effective lawyering and a sympathetic Judge, one cannot say that it is impossible to establish this legal principle. Nonetheless, we believe that based on what we know today, this difficulty leaves an infected employee with the "standard" burden of proof to establish a causal relationship of the disease to a workplace exposure within a reasonable degree of medical certainty, as opposed to a rebuttable presumption of a causal relationship.

However, even with generalized diseases such as Covid-19, what remains is still a complicated burden of proof. It will often be impossible to pinpoint where and when the infection was acquired. A co-worker may have transmitted the virus on the job, but it could have also been transmitted by a family member or another person in a public, non-work setting. If the non-work transmission possibilities cannot be eliminated, in fairness, the causal relationship burden generally will not be met.

Nonetheless, Pennsylvania case law suggests that if an employee can prove the specific source of infection was a workplace exposure within the scope of employment, then the effects of the resulting disease are compensable. In *New Castle v. WCAB (Sallie)* 546 A.2d 293, the claimant widow filed for fatal claim benefits when her decedent husband died of complications from Meningococcal Septicemia. Testing established that one of the decedent's co-workers, whom the decedent has kissed on the cheek at work days before the decedent's death, was a carrier of the Neisseria Meningitis infection. The purpose of the so-called "goodwill kiss" was for the decedent to bid farewell to an employee departing for maternity leave. It was concluded that this kiss transmitted the infection. The Court held that the "goodwill kiss" for the employee departing on maternity leave was within the decedent's scope of employment and that therefore, the claim was compensable as an "injury" because the cause of the disease was proven to be a workplace exposure.

An equally likely source of possible claims involves the employee who alleges a psychiatric disturbance from potential exposure to Covid-19, or a psychiatric disturbance from the consequences of an involuntary quarantine, especially a quarantine that is far from home for an employee traveling in the course and scope of their employment. Remember that with alleged psychiatric injuries, it is well-settled Pennsylvania law that with mental/mental cases, the employee must establish that they experienced emotional trauma in reaction to an actual objective abnormal working condition. A response to a subjective, perceived or imagined, abnormal working condition is not compensable. The question for Pennsylvania Workers' Compensation Judges in these scenarios will be to decide whether the fear of infection, amid some of the significant hysteria reported in the news media, is a injurious reaction to an abnormal working condition. If it is determined that the abnormal working condition includes routine travel or immersion in group settings where there is potential exposure to Covid-19 and its potentially deadly consequences, compensation for a psychiatric injury remains a distinct possibility.

The employer also must determine if they will use their workers' compensation policies to provide Covid-19 testing for employees who have actual or feared exposure to the virus. These decisions should be decided based on the facts at hand, case by case.

**Comment:** As concerns grow regarding the Coronavirus, various businesses and industries will be affected in a variety of ways. Employee health and employer exposure for workers' compensation benefits are only some of the considerations necessitated by

this public health crisis. Careful analysis and legal guidance will be necessary for dealing with these issues.

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