**WORKER’S COMPENSATION IN THE TIME OF COVID**

                                        By: Teresa Ward – Founding Partner, MSKW LLP



As you may have heard, on **Thursday September 17, 2020,** California Governor Gavin Newsom signed into law the bill solidifying the COVID-19 presumptions which impacts employers and their workers compensation carriers.

COVID-19 is full of statistics and information each day. From confirmed cases to projected timelines of vaccines. We are inundated in our personal lives with this pandemic and now, in our work lives, as individuals who deal with Worker’s Compensation as our career choice, it is our most prevalent topic.

As of September 8, 2020, California has 40,109 COVID-19 related reported workplace injuries. 38.3% of these are health care workers, followed by 15.6% for safety and government workers, and then retail (7.6%) and manufacturing (7.5%). These statistics can be broken down by county, by age group, by denial status and you can look at the information month by month. (*See:* <https://www.cwci.org/CV19claims.html>*).*

So, with all this knowledge accessible, it is interesting to combat the feeling of frustration at what **to DO** in this unusual time.

We want to start the process of helping. We are here to help as this settles and shapes out, and to give ideas on how to handle COVID-19 in your current work life.

**WHAT WE KNOW**

We know, for certain now, that the presumption that the Governor created by executive order in May, is lasting. Senate Bill 1159 is effective immediately. It clarifies the presumption that any worker who test positive or who has a diagnosis of COVID-19, so long as they have worked within 14 days prior, starting March 19, 2020 through January 1, 2023, has the benefit of an industrial presumption.

For **healthcare workers, police officers, fire fighters** and providers of home health/in home support services, the presumption of compensability is triggered so long as they test positive have a diagnosis within 14 days of the last date of work, if not rejected/denied within 30 days  of notice based on discovery of evidence to rebut contraction in the work place.

For **all other areas of employment**, this presumption applies if the employer has more than **5 employees** **AND**:

1. The worker has been required to go to the place of employment at the employer’s direction in the **14 days** prior to the positive test (this is clearly noted that “place of employment” does NOT include an employee’s residence).
2. There is an **outbreak threshold** reached. For employers under 100 workers, this is 4 people testing positive. For employers over 100 workers, there is a **4% requirement.**
   1. This is applied in a **14-day window** before and after the reported positive test.
   2. It is **site specific**, so for larger employers, you would look at the **site the employee worked out of** and **determine the number of employees** at each particular site the employee has worked at in the last 14 days. In the case of an employee who performs work at the employer’s direction in multiple places of employment within 14 days of the employee’s positive test, the employee’s positive test shall be counted for the purpose of determining the existence of an outbreak at each of those places of employment, and if an outbreak exists at any one of those places of employment, that shall be the employee’s “specific place of employment.”
3. There is **45 days from the date of the claim form** being filed to determine compensability. *Any claim* ***not denied in 45 days*** *is* ***deemed compensable***.

These are the rules for the presumption to apply. If you have a smaller than 5 people employer, or you have employer does not reach the 4 person/4% rule, a worker may still file a claim, but it is not subject to the presumption or the tighter 45 day requirement. The worker then must prove by a preponderance of the evidence that they contracted COVID-19 at work.

Please note, this bill does now include death benefits but it is confirmed that the Depart of Industrial Relations will waive the right to collect any death benefits payments and it does expand the possible medical professionals who can diagnose COVID-19. Sick time is to be used prior to eligibility for temporary disability.

For a worker to continue to get **temporary disability**, the worker must be certified for temporary disability been the first **15 days** after the initial diagnosis, and shall be recertified for temporary disability every 15 days thereafter, for the first 45 days from the diagnosis.

We want to reinforce that this bill does provide some relief from the initial executive order in terms of an additional 15 days to decide if the presumption applies, as well as to require an outbreak threshold requirement. In addition, the bill solidifies what we in the Defense world have been focusing on, there ARE relevant avenues to controvert the presumption of compensability, such as: evidence of measures in place to reduce potential transmission of COVID-19 in the employees place of employment, and evidence of an employee’s non-occupational risk of COVID-19 infection. Lastly, it does specify the **date of injury** on COVID-19 cases as the **last date the employee performed work** at the place of employment (which will allow for clarity for Applicant’s Attorneys who have taken to filing cumulative traumas AND specific injuries).

**So first steps first:**    When you receive a report of a possible workplace COVID test, we recommend a call to the employer and to the employee to find the basis of the evidence to determine whether this should in fact be presumed compensable. This is the ever-evolving list of questions we have been recommending to ask:

**QUESTIONS TO ASK:**

1. **Positive Test** – when did the worker submit to the testing?
2. What **caused** the worker to get tested (this could be a place to hear that their husband tested positive, a friend tested positive, or that they had symptoms)?
3. Was there a **confirmed diagnosis**? Do you have a medical report, if so, please obtain a copy of it?
   1. Confirm the diagnosis is by a licensed physician or surgeon holding an MD or OD degree or state licensed physician assistant or nurse practitioner acting under the review or supervision of a physician and surgeon pursuant to standardized procedures or protocols within their lawfully authorized scope of practice, and that diagnosis is confirmed by testing or by a COVID-19 serologic test within 30 days of the date of the diagnosis.
4. Did the **employer require** the employee **come to the place** of employment?
5. Does the worker have **other jobs**, if yes have they been to those jobs in the **last 14 days**?
6. What **measures** has the employer put into place to prevent or reduce the potential transmission of COVID-19 within the workplace
   1. Cleaning Schedule
   2. Spacing
   3. Masks/Gloves protocol
   4. Limitations on interaction with the public
7. What knowledge exists of **non-occupational avenues** of COVID-19 infections, simply what are the non-workplace activities, any knowledge of activity on social media, any participation known in large social gatherings etc.
   1. How many people in the household?
   2. Children are they in childcare facility.
   3. Are there any **known outbreaks** with the family members and those additional locations of employment?
   4. whether they have been **following quarantine guidelines**
   5. Are there **any family members living in the residence** **testing positive**, or do they have any other known exposures?
   6. Can they recall being at **places outside of work** for they may have contracted the virus such as school, stores, restaurants, gyms, or large social gatherings?
   7. Has there been any visitation of **family members or friends outside the home?**
   8. Whether they have any children, and if these **children have exposure** **to activities** with friends, sports school?
   9. Are there any **prior respiratory problems** or pre-existing conditions?
   10. Have they ever **smoked of “vaped**”?  If so, duration and extent of same?
   11. Do they drink **alcohol or use recreational drugs**? If so, duration and extent of same?

The above analysis provides our first steps into this new issue of a communicable disease being potentially presumed industrial.

We are all working together, as new issues are bound to arise as we start to apply this to actual cases.

We are here to help navigate the unique and unusual cases as they arise for you, so please do not hesitate to contact us with any questions or concerns.