

**From:** Edward Moriarty, Jr.

**Sent:** Monday, July 27, 2020 10:13 AM

**Subject:** M&A Email Alert re Overview of COVID-19 And Massachusetts Workers' Compensation

To our valued clients:

Please see the below information regarding Worker's Compensation in Massachusetts and how claims will potentially be affected by COVID-19.

This article will focus on 3 main areas, the legal perspective and the compensability of COVID related claims, the claims perspective and suggestions on how to handle a COVID claim, and then mitigation exposure and best practices for implementing measures to minimize potential workers compensation claims.

We hope you find this information useful, but in addition to the below please know that M&A is committed to educating and training on this topic as needed and can be made available safely in person or via zoom platforms.

### **OVERVIEW OF COVID-19 AND MASSACHUSETTS WORKERS' COMPENSATION:**

Over the past few months, states have been vigorously working to propose and enact new laws, orders, and guidelines regarding the compensability of workers' compensation benefits for employees who contract or come in to contact with COVID-19. This has been done in anticipation of wave of claims from employees. It is increasingly important that employer's stay on top of the developments as Massachusetts reopens its economy and the potential for costly worker's compensation claims increase substantially.

Many states have created a "legal presumption" for defined essential employees who have contracted COVID-19 which presumes that it was contracted on the job and in the scope of employment.<sup>[1]</sup> The burden shifts in these states from the employee proving that she contracted the disease on and in the scope of employment to the employer proving that he or she did not contract the virus on the job.

### **LEGAL PERSPECTIVE – MASSACHUSETTS:**

Massachusetts is not one of these presumption states. We must determine how to respond when a claim is received, how to perform a compensability analysis and how to take steps to mitigate these claims.

In Massachusetts, "Personal injury" includes infectious or contagious diseases if the nature of the employment is such that the hazard of contracting such diseases by an employee is inherent in the employment. <sup>[2]</sup> Thus, the common cold or flu, are not

traditionally compensable whereas contracting COVID-19 while working as a nurse, doctor, CNA, or EMT treating patients with COVID-19 would likely be compensable.

Since MA has not created a presumption for essential employees, employees are still required to prove that they contracted COVID-19 at the workplace and that it can be tied to their specific employment (i.e not at some work related social gathering if one were to occur in these conditions) to a reasonable medical certainty based on expert medical opinion and evidence.<sup>[3]</sup>

### **CLAIMS ANALYSIS:**

First, where are COVID-19 Claims coming from? Until May 18, 2020 only essential businesses were open, including the majority of high risk employees in healthcare, first responders, grocery store and food service employees, delivery drivers, and the like.

It is in the employee's best interest to report their COVID-19 compensation claim as early as possible. This the point that it was acquired at work. Once the claim is timely reported, it is crucial that there a thorough claims investigation follows.

First, analyze the case. Ask the following: Has claimant been tested? Is there a link to the claimants work? Was there a greater risk of transmission than general public based on job/activity? Is there a medical record? Corroborating statements of the employee, coworkers, and/or supervisor? Are there available results?

**Assuming a positive test comes back, then ask what the likelihood is that COVID-19 was contracted at work. Questions to ask after a positive test.** Has claimant been traveling? Does claimant have family members or friends who have tested positive? Has claimant been to large gatherings in weeks prior to exposure? Does claimant have a family member who is a first responder or healthcare worker? The more non-industrial sources of viral exposure, the less likely employment is causation.

Not every case, is going to be straight forward. In addition to physical symptoms for which an employee requires time off and treatment, there are bound to be significant psychological symptoms that give rise to compensable claims. There are two basic COVID-19 typologies: those who suffer mental health conditions because they are front line workers and constantly exposed to COVID-19 patients symptoms, suffering and death, and those who actually contract COVID-19 and are too nervous to work or return to work even when advised it is safe to do so.

How do we analyze these cases? Some questions of probative value include (1) whether there is a greater risk than the general public of having the resulting fears, anxieties, substance dependencies, etc. (2) does the patient have prior mental health

conditions (3) can the mental health claim be pin pointed to one specific event or specific repetitive nature of the job?

### **MITIGATION EXPOSURE:**

To prepare for the likely increase in workers compensation claims associated with COVID-19, employers need to take proactive measures to protect their employees' health and safety<sup>[4]</sup>, continue to communicate with their employees, and be proactive in implementing measures to minimize potential workers compensation claims. As this situation develops, employers should continue to consult with their human resource department and legal to amend their best practices as changing circumstances dictate.<sup>[5]</sup>

Even if employers take all possible measures to limit the risk of COVID-19, the employee can still prove her claim. Employers should notify employees of best industry practices to identify possible COVID-19 symptoms as well as ways combat the spread of the disease. Employers should strongly consider allowing employees to work from home where it is substantially less likely an employee can causally relate contracting COVID-19 to the workplace.

Employers also need to create a safe work environment. This means adhering to the state and local mandates regarding social distancing, personal hygiene, staffing protocols and effective, deep cleaning.

Remember, employees need to feel safe, and have a right to a reasonably safe environment. Employees need to be their own safety advocate and are aware of how to stay safe and keep others safe. A well-educated employee regarding the matter of the virus and public health knowledge of COVID-19's course and treatment, including prevention is the order of the day.

1. States through either Executive Order or Legislation include Alaska, Arkansas, California, Illinois Kentucky, Michigan, Minnesota, Missouri, North Dakota, Utah, Washington, and Wisconsin. This is an evolving list as more states address the issue.
2. *M.G.L Chapter 152 § 1 (7A)*
3. See e.g. Camilo Diaz Puntiel v. Demoulas Supermarket Board No. 027158-13
4. See Governor Baker's Mandated Safety Standard at <https://www.mass.gov/info-details/reopening-mandatory-safety-standards-for-workplaces>
5. See Governor Baker's Daily Dashboard at <https://www.mass.gov/info-details/covid-19-response-reporting>

Very truly yours,

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