

# Executive Order Expands TTD Liability in Kentucky COVID-19 Cases

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## PRACTICE AREAS

Workers' Compensation

### *Workers' Compensation E-Blast*

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On April 9, 2020, Kentucky Governor Andy Beshear issued Executive Order 2020-277. This Order dramatically changes entitlement to TTD benefits for Kentucky workers who have an occupational exposure to COVID-19, by eliminating the requirement of "proximate cause." For the exposure to be considered "occupational" there "must be a causal connection between the conditions under which the work is performed and COVID-19, and which can be seen to have followed as a natural incident to the work as a result of the exposure occasioned by the nature of the employment." The Order provides for TTD benefits for workers "removed from work by a physician due to occupational exposure to COVID-19..." These employees are entitled to TTD regardless of whether the employer ultimately denies liability for the claim.

For certain workers, it is presumed "that removal...from work by a physician is due to occupational exposure to COVID-19." These workers, which are specifically mentioned by the Order, are:

- Employees of a healthcare entity,
- First responders (including law enforcement, emergency medical services, 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
- Child care center workers permitted by the Cabinet for Health and Family Services to provide child care in a limited duration

The Order does not indicate the presumption is irrebuttable, and expressly provides that payment of TTD does not waive the employer's right to contest liability for the claim. The stated intent of the Order is to provide immediate economic relief to "frontline workers" who experience lost time due to

COVID-19. Workers who are not in one of the named occupations may still be entitled to benefits, but do not enjoy the presumption of “occupational exposure.” They will have to establish a causal connection as described above. Careful attention should be paid to the exact reason why an employee is taken off work and by whom.

When evaluating these claims we recommend using the following guidelines:

1. Was the employee taken off work by a physician?

a. **Yes.** Go to Question 2.

b. **No.** If the employee takes themselves off work, or is taken off work by the employer, the employee should seek unemployment benefits or paid sick leave. Any TTD benefits later awarded can be offset by unemployment benefits.

2. Did the physician list a “work-related COVID-19 exposure” or some variant thereof as the reason for the off-work note?

a. **Yes, but their job is not specifically mentioned in the Order.** If the worker is not listed in the specific occupations, the employee retains the same burden of proving a work-related occupational exposure – to prove a causal connection and that the disease is incident to the nature of the employment – except that it removes the “proximate cause” requirement. A full analysis of occupational diseases can be found here.

b. **Yes and their job is specifically mentioned in the Order.** This scenario would entitle the claimant to TTD benefits and would be the hardest for the employer to overcome. In these circumstances, TTD should be paid unless there is very strong evidence that the exposure was not work-related.

c. **No but their job is specifically listed in the Order.** Go to Question 3.

d. **No and their job is not specifically listed in the Order.** If the doctor did not mention work-related COVID-19 exposure, and the employee’s job is not listed in the Order, you can deny TTD benefits. This can change if the employee later obtains an opinion that the exposure was occupational.

3. Is the employee’s job specifically mentioned in the Executive Order?

a. **Yes, but the doctor did not list “work-related COVID-19 exposure” as the reason.** If the employee’s job is specifically mentioned in the Order, then “it shall be presumed” that the removal is due to COVID-19 exposure. This presumption is not final, and you should still conduct an investigation to determine if the employee had other exposures. However, you should begin TTD payments until you have a reason for that denial.

b. **Yes, and the doctor listed “work-related COVID-19 exposure” as the reason.** See 2(b).

c. **No.** See 2(a) or (d), depending on the circumstances.

If a high-risk employee (e.g. an elderly employee or an employee with respiratory issues) is taken off work as a precautionary measure, with no known exposure to COVID-19, they should not be paid TTD benefits. In this situation, there has been no “occupational exposure” that led to the off-work note. Precautionary measures are not listed in the Executive Order.

This Order does not waive the employer’s right to contest liability for a claim or other benefits to be provided; however, there is no mechanism for reimbursement of the benefits once they are paid out. As such, we

recommend taking a close look at each individual claim.

Finally, the Order waives the 7-day waiting period for TTD benefits. If a worker is entitled to TTD benefits under the Order, benefits should begin immediately.

If you have any questions, please contact a member of the Workers' Compensation Practice Group at Reminger.