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PROTECTING YOUR LEGAL RIGHTS DURING THE CORONAVIRUS/COVID-19 OUTBREAK

There has understandably been great deal of public concern regarding exposure to and the contracting of COVID 19 infection. That is true for public employees as well as the private sector workers, from blue-collar workers to office workers. Governmental agencies, the media, and online publications have provided much information regarding how to stay safe, the steps to take to continue limiting further catastrophic outbreaks of the disease and to help further the "flattening of the curve" of new cases. Our office has been fielding numerous questions about what workers should do if they believe they have been exposed to COVID-19 on the job, and worse, what they should do if they have tested positive for the disease. Here is some information we hope will help protect your members going forward.

Although a "Presumption Bill" is being considered by some NYS Legislators, it's anyone's guess as to when such a bill will actually be enacted. Until such time, here's what health care workers need to know.

At the present time virtually all health care workers in the metropolitan area have been drafted into the war against COVID-19. Not only is it an aspect of their job but also a **requirement** of the job. Social distancing may be practical within an office environment or among co-workers and neighbors. However, in many of the types of health care occupations, there is no way to limit the exposure that one might have from a member of the general public. When a health care worker members contracts COVID-19 disease in the line-of-duty and desires to make a work-related claim for illness or worse yet, his or her family needs to file a claim for workers compensation death benefits, employers, insurance carriers or self-insured third party administrators will undoubtedly contest such a claim on the grounds such cases are not covered under either established line of duty policies or under the Workers' Compensation Law.

Cases involving the contraction of an illness, like COVID-19, a condition to which the general public is widely exposed, are incredibly difficult to prove. However, in certain scenarios, with the proper evidence, a nexus can be established between the exposure while working and the disease.

We suggest that health care workers come into direct contact with PATIENTS afflicted with COVID-19, they should document that exposure with the employer, in writing, as soon as possible. They should also keep their own notes. Whether that documentation be an informal record that is kept with the job, or a memo book or log or AIDED book entry, or a more formal

procedure prescribed by the employer, every member has an affirmative obligation to put the employer on notice as soon as possible in order to best protect their potential benefits. If the exposure turns out to be a "nothing," so be it. However, if the member later tests positive for the disease, that initial documentation might be the piece of evidence that differentiates the valid and compensable claim from the many that will be denied due to a lack of an established nexus to the workplace or job duties.

The next step in protecting a potential claim is to obtain medical documentation supporting the diagnosis of the disease. That will certainly include a positive test for the disease by a medically accepted method. In the case of COVID-19, that would be a specific laboratory blood test. Once there is medical documentation confirming the exposure to and contraction of the disease, the member will also need a medical doctor to indicate, in writing, that they have been made aware of the patient's exposure on the job, and that he or she believes within a reasonable degree of medical certainty that the stated exposure is the cause of the member's illness. (Lawyers call that "*causal relationship*"). In Workers' Compensation, such medical reports are considered '*prima facie' medical evidence* and are the foundational piece of evidence to any claim.

From a legal standpoint, it's important such exposures be described as "accidental exposures." They are not "occupational diseases." (They are not "occupational diseases" because the general public is exposed to COVID-19 as well, the disease is not occupationally specific.) Because they are accidental exposures, workers must give notice of the exposure within 30 days, and file a C-3 within two years of the exposure. Perhaps as time reveals the course and duration severe COVID-19 infections, the legislature would consider extending the time limits as was done with 9/11 cases. Few will develop any symptoms within 30 days of the exposure, but they should document it in any event. But unlike the 9/11 cases, it is virtually certain that exposures, if they lead to illness, such illness will manifest itself in the next few week following the exposure.

While it may be impractical or impossible in some instances, if an assisted individual informs your member they have COVID-19, or your member suspects they do, the best practice is to take the name, address, telephone and perhaps even the email of such aided person, so you can later relate how and by whom you were exposed. This too may be critical information in the event of litigation. This aided individual may be asked to give a statement or even testify, if your member files a claim that is contested. That aided subject's personal information is protected by our HIPAA laws, so such cooperation would need to be voluntary. If the worker is working on a COVID dedicated ward, documentation must be secured to this effect, such as a memo from the hospital administration making such a designation.

Even when those steps have been taken by the members, we believe that, absent remedial legislation, the vast majority of situations will involve litigation. Insurance carriers and self-insureds will be loathe to simply accept that any exposure, with its potential cost of medical treatment (if any), and payment of compensation for time lost from work, should be covered as work-related. Thus, such a claim will likely involve a trial in which the member will need to testify to their exposure at work and the steps they took in order to timely inform the employer of that exposure. His or her doctor may also need to testify as may other corroborating witnesses.

Members should be aware that, in contrast to a physical injury case such as one involving a knee or shoulder injury, most of these claims are unlikely to result in a monetary settlement other than compensation for time lost from work. Therefore, the goal in such cases would be to ensure that employers cover the necessary medical treatment to get members back to work, and that members who miss time from work be compensated for that lost time pursuant to the applicable statutes and Workers' Compensation rates. However, it is also sadly true that many of these cases will result in death, in which case death claims should be filed so the victims's family may be compensated for the ongoing loss of income.

Over the past several weeks, we have had several individuals call to advise us that their employers are informing them that they will NOT cover COVID-19 infections as being incurred in the line of duty. Some employers have informed workers that or are giving workers the impression that injuries under these circumstances are never "covered" as work-related. While the general rule regarding job –related sickness and illness may confirm their instincts, the facts of how a specific exposure has occurred matter more than anything else. Thus, a blanket rule of "This is not coverable" does not apply to every set of facts.

In the past we have been able to establish cases for other diseases such as flesh-eating bacteria which, in the specific factual setting, could likely have only been contracted at work. The key is the quality of the medical evidence presented and a medical doctor's indication that in their opinion, based on the facts, they believe the worker contracted the disease at work or that a work-contracted exposure caused the infection.

Simply put, health care providers should not be led to believe that every case involving COVID-19 can not be found to be work-related. With a well documented exposure, it can be covered under Workers' Compensation as well as recognized by other agencies in exactly the same manner as any other disease or illness.

It's worth mentioning is that in some job titles and occupations, there are illnesses that are presumed to have been contracted due to a work related exposure. These might include Hepatitis-C, HIV/AIDS, or tuberculosis. Please note that these presumptions DO NOT apply to COVID-19. Those presumptions have been granted by law from the state or municipality. Until such a presumption is enacted for health care personnel on cases of COVID-19, each must document the exposure as best as possible in order to protect his or her benefits and rights.

If you have any questions or concerns, never hesitate to contact our office at 800.416.0400. One of our experienced and talented legal professionals will be happy to walk you and your members through the process and appropriately advise about the rights to benefits relating to job-related exposures of any type.

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