

COVID-19 BACKGROUND

A new virus first identified in Wuhan, China in late 2019 has been spreading across the globe and is now in the United States. The new coronavirus, COVID-19, is not a flu but a pneumonia-like infection. Coronaviruses, so called because of their crownlike shape, range from the common cold to SARS-CoV and 2012's MERS (Middle East Respiratory Syndrome). They differ from Avian (H1N1) influenza and swine flu.

On March 11, 2020, the World Health Organization (WHO) declared the COVID-19 coronavirus outbreak as a pandemic. This designation signifies that we are in the midst of a global disease outbreak, which occurs when a new virus emerges for which there is little or no immunity in the human population, begins to cause serious illness, and then spreads easily person-to-person worldwide. There have only been four influenza pandemics since 1900. The most recent pandemic declaration was the H1N1 outbreak in 2009.

- Is it an occupational disease or generalized illness?

It is important to note that the workers' compensation system is a no-fault system, meaning that an employee claiming a work-related injury does not need to prove negligence on the part of the employer. Instead, the employee need only prove that the injury occurred at work and was proximately caused by their employment. Additionally, the virus is not an "injury" but is instead analyzed under state law to determine if it is an "occupational disease." To be an occupational disease (again subject to state law variations), an employee must generally show two things:

- the illness or disease must be "occupational," meaning that it arose out of and was in the course of employment; and
- the illness or disease must arise out of or be caused by conditions peculiar to the work and creates a risk of contracting the disease in a greater degree and in a different manner than in the public generally.

The general test in determining whether an injury "arises out of and in the course of employment" is whether the employee was involved in some activity where they were benefitting the employer and was exposed to the virus. Importantly, special consideration will be given to health care workers and first responders, as these employees will likely enjoy a presumption that any communicable disease was contracted as the result of employment. This would also include plant nurses and physicians who are exposed to the virus while at the worksite.

As for other categories of employees, compensability for a workers' compensation claim will be determined on a case-by-case basis. The key point will be whether the employee contracted the virus at work and whether the contraction of the disease was "peculiar" to their employment.

Absent state legislation on this topic, an employee seeking workers' compensation benefits for a coronavirus infection will still have to provide medical evidence to support the claim. Employers who seek to contest such a claim may be able to challenge the allowance if there is another alternative exposure or if the employee's medical evidence is merely speculative.

- **WHAT IS THE EXPOSURE RISK ?**

The Occupational Safety and Health Administration (OSHA) recently published [Guidance on Preparing Workplaces for COVID-19](#), outlining steps employers can take to help protect their workforce. OSHA has divided workplaces and work operations into [four risk zones](#), according to the likelihood of employees' occupational exposure during a pandemic. These risk zones are useful in determining appropriate work practices and precautions.

Very High Exposure Risk:

Healthcare employees performing aerosol-generating procedures on known or suspected pandemic patients.
Healthcare or laboratory personnel collecting or handling specimens from known or suspected pandemic patients.

High Exposure Risk:

Healthcare delivery and support staff exposed to known or suspected pandemic patients.
Medical transport of known or suspected pandemic patients in enclosed vehicles.
Performing autopsies on known or suspected pandemic patients.

Medium Exposure Risk:

Employees with high-frequency contact with the general population (such as schools, high population density work environments, and some high-volume retail).

Lower Exposure Risk (Caution):

Employees who have minimal occupational contact with the general public and other coworkers (such as office employees).

According to OSHA, those most at risk include:

Healthcare (including pre-hospital and medical transport workers, healthcare providers, clinical laboratory personnel, and support staff).

Deathcare (including coroners, medical examiners, and funeral directors).

Airline operations.

Waste management.

Travel to areas, including parts of China, where the virus is spreading.

- **My employee alleges that they contracted the coronavirus while at work. Will this result in a compensable workers' compensation claim?**

If the employee is a health care worker or first responder, the answer is likely yes (subject to variations in state law). For other categories of employees, a compensable workers' compensation claim is possible, but the analysis would be very fact-specific.

- **If there was an exposure to COVID 19 in the work place is the employee likely to establish a compensable workers compensation claim?**

Each state has different laws around what establishes a work related injury. In most cases an exposure to COVID 19 is similar to an exposure to the flu which would not be compensable. There are exceptions with certain classes of employees and different state jurisdictions.

The employee must still prove that the contagious disease resulted from the work environment.

- **My employee reports to his supervisor that he believes he was exposed to COVID 19 at work because a co-worker who has a confirmed exposure. Does the employer need to report the alleged work exposure to the WC carrier/TPA?**

In most circumstances – no. Exposure does not mean the employee sustained a compensable injury. A compensable injury is one that causes a disability or the need for medical treatment.

- **My employee contracted COVID-19 while on a business trip for my company. Is this a compensable workers' compensation claim?**

While an employee who contracts a disease while traveling for business may be eligible for workers' compensation benefits in many jurisdictions, the analysis will be very fact-specific. In most states, the worker will need to satisfy the test for compensability outlined above. States often differentiate between exposures that occur while "working" during a business trip versus exposures that occur during "down time." Some states create almost strict liability for any injury that occurs on a business trip, whether the employee is working or not.

But again, in order to have a compensable claim, the employee must, at a minimum, establish that they had an exposure to the coronavirus while traveling for business.

- **My employee has been diagnosed with a confirmed case of COVID 19. If that employee reports to his supervisor that he believes he acquired the illness through an exposure at work, what should the employer do?**

Follow your normal employer protocols for when any employee reports an alleged workers compensation claim or occupational disease.

- Complete and incident report and investigation paperwork – this should include who at work they have been in contact with over the 14 days
 - Provide the employee with the proper notices
 - Report the claim to your WC carrier/TPA
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- **If an employee has an exposure to an COVID 19 and is medically removed from work as a result of the exposure is TTD owed?**

No. Temporary disability benefits would not be payable because there has been no injury – an exposure is not an injury

- **Can employers send employees home who exhibit potential symptoms of contagious illnesses at work?**

Yes. If an employee displays viral or influenza type symptoms at work, the ADA Act does not prohibit an employer from encouraging or requesting that the employee leave work.

Note: Employers should instruct their employees to inform management if they have been exposed to the virus or show symptoms of infection, or if they or another member of their household have vulnerabilities such as a weakened immune system.

- **May an employer encourage employees to telework as an infection-control strategy?**

Yes. The EEOC has opined that telework is an effective infection control strategy. The EEOC has also stated that employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation under the ADA to reduce their chances of infection during a pandemic.