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**WORKERS COMPENSATION
IMPLICATIONS OF COVID IN
OHIO, KENTUCKY, & INDIANA**



WORKPLACE GUIDANCE WEBINAR SERIES

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**WORKPLACE GUIDANCE
WEBINAR SERIES**

Presented By:

**Reminger Co., LPA
Employment Practices
Group**

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Workers Compensation Implications of COVID-19 in Ohio, Kentucky, & Indiana



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DISCLAIMER:

These materials were prepared by the law firm of Reminger Co. LPA for attendees' reference during this seminar. This presentation, these materials, and related discussions are informational and educational in nature and are not intended to provide legal advice for any specific situation. Professional advice should be obtained before attempting to address any particular legal situation or problem. Furthermore, because requirements at the federal, state, and local levels are continually changing during this COVID-19 pandemic and some rules/regulations are industry-specific, please consult counsel prior to relying on the information contained herein.

Ohio – Occupational Diseases

- **Currently no specific COVID-19 rules or statutory changes.**
- **Is COVID-19 a “Scheduled” or “Non-Scheduled” Occupational Disease?**
 - **“Scheduled” R.C. §4123.68**
 - **“Non-Scheduled” R.C. §4123.01(F)**
- **Definition of a Non-Scheduled Occupational Disease per R.C. §4123.01(F):**
 - "Occupational disease" means a disease contracted in the course of employment, which by its causes and the characteristics of its manifestation or the condition of the employment results in a hazard which distinguishes the employment in character from employment generally, and the employment creates a risk of contracting the disease in greater degree and in a different manner from the public in general.

Ohio – Explaining Non-Scheduled Occupational Diseases

- Three Elements to a Non-Scheduled Occupational Disease:
 - (1) Claimant must **contract** the disease in the course of employment;
 - (2) the characteristics and manifestation of the disease or the condition of the claimant's employment distinguishes it from employment generally; and
 - (3) the employment creates a risk of contracting the disease in a greater degree and different manner from the public in general.

Ohio- Compensability of COVID-19

- The compensability of coronavirus claims must be determined on a case-by-case basis. Under existing Ohio law, there is not a bright line test to say an alleged occupational disease for coronavirus and its developing sequela and/or death is or is not compensable.
- There must be a case-by-case assessment as to compensability of COVID-19 claims
- Claimant bears the burden of proof to a preponderance of the evidence

Ohio- Compensability Cont'd

- Case Law: *Ingram v. Conrad*, (4th App. Dist. No. 01CA36), 2001 Ohio App. LEXIS 6017
 - Claimant alleged occupational disease claim for contracting pneumonia
 - Claimant must prove an injurious exposure in the workplace, and must be proven by medical evidence
 - Claimant required to prove the pneumonia was peculiar to his employment or that the conditions of his employment resulted in a hazard that distinguishes his employment in character from employment generally
 - Claimant must also establish that his employment created a risk of contracting pneumonia in a greater degree and in a different manner than the public generally

Ohio – COVID-19 Claims

- Claimant must prove through medical evidence that he/she contracted COVID-19 in the course of employment
- Claimant required to prove the COVID-19 was peculiar to his/her employment or that the conditions of his/her employment resulted in a hazard that distinguishes his/her employment in character from employment generally
- Claimant must also establish that his/her employment created a risk of contracting COVID-19 in a greater degree and in a different manner than the public generally

Ohio – Tips for Handling / Mitigating COVID-19 Claims

- RECORDED INTERVIEW:
 - Always take one when doing the initial claim contact
- MEDICAL CAUSATION:
 - Require claimant to produce evidence of positive test and medical opinion on causation
- RECORDS RELEASES:
 - On questionable claims obtain medical records
- EDUCATE:
 - Re-enforce safe practices
- DON'T LOSE FOCUS:
 - This is just like any other work comp claim – treat it as such

Ohio – Other Considerations

- Person has unrelated claim and is on light duty and must quarantine for COVID-19 reasons:
 - Claimant becomes eligible for TTD benefits because employer no longer accommodating via light duty
- Person has unrelated claim, is on TTD, and must quarantine:
 - Claimant remains on TTD benefits because still has incapacity to work
- Person has unrelated claim, is in light duty, and voluntarily chooses to not report to work because of COVID-19 fears:
 - Claimant not eligible for TTD
- Employers get unemployment compensation credit when unemployment and TTD paid simultaneously

Indiana – Occupational Disease Act

- **No specific COVID-19 rules or statutory changes.**
- COVID-19 may be compensable as an “occupational disease” under Indiana’s Occupational Diseases Act – “[A] disease arising out of and in the course of the employment.” Ind. Code § 22-3-7-10(a)
- **“Ordinary diseases of life”, however, are not compensable.** Ind. Code § 22-3-7-10(b)
 - An “**ordinary disease of life**” is one in which “the general public is exposed outside of the employment”, or “ills all human flesh is heir to” [*McGill Mfg. Co. v. Dodd*, 59 N.E.2d 899, 901 (Ind. Ct. App. 1945)]
 - Examples:
 - Tuberculosis (bacterial infection of the lungs) [*Evans v. Ind. Univ. Med. Ctr.*, 100 N.E.2d 828 (Ind. Ct. App. 1951)]
 - Neurosis (excessive and irrational anxiety or obsession) [*McGill Mfg.*, 59 N.E.2d at 901]
- **Key Point: COVID-19 is presumably a “ordinary disease of life”, thus not generally compensable**

Indiana – Not - “Ordinary Diseases of Life”

- Exceptions to “Ordinary Diseases of Life”
 - A disease arises out of the employment only if there is apparent “to the rational mind upon consideration of all of the circumstances” a **direct causal connection between the conditions under which the work is performed and the occupational disease**; and which:
 - (1) can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
 - (2) can be fairly traced to the employment as the proximate cause; and
 - (3) do not come from a hazard to which workers would have been equally exposed outside of the employment.

Indiana – Occupational Diseases

- Examples:
 - **Asbestosis** caused by inhalation of asbestos materials. [*Knox v. AC&S*, 752 F. Supp. 866 (S.D. Ind. 1990)]
 - **Bronchiectasis** - mucus and bacteria build up on bronchial tubes) caused by ingestion of dust at factories [*Chevrolet Muncie Div. of Gen. Motors Corp. v. Hirst*, 46 N.E.2d 281 (Ind. Ct. App. 1943); *Schwitzer-Cummins Co. v. Hacker*, 112 N.E.2d 221 (Ind. Ct. App. 1953)]
 - **Leukopenia** (low white blood cell count) caused by exposure to benzene during testing of flame retardancy testing [*Buford v. American Tel. & Tel. Co.*, 881 F.2d 432 (7th Cir. Ind. 1989)]

Indiana – Particular Conditions of Work

- Key Point: “The question is not whether the workman has a disease which is more or less common to others of the general public, but whether the *particular conditions* of his work were such as to cause and did cause him to acquire the disease.” *Schwitzer-Cummins Co. v. Hacker*, 112 N.E.2d 221, 225 (Ind. Ct. App. 1953).

Or, simply:

When has COVID-19 been occasioned by employment?

Indiana – Guidance

- Guidance from Worker's Compensation Board on April 2, 2020
 - "Under our laws, the State cannot tell employers they must automatically cover employees who contract Covid-19."
 - But, noted that it is "well accepted" that **first responders, healthcare workers**, and other employees "directly involved in the provision of services to those exhibiting symptoms of Covid-19 are more susceptible to contraction of the disease as a direct result of their work duties".
 - With the statement they are urging employers to presume such employees contracted the virus on occasion of their employment.
 - Be aware that definition of "first responder" and "healthcare workers" is very broad, includes: "gaming agents", podiatrist, optometrist
- Consider other employees at increased risk of exposure, including: employees who travel or work in high-volume retail

Indiana – Suggestions for Employers

- Be aware that if employee is laid off or terminated that an injured employee will still be entitled to TTD benefits until the point they reach MMI.
- Prospectively decide whether “vulnerable segments” of their workforce will be presumptively covered for worker’s compensation benefits.
 - This was suggested by the Worker’s Compensation Board in the April 2, 2020 notice to allay fears of employees and expedite the claims process.
- Follow CDC and Indiana State Department of Health guidelines
 - Executive Order provides that employers shall follow CDC/ISDH guidelines
 - Failing to put proper safety protocols in place increases risk of contraction

COVID-19 and Kentucky Workers' Compensation

- The State of Emergency and Kentucky Workers' Compensation
- Executive Order 2020-215
 - Issued on March 6, 2020 declaring a state of Emergency
- Supreme Court Order 2020-08
 - All in-person civil and criminal dockets are cancelled
- DWC Memo dated April 20, 2020
 - All in-person BRC's and Hearing cancelled
 - Cancellation later extended indefinitely

Kentucky – COVID-19: An Occupational Disease?

- KRS 342.0011(2)-(3)
- *Princess Mfg. Company v. Jarrell* Test:
 - (1) employment conditions specifically affected the employee in a manner resulting in contraction of disease; or
 - (2) Employment conditions generally can, to a reasonable medical probability, cause a particular disease or condition in a given class of workers
- *Dealers Transport Co. v. Thompson*, 593 S.W.2d (Ky. Ct. App. 1979)
 - Expansion beyond *Princess Mfg.*
- *Barren River Dist. Health Dept. v. Hussey*, 2000 Ky. App. LEXIS 39 (Ky. Ct. App. 2000).
 - Being placed at a higher risk

Kentucky – Compensability as an Occupational Disease

- Communicable Disease under KRS 342.0011(1)
 - Like pneumonia or AIDS
- Case-by-Case Basis
 - The employee's job;
 - Potential work-related exposures to COVID-19;
 - External exposures to COVID-19;
- Traveling Employees

Kentucky – Executive Order 2020-277

- Issued on April 9, 2020 by Kentucky Governor Beshear
- Elimination of “proximate cause” requirement
- TTD for employees taken off work by a physician due to COVID-19 exposure
- Some employees are entitled to a presumption of work-relatedness
 - Employees of a healthcare facility
 - First responders (including law enforcement, emergency medical services, and fire departments)
 - Corrections officers
 - Military
 - Activated National Guard
 - Domestic violence shelter workers
 - Child advocacy workers, rape crisis center staff, Department for Community Based Services workers’
 - Grocery workers
 - Postal service workers; and
 - Family services to provide child care in a limited duration

Kentucky – Executive Order 2020-277

- Not an irrebuttable presumption
- Not a waiver of employer's right to contest liability
- Waiver of the 7-day waiting period
- Purpose: immediate economic relief to frontline workers

Kentucky – Executive Order 2020-277

- Examples and Hypotheticals:
 - Employee believes they are exposed to COVID-19 and decided to self-quarantine
 - A: Employee should seek unemployment benefits
 - Employee is taken off work by a physician for a “work-related COVID-19 exposure” but they are not a frontline worker
 - A: Employee retains the same burden of proof for a normal occupational exposure claim but TTD benefits should begin
 - Employee is taken off work for a “work-related COVID-19 exposure” and they are a listed front-line worker
 - A: Employee is entitled to TTD benefits. This will be the hardest scenario to overcome

Kentucky – Executive Order 2020-277

- Examples and Hypotheticals
 - Employee is take off work for “COVID-19 exposure” and they are listed as a frontline worker
 - A: The employee is entitled to the presumption of work-relatedness. Perform a through investigation of potential exposures
 - Employee is taken off work for “COVID-19 exposure” but is not listed as a front-line worker
 - A: You can deny TTD benefits unless and until the employee presents some evidence that it is work-related.

Kentucky – Lay-offs and COVID-19

- Two-part test for TTD:
 - (1) Employee has not reached MMI; and
 - (2) Employee has not returned to customary employment
- *Lexington-Fayette Urban County Government v. Bright*, 2013 Ky. App. Unpub. LEXIS 894 (Ky. Ct. App. 2013)
 - Termination for misconduct is not a reason to terminate TTD benefits
- Layoff due to COVID-19 (i.e. business interruption or downsizing)
 - Governor Beshear has waived the unemployment waiting period
 - Deny benefits, with close examination of the facts
 - Any TTD later awarded can be offset by unemployment benefits

Kentucky – Moving Forward with Workers' Compensation Claims



Video Depositions
and Hearings

In-person hearings will
not return "in the near
future"



Delays due to IME
scheduling

Consider deposing treating
physicians

Consider records reviews
where possible



Opportunities for
Settlement

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QUESTIONS?



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Future Presentations

Tues., August 18, 2020 @ 2:00 p.m.

*Inclusive Hiring Practices: Legal
Compliance and Best Practices*

Stella Skaljac

Additional Topics & Dates TBD