New State Relief Bill Marks Fundamental Change in Workers' Compensation Law for "First Responders"

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Some media outlets, commentators and business organizations have expressed concern that as they return employees to work, employers may have potential liability on a variety of fronts. This came true for employers who have "first responders" in an important provision of the coronavirus relief package signed into law by Governor Evers on April 15.

To collect workers' compensation benefits, an employee has to show that at the time of injury or occupational disease, the employer-employee relationship existed, the employee was performing services for the employer, the injury wasn't self-inflicted, and that the accident or occupational disease causing the injury arose out of his or her employment. See Wis. Stat. 102(03).

"Occupational disease" most often incudes afflictions such as lead poisoning, silicosis, hearing loss and degenerative neck or back problems- all conditions where there is a clear link between the work performed and the disease or transmission of the condition from another employee or patron. As an exception to that rule, benefits have been allowed where there has been a clear link between a disease (such as Hepatitis C) and the employee's job (a nurse who routinely worked with Hepatitis C patients and who had several "needle sticks" from syringes used to treat those patients.) However, other communicable diseases that could be contracted from sources other than the workplace have not been considered "Occupational Disease." For example, there are no cases where influenza or SARS has been recognized as an occupational disease.

That changed on April 15 with respect to COVID-19 claims, when Governor Evers signed into law a coronavirus relief package that significantly alters the occupational disease landscape for employees and volunteers infected with COVID-19 as a result of their work in emergency health care or protective services. The law creates a new provision of the workers' compensation law (Sec. 102.06(6)(a)) which is worth quoting in its entirety:

> ".....In this subsection, "first responder" means an employee of or volunteer for an employer that provides fire fighting, law enforcement, medical, or other emergency services, and who has regular, direct contact

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> with, or is regularly in close proximity to, patients or other members of the public requiring emergency services, within the scope of the individual's work for the employer. (b) For the purposes of benefits under this chapter, where an injury to a first responder is found to be caused by COVID-19 during the public health emergency declared by the governor under s. 323.10 on March 12, 2020, by executive order 72, and ending 30 days after the termination of the order, the injury is presumed to be caused by the individual's employment."

What does this mean? Due to this change in the law, if an employee who falls within the law's definition of "first responder" becomes infected with COVID-19, it will be up to the employer to prove a negative, namely that the infection was **not** caused by the individual's employment.

The law leaves many questions unanswered, such as what constitutes "regular, direct contact" and what constitutes "emergency services." Only time, and litigation, will tell.

What about other employees who contract COVID-19? Will they be able to file workers' compensation claims? By carving out this limited exception, the legislature seems to be recognizing that in other respects the traditional definition of "occupational disease" applies, meaning that an employee will probably have a difficult time successfully prosecuting a COVID-19 based claim. Again, only time and litigation will tell.

In a subsequent article we will discuss other areas of potential employer liability in the post-COVID-19 era, including potential claims under OSHA, FMLA, ADA and the CARES Act.