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COVID-19's impact on California workers' compensation insurance exposure

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As employers are facing the devastating effects of COVID-19, a question arises whether an employee who tests positive for COVID-19 and loses time at work due to illness may recover from his or her employer under California workers' compensation law.

As a preliminary matter, California workers' compensation law applies to employees who are performing services regardless of whether they are working on-premises or remotely. This means that California workers' compensation law applies to employees working from home under current state and local "shelter in place" orders. Assuming these workers maintain proper social distancing, they present relatively few concerns to the employer about compensable viral exposures.

Of larger concern are employees who are continuing to work outside the home because they are employed by businesses that provide "essential services," or because the employees cannot work remotely and are needed to provide minimum basic operations such as the necessary activities to maintain the value of the business's inventory, ensure security, process payroll and employee benefits, or for related functions. These employees present the greatest risk of viral exposure claims.

Generally speaking, most viral exposures faced at work are considered "nonindustrial" and are therefore not compensable under workers' compensation law due to the difficulties associated with showing that the employee was exposed to the virus at work, instead of during his or her daily commute or other social interactions. However, there are two exceptions where an employee might be able to recover: (1) where the employment subjected the employee to an increased risk of contracting the disease, compared to the risk posed to the general public; or (2) if the disease is caused by an intervening human agency or instrumentality of employment. *LaTourette v. W.C.A.B.* (1998) 17 Cal.4th 644, 654.

COVID-19 is far too new to have been the subject of any definitive guidance. However, we can look to California case law discussing other industrial diseases and exposures to guide us in navigating these waters.

One relevant example, related to whether the employee was subjected to "increased risk," is published law addressing the onset of "Valley Fever," an infectious fungal disease, coccidiodomycosis. Valley Fever was a disease contracted by "inhaling fungal spores that [became] airborne after disturbance of contaminated soil by humans or natural disasters." *Id*. at 1329. In some cases, these spores would travel far and wide as "[s]trong winds [could] carry spores of the *Cocci*fungus for hundreds of kilometers. Therefore, in certain circumstances infection can be spread well outside of recognized endemic areas." *Id*. Furthermore, "[a]bout 60 percent of the people infected are asymptomatic, their exposure to the infection being reflected only by a positive . . . skin test." *Id*. at 1330. Therefore, where Valley Fever was considered endemic to a large portion of California, "'the exact source (home, recreation, work, travel, etc.) of the exposure [could not] be determined absent scientific data, e.g., soils tests, confirming the existence of the *Cocci* fungus in the soil at issue at the time of exposure.'" *Id*. at 1336; see also *Pacific Employers Ins. Co. v. Industrial Acc. Commission* (1942) 19 Cal.2d 622, 628 ("It is, of course, a fundamental principle that the disease must be contracted in the course of the employment, and the burden of proof thereof rests upon the applicant").

If the employee is able to show that "the risk to which he was subjected by his employment was not the same as that of the public in the endemic area inasmuch as the great majority of the inhabitants there possessed an immunity." *Id*. at 574. Therefore, we can envision situations where this could arise, especially for front line personnel in the health care field. Complicating matters is that, under the statewide "shelter in place" order, most of California's workforce are working remotely or not working at all, making any workplace risk probably greater, in a relative sense, than what it would have been otherwise.

For companies that have workforces still on-premises, we recommend using only the smallest number of employees necessary to provide the service, consistent with "essential services" restrictions, providing personal protective equipment, eliminating shared equipment, regularly disinfecting all surfaces, and creating at least six feet of space between workers. Anyone who is sick or exhibiting viral symptoms should be ordered to stay home. Additional measures may be necessary depending on the employment. All steps should be taken to document these protections.

For more information on the content of this alert, please contact our Coronavirus Response Team, your Nixon Peabody attorney, or:

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