

Workers' Compensation and Employer's Liability

SCOPE OF COVERAGE

Part One ("Coverage A")

Part One covers work-related injury or illness that is either:

- Sustained on business premises
- Due to business operations that an insured company is required to pay under state law

There is normally no limit to this coverage.

The insurer pays all compensation and benefits the employer is legally obligated to pay under its state's workers' compensation statutes, *e.g.*,

- Medical expenses
- Rehabilitation costs
- Some portion of the injured employee's lost wages

Part One typically covers only "occupational diseases."

- Diseases that are unique or peculiar to one's job
- Ordinary diseases of life (like the common cold or flu) are not covered
- COVID-19 may be covered in certain limited circumstances depending on how the individual contracted it, their occupation, and the specific policy

To incentivize employers to purchase this coverage, states usually offer some measure of legal immunity to employers against lawsuits by injured employees.

- "Exclusive remedy doctrine"
- Employee's only remedy is workers' compensation benefits
- Most states have limitations or exceptions to this doctrine that, in effect, can leave an employer exposed to liability (discussed next)

Part Two ("Coverage B" or "1B Coverage")

Part Two insures a company for the obligation to pay damages because of:

- Bodily injury by accident or disease, including death
- If the condition arises out of and in the course of employment
- If there is a legal-recovery theory available to the employee that is beyond the legal immunity protecting the employer under that state's workers' compensation statutes

There are varying situations where an employer may face liability that is protected by Part Two coverage. A common scenario is where an employee successfully sues a third-party for a work-related injury (because the employee was barred from suing the employer directly) and the third-party sues the employer based on negligence under a legal claim for indemnity, contribution, or subrogation.

SUMMARY OF ANTICIPATED CLAIMS

Workers' compensation insurers could soon face an influx of claims from workers who say they contracted COVID-19 while on the job.

Health care workers and **first responders** will be at substantial risk for exposure given the populations they encounter as part of their typical work activities. However, insurers should anticipate many claims by other classes of workers.

COVID-19 is readily transmitted among the general population. Workers may be exposed:

- Using mass transit or air travel
- Routinely facing the general public in retail establishments
- Working in crowded, open-air office spaces

INITIAL COVERAGE CONSIDERATIONS

Most states' workers' compensation statutes provide that an employee is entitled to benefits for "**occupational diseases.**"

"**Ordinary diseases of life**" (those to which the general public is equally exposed) are generally excluded from workers' compensation.

But, if an employee can establish a direct causal connection to the workplace, there may be a valid argument for workers' compensation insurance coverage.

Coronavirus is transmitted primarily through animal or human contact, and is, thus, arguably an "ordinary disease."

- ▶ In the case of first responders, it should be fairly easy to demonstrate work relatedness, given that they regularly deal with populations that are more vulnerable to infection.
- ▶ But, for other workers, even those in customer-facing roles, it may be more difficult for them to prove that their exposure to the coronavirus occurred at work.

ASSESSING COMPENSABILITY: JURISDICTIONAL CONSIDERATIONS

States vary on what constitutes a compensable work-related illness.

For example, in **Florida**, there must be a particular hazard of contraction specific to the claimant's occupation compared to other occupations and a higher incidence of contraction in that occupation than in other occupations.

In **South Carolina**, a contagious disease is not covered for workers who contracted the disease from co-workers or who faced equal exposure while away from work.

In **New York**, there must be a discrete event or series of events which could reasonably be deemed to mark the onset of the infection. Exposure to COVID-19 is not enough. The claimant must have been exposed to a person known to be infected with COVID-19 and then have contracted it.

In **Washington State**, claims from health care providers and first responders involving COVID-19 may be allowed. Other claims that meet certain criteria for exposure will be considered on a case-by-case basis. But, in most cases, exposure and/or contraction of COVID-19 is *not* considered to be an allowable, work-related condition.

But, in **California**, employees sickened by communicable diseases can get benefits by showing they were particularly vulnerable. For example, a Disneyland employee who contracted measles from a 2015 outbreak originating at the amusement park was awarded benefits for the illness. He showed he had been exposed to unvaccinated foreign visitors at the park.

CLAIMS-HANDLING TIPS

Challenge these claims at the outset, particularly as information about the strain is evolving. Can the claimant prove:

- That the risk of contracting COVID-19 is inherent to the claimant's employment
- By competent medical evidence, a specific time/place/person resulting in exposure to COVID-19
- Actually contracting the COVID-19 illness

Consider the burdens of proof for the claimant or the employer.

For example, **Illinois** has a "preponderance of the evidence" ("more likely than not") standard

- ▶ But, it may be very difficult for each claimant to show when, where, or how that virus was contracted.
- ▶ Moreover, the classification of COVID-19 as a global pandemic inherently places the general public at risk.

Florida applies an even higher standard of "clear and convincing evidence" (except for first responders to whom the "preponderance of the evidence" standard applies).

But, for workers at America's busy shipping ports governed by the federal **Longshore and Harbor Workers' Compensation Act**:

- ▶ They are often entitled to a presumption that the illness is related to the work.
- ▶ The employer bears the burden of rebutting the presumption.

Prepare for a case-by-case approach in the near-term because this is a rapidly evolving situation.

SAMPLING OF RECENT STATE-SPECIFIC REGULATORY CONSIDERATIONS DIRECTED AT COVID-19

California

- ▶ The state insurance commissioner issued a “Notice” asking all insurers to “provide their insureds with at least a 60-day grace period to pay insurance premiums ... due to circumstances beyond the control of the insured.”
- ▶ The “Notice” is directed to “all” insurers “that provide any insurance coverage in California,” without any specified exceptions.

New York

- ▶ New York’s governor is encouraging health insurers to cover coinsurance, copays, and deductibles for COVID-19 tests and treatment.
- ▶ In addition, he is pushing an amendment to a bill to encourage or even require additional paid sick leave.
- ▶ With that, and the availability of job-protected and unpaid leave under the Family and Medical Leave Act (FMLA), *there are other avenues available to encourage claimants to process any costs through their private insurance, as opposed to filing a workers’ compensation claim.*

South Carolina

- ▶ The director of insurance said that he has the authority to call for insurers to offer a premium grace period, similar to California.
- ▶ Authority is derived from the South Carolina governor’s emergency declaration for COVID-19.

West Virginia

- ▶ The state insurance commissioner ordered multiple directives in response to the COVID-19 outbreak.
- ▶ For workers’ compensation policies, he directed that an insurer:
 - “Shall” do a premium audit, if the insured requests it, to see if a lower premium is proper “due to the idling, furloughing, laying off or other dismissal of workers”
 - May not cancel or refuse policy renewal because of concerns for COVID-19 or a related state of emergency

FOR MORE INFORMATION OR TO LEARN HOW OUR TEAMS CAN WORK TOGETHER, CONTACT:

David L. Brown

Co-Chair, Global Insurance Services
336.419.4902 | dbrown@goldbergsegalla.com

Damon M. Gruber

Co-Chair, Workers’ Compensation
716.566.5491 | dgruber@goldbergsegalla.com

Jeffrey L. Kingsley

Co-Chair, Global Insurance Services
716.566.5434 | jkingsley@goldbergsegalla.com

Sean J. McKinley

Co-Chair, Workers’ Compensation
516.281.9833 | smckinley@goldbergsegalla.com



California | Connecticut | Florida | Illinois | Maryland | Missouri
New Jersey | New York | North Carolina | Pennsylvania | United Kingdom