ALABAMA

WORKERS' COMPENSATION CLAIMS FOR COVID - 19

Workers' compensation claims premised on COVID-19 infections are growing more frequent. While some states have specifically amended their workers' compensation laws to address these claims, practitioners in most jurisdictions must evaluate these claims based on a given state's already-existing workers' compensation regime. This article will provide a framework for analyzing a COVID-19 claim under general principles of worker's compensation law, followed by a brief compilation of new statutes and executive orders specifically applicable to COVID-19 claims.

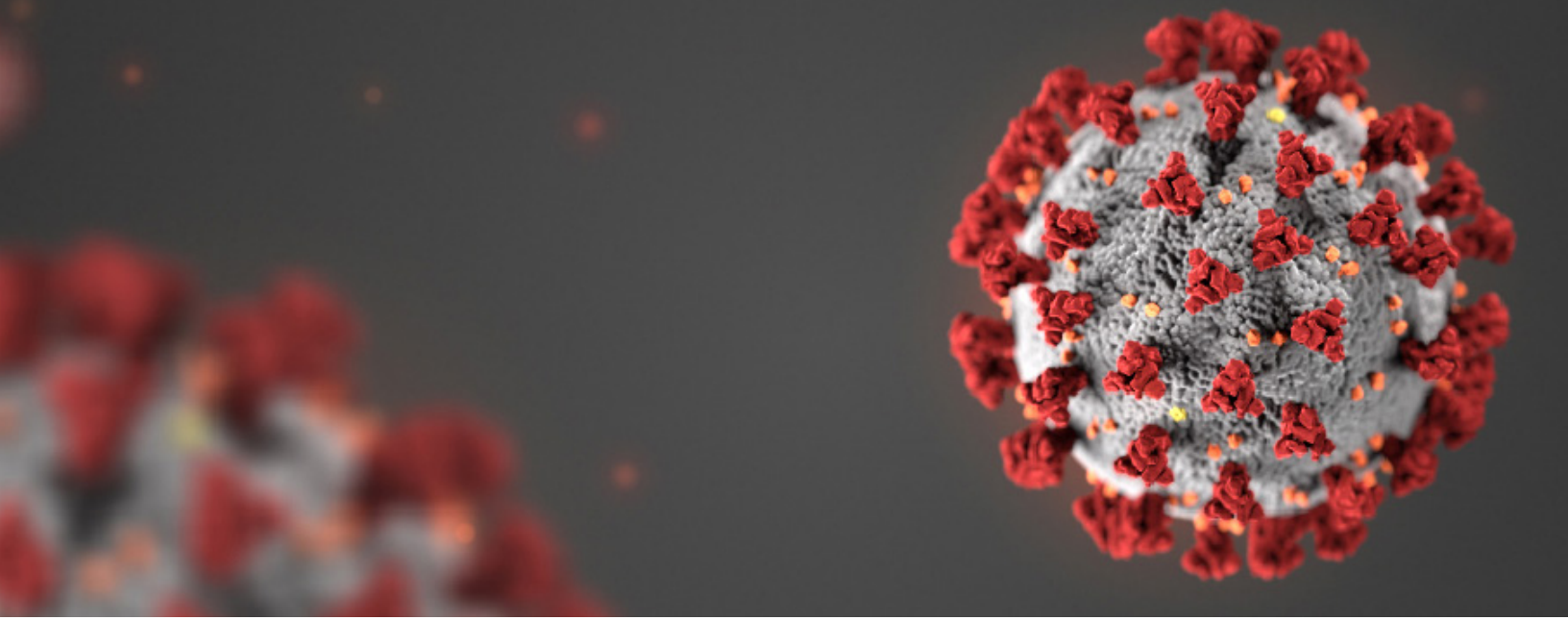
When first confronted with a workers' compensation claim based on a COVID-19 infection, a common first inclination may be to treat it as an occupational disease claim. However, absent specific statutory provisions to the contrary, a COVID-19 infection is not likely to be classified as an "occupational disease" under most states' workers compensation statutes. Where workers' compensation statues often contain special provisions applicable to occupational diseases, those provisions are generally limited to diseases which are peculiar to the occupation in which the employee is engaged. In Alabama, for example, the statutory definition of "occupational disease" provides, in pertinent part: "A disease. . . shall be deemed an occupational disease only if caused by a hazard recognized as peculiar to a particular trade, process, occupation, or employment as a direct result of exposure, over a period of time, to the normal working conditions of the trade, process, occupation, or employment."

Section 25-5-110(1), Code of Ala. (1975). One should not rule out COVID-19 as qualifying as an "occupational disease" in the appropriate case (a front-line health worker, under the appropriate fact scenario, might make a colorable argument). In addition, some states have recently enacted specific statutory provisions deeming COVID-19 to be an occupational disease. A careful lawyer should be mindful of these situations where the occupational disease analysis might apply, but in the majority of cases, it will not.

In the absence of a statute or executive order specifically addressing the compensability of a COVID-19 workers' compensation claim, most COVID-19 claims should be subjected to the same analysis as other claims where the alleged disability does not result from a sudden and traumatic accident (sometimes called "non-accidental injuries"). In some states, where claims are not compensable in the absence of a sudden and traumatic accident, this may end the analysis. In other states, a COVID-19 infection can potentially be compensable under standards applicable to other non-accidental injury cases involving heat stroke, heart attacks, gradual deteriorations, cumulative stress, and the like. While worded in a variety of ways (e.g., "excessive exposure," "increased risk," etc.), the tests for compensability in these cases commonly inquire whether there was something about the employment environment which increased the likelihood that the employee would be injured or made ill by a given hazard, when compared to the general public. These cases recognize certain hazards are ubiquitous, such that the general public may be just as likely to be exposed to them as some one in any given workplace.

A robust body of common law has developed to discern those instances where a disability caused by such a ubiquitous hazard will be deemed to be caused by the employment. These cases focus on the question of the degree to which the work environment might make an employee more likely to be injured or become ill as a result of being exposed to the hazard, when compared to the general population. In Alabama, for example, the test is phrased: "[W]hen an injury to [Employee] results from exposure the injury cannot be regarded as arising out of his employment unless he is subjected to unusual risk and excessive exposure because of the nature of his work." Southern Cotton Oil Co. v. Wynn, 680 So.2d 276, 277 (Ala. Civ. App. 1996).

Applying an excessive exposure (or increased risk) test, the mere fact that an employee contracts a COVID-19 infection at work is insufficient to establish legal causation. In order to prove the



illness arose out of the employment, the employee would have to prove the nature of the work put the employee at a materially higher risk of injury, when compared to everyone else who leaves their home to go the grocery, or a bistro, or to work in an office, or to the polls to vote. The test might possibly be met in an employment environment where employees are required to pack many people into close quarters for extended periods where social distancing is not possible and masks are not used, but each case would be judged on its own facts.

Before rendering an opinion on a COVID-19 case, a careful practitioner will first verify the current status of COVID-19-specific legislation in their jurisdiction. Several states have amended their workers compensation acts to specifically address COVID-19. Those states include Alaska (SB 241, enacted 5-18-2020, program has expired), Florida (CFO Directive 2020-05), Florida (OIR-20-05M), Illinois (HB 2455, enacted 6-5-2020), Minnesota (HF 9 e, enacted 4-8-2020), New Jersey (S2380, enacted 9-14-2020), Puerto Rico (Act No. 56-2020, enacted 6-1-2020), Utah (SB 3007, enacted 5-4-2020), and Vermont (SB 342, enacted 6-13- 2020). In other states, the Governor has made temporary changes to their workers compensation acts using Executive Orders. Those states include Arkansas (EO 20-35), California (EO N-62-20, and AB 685 and SB 1159 both enacted 9-17-2020), Connecticut (EO 7JJJ), Kentucky (EO 2020-277), Michigan (EO 2020-125), New Hampshire (Emergency Order #36), New Mexico (EO 2020-025), and North Dakota (EO 2020-12.2).

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