

IWCC Establishes Emergency Rule for Certain Workers Sickened with COVID-19

Amundsen Davis Insurance Alert
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If an employee can establish a direct causal connection to its exposure to COVID-19 via its workplace, the employee may now have a valid claim for workers' compensation coverage.

On April 13, 2020, the Illinois Workers' Compensation Commission (IWCC) established an emergency rule amending the Illinois Administrative Code for workers' compensation hearings that created a rebuttable presumption for workers sickened with COVID-19 who work in "critical" industries as defined in the Illinois Stay Home Order, as well as those workers who are first responders. The emergency rule expanded the definition of COVID-19 "First Responder" or "Front-Line Worker" to a broad category of workers, and would have applied to virtually all businesses that are permitted to remain open under the Illinois Stay Home Order. The emergency rule created a presumption that those workers contracted the illness *at work* and are therefore entitled to workers' compensation benefits.

Due to the expected increased rate of claims and economic impact on employers, on April 22, 2020, a group of businesses filed a lawsuit seeking to stop the implementation of the emergency rule. The businesses asserted that the emergency rule was passed in violation of the Illinois Open Meetings Act, and that only the legislature has the authority to make a substantive change in coverage. On April 23, 2020, Sangamon County Circuit Judge John M. Madonia issued a temporary restraining order barring implementation of the emergency rule. Following the order, on April 27, 2020, the IWCC repealed the emergency rule. It is possible the IWCC will attempt additional amendments that shift the burden of proof onto employers/carriers. Similarly, it remains to be seen whether state legislatures, including those of Illinois and Indiana, will attempt to pass laws amending their respective workers' compensation acts to provide additional relief for workers. Under either set of circumstances, litigation among employees, employers, and carriers will result.

One likely issue is whether the workers' compensation system is the appropriate system of relief for COVID-19 claims filed by affected workers. In addition to the economic impact on employers, the impact on carriers should also be an issue. Undoubtedly one of the most contested issues will be whether COVID-19 is

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compensable under workers' compensation acts. Workers' compensation laws generally provide compensation for "occupational diseases" that arise out of and in the course of employment. In some states, including Indiana, "ordinary diseases of life" (e.g., the common cold or flu) are excluded and cannot be an "occupational disease." Ind. Code Ann. § 22-3-7-10. In Illinois, an ordinary disease of life may come within the definition of "occupational disease" as long as it is caused or aggravated by an employment-related risk. See *Fitts v. Indus. Comm'n*, 172 Ill. 2d 303, 666 N.E.2d 4 (1996) (where the court explained that once causation is established between employment exposure and the disability, the claimant is entitled to an award for the "full nature and extent of his disability").

Accordingly, carriers should expect states to attempt other exceptions to workers' compensation laws, especially for medical providers and first responders. Prior cases involving employees sickened from disease, virus, or other infection who unsuccessfully sought workers' compensation benefits will provide support for insurers faced with COVID-19 claims. While the case law is limited, some courts have ruled that the claimants had not met their burden of proving that their illness was an "occupational disease" to which the claimant's work caused a peculiar and heightened risk of exposure, as distinct from an "ordinary disease of life" that members of the public are generally exposed to. See e.g., *Jeffrey M. Goolish, Petitioner*, 05 IL. W.C. 30212 (Ill. Indus. Com'n Nov. 13, 2009) (commission finding claimant, a firefighter who treated an HIV positive patient and thereafter discovered blood on his hand, did not prove a compensable exposure); *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 463 S.E.2d 259 (1995), aff'd, 343 N.C. 302, 469 S.E.2d 552 (1996) (court holding evidence was sufficient to support finding that claimant's salmonella infection was not caused by contaminated water in work place based on evidence that claimant became ill more than 48 hours after leaving workplace which was longer than usual incubation period, there was no evidence of contamination, and although two other employees became sick, there was no evidence that it was due to salmonella or contaminated water).

There could also be litigation involving premium calculations for employers, employment classifications of employees, class codes of employers, scope of coverage for employees working at home, and employers' compliance with administrative rules.

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