



# The Next Wave: COVID-19 Workers Compensation and General Liability Claims Likely to Spike

By David G. Jordan & Jeffrey J. Vita

To state the obvious, the global "COVID-19" pandemic has resulted in substantial financial losses for many businesses and furloughed workers. Forced shutdowns, lower consumer demand, and reduced capacity/shortened hours of operation have translated to lower revenues for many companies, causing them to make hard decisions. These tough choices include cost-cutting measures (layoffs or furloughs), bankruptcy restructuring, or even permanent closure. Numerous articles, including [articles](#) from this office, have chronicled the challenges and associated legal disputes that struggling entities have encountered with their property insurers – an obvious source of potential relief – regarding whether COVID-19 constitutes physical loss or damage and related business interruption claims. However, as the number of gravely ill infected persons declines and businesses start to reopen (or expand the scope and hours of their operations), and welcome back the public into their facilities, another challenge has emerged – the risks of virus exposure to those employees called back to their office buildings, storefronts, or other public settings (and away from the safety of their homes). With these added risks, the focus upon insurance not only concerns property policies but also involves coverage under workers compensation/employer liability and commercial general liability programs. Claims under these lines of policies are likely to increase dramatically in the near future.

Those contracting the novel coronavirus may be apt to blame their employers' return to work mandates as the cause of their condition. A recent article published in the *Wall Street Journal* has reported a swath of lawsuits filed by workers deemed essential to the public welfare, including those working in meat-packing plants, contractors, and healthcare providers seeking recovery against their employers for bodily injuries related to contracting the coronavirus. Other industries re-opening, or set to reopen, may ultimately face similar exposure to such bodily injury actions. (No doubt, schools and universities set to open in September are assessing this very dilemma). Given that COVID-19 can be contracted virtually anywhere, and at any time, the pivotal issue involves the demonstration of adequate proof of virus exposure in the workplace.

The outcome of an employee's ability to recover against his/her employer for injuries related to COVID-19, either as a workers compensation claim (which is typically the exclusive remedy for work-related injuries) or in a civil action (for claims where the employer's alleged behavior is outside the scope of workers comp. - such as willful misconduct or conduct substantially certain

to cause injury or death), will likely depend upon the (1) amount of evidence supporting the connection between the employment activity and the contraction of the virus; (2) the nature of the employment - establishing COVID-19 illness as work-related may be easier to demonstrate in high-risk types of work (such as those in the medical profession) than for other types of work; and (3) the law of the particular jurisdiction where the injury was suffered concerning the establishment of an occupational hazard. As to this last point, state law can vary dramatically.

In Florida, for example, a rigid standard generally applies to prove that injury from an infectious disease is work-related. See FLA. STAT. ANN. § 440.151. However, exceptions have been recently established by executive directive as to "Frontline State Employees" (i.e., first responders, correctional officers, state employees working in healthcare, child safety investigators and members of the Florida national guard), which create a rebuttable presumption that any of these categories of workers suffering from COVID 19 will be deemed work-related unless the employer (the State) can clearly establish otherwise. See Press Release, Jimmy Patronis, Florida's Chief Financial Officer, CFO Patronis Directs Florida to Provide Workers' Comp Coverage for Public Servants on the Front Line of COVID-19 (April 1, 2020)(on file with Florida CFO). Illinois has similarly passed legislation related to "Frontline Workers and Essential Employees." As for other professions, the burden of proof still remains with the employee. See. 820 Ill. Comp. Stat. Ann. 310/1 (g).

California, by comparison, enacted a much broader mandate that created a rebuttable presumption in favor of the employee, without restriction upon the type of work, provided that (1) the employee received a COVID 19 diagnosis (or tested positive for the virus) within 14 days of working at the direction of his/her employer; (2) the individual was working after March 19, 2020; (3) the employee was working outside of his/her residence; and (4) the diagnosis was by a physician licensed in CA. The burden then shifts to the employer to demonstrate that the employee contracted the virus elsewhere. See *California Governor Gavin Newsom Executive Order N-62-20* (The order expired on July 5th, but it remains to be seen if it will be revived). Texas is at the other end of the spectrum, with the burden of proof placed squarely on the shoulders of the employee without consideration for the type of work performed, and no executive orders or legislation regarding COVID 19 as applied to high-risk workers See *Mueller v. Charter Oak Fire Ins. Co.*, 533 S.W.2d 123, 126 (Tex. Civ. App. 1976) (holding that there must be "a probative force of a causal connection" between the employee's work and the illness to establish a claim for an occupational disease)

Further adding to the complexity of the issue is potential federal legislation curtailing worker injuries from COVID 19, in response to concerns from companies and public agencies whose re-opening is vital to the economy and the well-being of American citizens. There are differing views within Congress as to whether such immunities from suits by allegedly injured workers should be extended to a broader group of industries and "if so" to whom and under what limitations should the immunities be extended (Republicans are largely in favor of such immunity protections and Democrats are largely against). These issues aside, it is clear that there will soon be no shortage of allegations of work-related COVID-19 injuries, which will have a substantial impact upon the Workers Compensation and General Liability markets.

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