NAVIGATING THE COVID-19 PANDEMIC WITHIN YOUR WORKERS' COMPENSATION PROGRAM AND EMPLOYMENT POLICIES

Employers are dealing with a wide variety of issues that have arisen in recent weeks due to the current COVID-19 Pandemic with associated Executive Orders and legislation issued at local, State and Federal levels. This includes the question of whether exposed employees who present claims for benefits are covered under the Illinois Workers' Compensation Act and Occupational Diseases Act. Due to the rapid onset of this crisis, there simply has not been time for cases involving these issues to be presented to the Illinois Workers' Compensation Commission for hearing. Nonetheless, the Commission has begun to set out some direction on how it intends to address these cases.

1. **Emergency Rule Change**

On April 13, 2020, the Illinois Workers' Compensation Commission adopted an emergency rule which effectively amends both the Workers' Compensation Act and Occupational Diseases Act.

The rule states that employees who are First Responders or Front-Line workers and who develop COVID-19 are rebuttably presumed to have contracted the disease in connection with his or her employment. The definition of "First Responders" and "Front-Line Workers" is quite broad, and encompasses all workers designated as essential in the Governor's "stay-at-home" Order, as follows:

a. Police, Fire, Emergency Medical Technicians or Paramedics
b. Health Care Providers engaged in patient care
c. Corrections Officers
d. Crucial Personnel Identified in Executive Order 2020-10 which included:

i. Stores that sell groceries and medicine
ii. Food, beverage, and cannabis production and agriculture
iii. Organizations that provide charitable and social services
iv. Gas stations and businesses needed for transportation
v. Financial institutions
vi. Hardware and supply stores
vii. Critical trades
viii. Mail, post, shipping, logistics, delivery and pick-up services
ix. Educational institutions
x. Laundry services
xi. Restaurants for consumption off-premises
xii. Supplies to work from home
xiii. Supplies for essential businesses and operations
xiv. Transportation
xv. Home-based care and services
xvi. Residential facilities and shelters
xvii. Professional Services
xviii. Day care centers for employees exempted by the Executive Order
xix. Manufacture, distribution and supply chain for critical products and industries
xx. Critical labor union functions
xxi. Hotels and motels; and
xxii. Funeral services

This emergency amendment states that a COVID-19 infection is presumed to be caused by people working the professions/industries listed above. If an employer wishes to challenge a COVID-19 exposure claim, they will need to obtain a medical opinion or provide evidence that the exposure came from a source other than one related to work, which will then shift the burden of proof back to the employee

We suspect this amendment will face legal challenges for several reasons, including that the emergency meeting wherein the amendment was implemented violated the Open Meetings Act due to lack of timely notice. Furthermore, a substantive amendment to the definition of compensability requires a statutory (legislative) remedy, and the IWCC's action therefore exceeds its rule making authority.

The remainder of this memorandum provides an analysis for those employers not impacted by the Emergency Rule Change, or in the event the rules process resulting in the adoption of the Emergency Rule is deemed to have been invalid.

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2. **Compensability:** Generally, both the Illinois Workers' Compensation Act ("WCA") and the Workers' Occupational Diseases Act ("ODA") address claims of work place exposure to injury and disease. Claims under with Act fall under the purview of the Illinois Workers' Compensation Commission. Much of the language of the Occupational Diseases Act mirrors that of the Illinois Workers' Compensation Act and handling procedures as well as the Commission's approach to both are substantially the same. With respect to COVID-19 a claim for benefits would most probably be made under the Occupational Diseases Act, although some will likely be filed under the Illinois Workers' Compensation Act as well. Both Acts establish that in order to be compensable, the injury or condition must arise out of and in the course of a person's employment. The ODA adds a substantial amount of language outlining its meaning of "compensability" given the more nebulous nature of exposure to a disease as opposed to a specific injury.

According the plain language of either Act, a claim for benefits based upon an ordinary work place exposure to COVID-19 could be found compensable. Absent the Emergency Rule Change, the burden of proof will remain on the employee to establish that the disease was contracted as a result of work place exposure rather than general public exposure. But in principal, COVID-19 claims may result in benefits where this burden is met. Employers should approach these claims as they would under any other circumstances in terms of documenting initial reports by employees, notifying insurance carriers and implementing applicable internal work place polices and procedures.

3. **Initial Testing:** It does not appear that a claim based solely on potential exposure without development of symptoms or even a positive test for COVID-19 should be considered compensable as no true "injury" or "disease" actually exists. Therefore, we do not view an employee making initial allegation of exposure or requesting that initial testing be processed through workers' compensation is enough to establish a claim in itself. We recommend that TTD benefits for an employee who is off work due to a potential exposure not be paid and compensation for that employee would probably be handled as an employment matter subject to recently updated statutes such as the Families First Coronavirus Response Act (FFCRA). An individual making a claim prior to actually developing symptoms or testing positive for COVID-19 is acting prematurely and that claim should be denied. We recommend advising employees with questions about initial testing or potential exposure to process such testing through their group health insurance, if applicable, rather than try to put such testing through the workers' compensation program. However, should you decide that it is in your organization's best interest to make sure that all relevant employees are tested, the Illinois Workers' Compensation Act is very clear, that payment of such a medical benefit is not an admission of liability. If you choose to pay for testing under you workers' compensation program, you will reserve any rights and defenses you would have as to any other claims, whether it is accepted or denied.

4. **Confirmed Cases:** Due to the wide nature of this Pandemic, there will likely be claims which can be defended on the basis of an individual's employment not creating an increased risk of exposure relative to the general public, and we may ultimately be able to show alternate avenues of exposure that are enough to present a Petitioner from sustaining the burden of proof. Like any other claim, a COVID-19 claim is not automatically compensable.

However, particularly in light of the recent Emergency Rule Change, it is anticipated that the Commission may take a dim view of employers who issue blanket denials of COVID-19 cases, particularly those where there is a confirmed exposure. For employees who do contract the actual disease and notify you of their claim, whether filed with the Commission or not, we strongly recommend handling such claims as they would be ordinarily be handled for other injuries or exposure claims. Individual claims, and defenses to those claims, should continue to be handled on a case by case basis.

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5. **High Risk Employees:** Although this disease is present at this point throughout our world, the Illinois Workers' Compensation Act and Occupational Diseases Act do view certain types of employees as more likely to be able to show an increased risk than others. These are individuals who more routinely come into contact with members of the public who have been exposed and therefore will be more likely to be able to prove an increased risk of exposure – police officers and firefighters, paramedics and workers in the health care industry do meet this increased risk. Furthermore, employees who travel as part of their employment and who are currently deemed essential and therefore not subject to State and Municipal Stay at Home Orders could also fall into this category of an increased risk of exposure. Municipalities in general should be aware that their public-facing employees such as First Responders may be able to show an increased risk of exposure due to the nature of their employment, even without the protections of the recent Emergency Rule Change.

Non-first responder employees who are also working in essential industries who are exempt from the current Stay at Home Orders could argue that they are subject to an increased risk due to the "essential nature of their jobs." In the absence of the Emergency Rule Change, our position is that unless the employee can show an exposure directly related to a risk associated with their employment, there claim would be adopting the Positional Risk Doctrine. The Positional Risk Doctrine stands for the proposition that any injury an employee suffers while at work is compensable. Illinois has not adopted the Positional Risk Doctrine, and it is not the law under the WCA and ODA.

6. **Rebuttable Presumption:** Before the Covid-19 crisis, under both Acts, firefighters, EMTs and paramedics were already provided a substantial additional protection in the form of a "rebuttable presumption" that certain types of exposures are related to their employment. Several types of exposures are singled out, but the most pertinent to our current COVID-19 issue is "lung or respiratory disease." Due to the rapid onset of this Pandemic, there is not yet existing case law establishing that COVID-19 will be treated by the courts as a "lung or respiratory disease."

7. **Known Exposure:** If an employee sites a specific instance of exposure through their employment to someone who has tested positive COVID-19, it is expected that their likelihood of providing a work place exposure will be greater. This may ultimately mean that a chain of employee claims could result from an employee testing positive due to the basic nature of the virus. While this is not an automatic finding by any means, we do expect that a positive testing employee, who is able to show that another individual with whom they had contact had also earlier tested positive will be more likely to prove an increased risk of exposure due to their employment than an employee that is not able to make that showing.

8. **Benefits:** Under the Illinois Workers' Compensation Act, Petitioners are entitled to medical benefits, time loss benefits and potential benefits should an injury or occupational disease result in permanent disability.

a. **Medical Benefits:** If an employee is exposed to the COVID-19 virus as a result of a work-related exposure and develops he symptoms to the extent that require medical attention, medical benefits under §8(a) of the Illinois Workers' Compensation Act are indicated, just as they would with any other accidents or injuries. However, as mentioned earlier, if medical benefits are paid and it is later learned that the person either did not have COVID-19 or that the exposure was not related to work, payment of said benefits is not a bar to defending of denying the claim at a later time.

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b. **Time Loss Benefits:** Employers have taken several different approaches to addressing potential time loss. Some employers, when learning of a potential exposure or development of symptoms have decided to tell the affected employees to stay home for two weeks and pay them for their time loss for their time away from as a preventative measure. This is a reminder that payment of such benefits is not ultimately an acceptance of the claim.

If an employee is on light duty, not yet at MMI and there is no light duty available because of the COVID-19 crisis, but the rest of the workforce for the employer is working, then TTD benefits are owed. However, if an injured employee is not at MMI with work restrictions and has been laid off, furloughed or terminated as part of a company-wide policy affecting all employees, TTD benefits would not be owed because the inability to provide light duty work is based upon widespread economic conditions and not something specific to the person's claimed injury.

c. **Permanency**: Due to the rapid onset of this disease, the wide range of symptoms that those have contracted it seem to experience, and the dearth of information as to long standing permanent effects of the disease, it is difficult to fully assess potential exposure for such claims.

If an employee tests positive, has symptoms for a couple of weeks, recovers to baseline and has no obvious long-lasting symptoms then the potential permanent value of the claim is likely minimal.

Please note that with Covid-19, even after the disease has run its course and the affected employee appears to have returned to their baseline function, new medical information may surface which reflect that a person who contracts COVID-19 may have permanent lung damage. We have heard stories that some autopsies of people who have presumably died from COVID-19 show lung damage which could be considered permanent. If that is true, that certainly could have an impact on the value of a claim even for an employee who appears to have otherwise recovered.

With this in mind, please note that jurisprudence and medical information as to the full effects of COVID-19 may be delayed until such credible research and reporting is completed. We suspect that for cases filed under the WCA or ODA for otherwise seemingly healthy individuals who did suffer from a work related COVID-19 exposure, there may be demands for additional medical procedures to evaluate if in fact there is any permanent damage done to their longs or edited in their lungs and we will have to be diligent in challenging any such medical allegations that are not substantiated in peer review literature.

9. **Further Employer Obligations:** The recently enacted Families First Coronavirus Response Act ("FFCRA") provides benefits for Employees and requirements on Government Employers. The FFCRA contains the Emergency Paid Sick Leave Act ("EPSLA"). This advice is limited to an employee that contracts COVID-19 (with either a confirmed test or advice from a medical provider that they may have COVID-19 and should self-quarantine. Please note that the FFCRA is expansive and has other basis for leaves including the Emergency Family and Medical Leave Expansion Act ("EFMLEA") which amends Title I of the Family Medical Leave Act ("FMLA"). The FFCRA provides employees with the following:

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- Two weeks (up to 80 hours) of ***paid sick leave*** at the employee's regular rate of pay (subject to caps) where the employee is unable to work because the employee is quarantined (pursuant to government order or advice of health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period (if schedule varies, six-month average is used).
- Caps: For paid sick leave at regular rate of pay, the employee is paid regular rate or minimum wage (whichever is higher) up to $511 per day and $5,110 in the aggregate 2-week period.
- Notice can be Oral at first, but the Employer should require follow-up written notice with additional information including (1) Employee's Name; (2) the date or dates for which leave is requested; (3) a statement of the COVID-19 related reason the employee is requesting leave; and (4) a statement that the employee is unable to work, including by means of telework, for such reason.
- If leave request is based on a quarantine order or self-quarantine advice, the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine.
- The employee must also provide "written support" or documentation of the COVID-19 related reason for leave. In this instance, sufficient documentation would be a written government order or health care provider's note advising an employee to quarantine because the employee has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19, or a health care provider's note confirming that the employee has or had symptoms of COVID-19 and sought related medical treatment.
- No Carryover/Payout: There is no carryover of unused hours into subsequent years or payout upon termination.
- Please note that work must be available. If an employee is subject to a Stay-At-Home order (for Illinois, a non-essential job function/service), then the employee may not take paid sick leave where the employer does not have work for the employee. Local Government is exempt from the current Illinois Governor's Stay-Home Executive Order, but this could be updated.
- Likewise if an employee has symptoms and is under advise/order to self-quarantine, and telework is available from the employer and the symptoms do not prevent the employee from performing telework duties, the employee may not take sick leave.
- A violation of the Sick Leave Portion of the Act is a minimum wage violation under the Fair Labor Standards Act, which can include lost wages, liquidated damages, attorney's fees and costs. Intentional violations may result in up to a $10,000 fine and, for repeat offenders, up to six months in prison after a prior conviction.

10. **Notice to Other Employees**: If an employee reports a positive test result or reports experiencing symptoms of COVID-19, the employer should determine which other employees may be affected based on CDC guidance in an ADA-compliant manner. An employer's obligation is to take reasonable steps to protect the confidentiality of the positive test result by (i) not identifying the employee by name, and (ii) avoiding, to the extent reasonably feasible, making other references that would permit a manager or co-workers to guess that an employee has been infected. While the employer cannot prevent speculation in the workplace, it must take reasonable steps not to contribute to it. The employer should, however, generally inform co-workers who may have had contact with the employee that they may have been exposed and may wish to see a health care provider to monitor their health. However, under the ADA, an Employer can request and an Employee can give a truly voluntary disclosure, thus allowing the Employer to inform co-workers who tested positive.

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In determining who the Employer should notify of a potential exposure, the factors that the CDC recommends considering are: (1) Who was in "close contact" with the employee, meaning within 6 feet; (2) Whether the exposure was for a "prolonged" time period, which could be up to a half hour; and; (3) Whether the prolonged close contact occurred within the 48-hour period before symptoms developed. Current guidance suggests that employees who had prolonged close contact with a symptomatic co-worker during the 48-hour period before symptoms developed should stay home for 14 days to monitor for symptoms. This 48-hour lookback period is shorter than prior recommendations and should be more manageable.

As you navigate this crisis on a personal, professional and corporate level, please know that Power & Cronin is here to support you. We are happy to talk to about these issues and further discuss the best way to navigate these trying and rapidly moving times. We will continue to provide guidance as the situation changes.