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Injury Claims and Workers' Comp for Remote Employees: OSHA Requirements, Documentation, State Regs

WEDNESDAY, JULY 6, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Work From Home and Traveling Employees

GUIDANCE FOR EMPLOYERS

WFH – WC Issues - Subtopics

- Reach of WC liability for WFH
- Handling COVID exposures and positive tests
- Choice of law for out of state injury

Reach of employer WC liability…

Employees working from home retain the right to file for and collect Workers' Comp wage loss and medical benefits for disabling injuries that occur while working at home, as long as they can provide proof that they were acting "in furtherance of the employer's interest" at the time the injury occurred.

Who is “at work”?

A better question is – who is “acting in furtherance of the employer’s interests?”

For decades, Pennsylvania Courts have awarded Workers’ Comp benefits regardless of whether the employee is on or off the employer’s property when an injury occurs, provided that the injury occurs while the employee was “acting in furtherance of the employer’s interests.” *See Acme Markets, Inc. v. WCAB (Purcell),* 819 A.2d 143 (Pa. Cmwlth. 2003); *see also, WCAB (Slaugenhaupt) v. United States Steel Corp.*, 31 Pa.Cmwlth. 329, 376 A.2d 271 (1977).

The scope of protection for injured workers extends beyond the walls of an employer-owned workplace. The well-settled principle in PA remains, if you are injured while acting in furtherance of the employer’s interests – your claim is compensable.

Who is “at work”?

Through the pandemic, millions of workers, whose normal office jobs require them to be at the office, have been relegated to home work stations. Despite the huge change in “venue” the typical work day for these office workers somewhat resembles their usual office work.

A traditional work day, for these employees, now means: being logged on to a company database/email platform from a home computer work station, sitting on the couch with a laptop, doing paperwork at the dining room table, sending/receiving work emails from your iPhone. But significant breaks and interruptions throughout the day can take the employee outside the scope of actual work.

In some instances, a break from work will not interrupt the “on the clock” designation for an employee working from home, as long as the break is brief, and used for the employee’s “personal comfort.” Arguing the reverse would be a losing proposition for employers.

Who's "at work"?

An important distinction to note is that many states have always treated work-from-home employees much differently than traveling employees.

There is expansive protection for employees who travel as part of their job. For employees who travel, Workers' Comp benefit recovery extends to wherever they go, and to virtually whatever they do, while traveling for work. *See Roman v. WCAB (Dept. of Environmental Resources)*, 616 A.2d 128 (Pa. Cmwlth. Ct. 1992)(car accident while DEP employee traveling to site).

Work from home – NOT the same as traveling employee.

Traveling employee…

Traveling employees are covered – for the sake of Workers' Compensation – for virtually any injury that occurs while they are traveling. Deviations from "actual work" will likely be deemed an "inconsequential departure."

In *Baby's Room v. WCAB (Stairs),* 860 A.2d 200 (Pa. Cmwlth. 2004) – a furniture deliveryman was injured while jumping to touch the rim of a customer's driveway basketball hoop. His claim was compensable. The Commonwealth Court Opinion set forth: "intervals of leisure activity during the work day are deemed inconsequential departures from the act of delivering furniture for the employer."

Traveling employee…

Evans v. WCAB (Hotwork, Inc.), 664 A.2d 216 (Pa. Cmwlth. Ct. 1996) - PA contractor on remote job site on Emerald Isle, NC, fatally injured while bodysurfing at the end of a work day. Compensable death claim for surviving spouse.

Work station…

By contrast, work-from-home employees are not given the same blanket protections as traveling employees. Work-from-home employees are also not afforded the same protections as those injured in the workplace…where "relatedness" is all but assumed because the injury occurred on the employer's premises.

Tens of millions of Americans working from home must prove that they were "acting in furtherance of the employer's interests" in order to recover benefits in the event of an injury.

Work from home – WC liability

The following examples and case references –both involving injuries sustained at home, with very different outcomes – can serve as a guide for employers in assessing whether a reported work-from-home injury is compensable through Workers' Comp:

- Employee trips and falls down the stairs after leaving her basement computer work station, to get a drink of juice in the kitchen. Yes, it's compensable. *See Verizon Pennsylvania, Inc. v. WCAB (Alston)*, 900 A.2d 440 (Pa. Cmwlth. Ct. 2006).

- Employee sustains head injury when he trips and falls while outside the house – getting the mail, likely during a smoke break. No, not compensable. *See Werner v. WCAB (Greenleaf Serv. Corp.)*, 28 A.3d 245 (Pa. Cmwlth. Ct. 2011).

Werner

Werner best illustrates the employee's burden of proving "acting in furtherance" at the time of an injury. The claim involved a fatal head injury to an employee who was injured while going to get the mail during a smoke break; it was determined that he had been either on his front porch or driveway – away from his computer work station. In defending the claim, the employer sent an investigator to the home, to do a sort of "CSI" investigation. The investigation revealed the presence of blood in the driveway, from decedent's head injury.

Werner

During litigation, at a hearing, the Claimant/decedent's widow admitted that he had gotten the mail that day, and that he took frequent smoke breaks, standing on the front porch and/or in the driveway. Because there was insufficient proof that his injury occurred while "acting in furtherance," the claim was denied…and the Commonwealth Court upheld the denial on appeal.

Case comparison: *Werner* and *Alston*

Case contrasts: in *Werner,* the Court denied the claim on the basis that the Claimant had deviated from his job…beyond the scope of "personal comfort." Because his widow could not establish what he was doing when he was injured, the Court determined that his injury occurred during a time when he was not "acting in furtherance" of his employer's interests. By contrast, in *Alston*, the Court reached the opposite conclusion…finding that Claimant was merely attending to her "personal comfort" at the time her injury occurred…and therefore she was "acting in furtherance" of her employer's interests.

Case similarities: both cases predate COVID, but in both cases it is worth noting that the employer had "approved" a work-from-home arrangement, and provided the employee with hardware to set up a work station at home.

Alston

Ms. Alston got a drink of juice in the kitchen, and left her basement work station temporarily for that purpose. At the time she was injured – she had just answered a call from her supervisor and was going back downstairs to her work station. In contrast to *Werner*, the injury claim was deemed compensable because it was determined that Ms. Alston was engaged in "personal comfort" – but not a break from furtherance of her employer's interest – at the time the injury occurred.

Employer takeaways…

- May be wise to set standard work hours or designations of when a work-from-home employee is on or off the clock;
- Always critical to fully investigate any injury claim by a traveling employee or work-from-home employee; and
- Setting “positive work orders” to designate what an employee can/cannot do, regardless of location of work, can limit exposure.

Positive WFH COVID employees?

How to verify exposure “in the workplace”?

How to exclude non-work exposure?

HIPAA concerns re: family & friends?

Enforcing quarantine…RTW…sick days?

Choice of law?

- Employer risk issue with coverage
- Claimant “home field”
- Jurisdiction/Venue

Thank you!!

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Injury Claims and Workers' Comp for Remote Employees – New York

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The Claims Process in New York

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- **ANCR** - Claimant's need only show that a compensable accident occurred arising in out of the course of employment and that the injuries are causally related to the accident.
- **ODNCR** – The claimant must show that they have contracted a disease/illness that is unique to a particular occupation and that the condition is causally related to the claimant's occupation.
- Basic **Defenses** - No Accident/Occupational disease, Causal Relationship, Coverage, Employer/Employee Relationship, Notice (WCL § 18), timely filing (WCL § 28).
- **PH-16.2** forms asserting defenses must be submitted by both parties at least 10 days prior to the Pre-Hearing Conference
  - Carrier's failure to timely submit will generally result in waiver of all defenses except coverage

Controverting a Claim: Basic Defenses - ANCR

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- **Accident** – Is there a compensable accident? Is there evidence against the claimant's allegation and legal presumption this accident occurred?
  - Not the definition of a WCL accident;
  - **Coming and Going;**
  - **Not while at work**;

- **Notice** – Was the employer given notice within 30 days? Did they investigate the claim/is there prejudice from the failure to give timely notice?
  - More likely to be an issue for at home because no one to witness/report to right away.
  - Excused if claimant can show no prejudice caused to carrier/employer

- **Causal Relationship**– Is there medical evidence constituting PFME? Was there prior injury/treatment for the same site(s)?
  - Did the injury truly arise out of the work activity?

Board/Judicial Review Process in New York

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- Hearing/Trial before a Workers' Compensation Law Judge
- Board Panel Review (three commissioners)
  - Discretionary or Mandatory Full Board Review
- Appellate Division, Third Department
  - Skips any type of review by Supreme Court (New York's trial level court)
  - All appeals from the Workers' Compensation Board automatically go to the Third Department in Albany, New York.
- Court of Appeals (New York's highest court)

Matter of Capraro v. Matrix Absence Management

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187 AD3d 1395 (3d Dept 2020)

- Claimant injured while working from home carrying furniture upstairs to be assembled in his home office
  - The employer did not purchase this furniture and did not agree to reimburse these items.
- Court found that a regular pattern of work at home renders the employee's residence a place of employment, no different than the traditional workplace maintained by the employer
- No requirement that the activity being performed at the time of injury be done at the employer's direction or directly benefit the employer for the resulting injury to be compensable

Matter of Capraro v. Matrix Absence Management

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- Standard is activity that is "reasonable and sufficiently work related under the circumstances." Matter of Capraro v. Matrix Absence Management, 187 AD3d 1395 (3d Dept 2020).
- Matter of Capraro reversed Full Board Memorandum of Decision WCB No. G195 3353 (May 3, 2019) holding that injuries sustained by employees working from home should only be found compensable if they occurred (1) during regular work hours, and (2) while the employee was performing his or her employment duties.
  - The Board Panel decision was filed in May 2019, while the Appellate Division was decided in October 2020.
- Claims are still not compensable where the activity is purely personal.

Current Considerations after Capraro

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- Deviations from employment
- Coming and going
- Hybrid work
- Actual time/day of the accident
- Public policy concerns

Deviations from Employment

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- “Momentary deviation” from the work routine for a customary and accepted purpose does not constitute an interruption in employment sufficient to bar a claim for benefits
- Examples:
  - Coffee Break
  - Short break for a personal phone call
  - Brief walk around the block
  - Quick run to the bank
- Theory that the employer retains “constructive control” over the injured worker during the break
  - Creates questions when there is essentially constant control for work from home employees

Deviations from Employment

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- Limitations
  - Board regularly states anything “purely personal” is not covered, but then regularly finds exceptions
  - Lunch (unless connected to some work-activity)

    Look for if employer/employee relationship was terminated or suspended during the break
  - If there is an absolute requirement to remain at work and the deviation is clearly removed from the assignment (e.g. a part-time home health aide required to be with the patient without any breaks)
  - Unauthorized coffee break
    - One very limited Board Panel example, may be inconsistent with earlier Appellate Division ruling that authority is meaningless

Coming and Going

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- **General Rule -** Accidents that occur while an employee is on the way to or from work do not arise out of and in the course of employment because the risks of travel are not risks flowing from the work

- **Exception for "Outside Employees"**
  - Covered portal to portal; from the time they leave home until they return

- An employee, who must first report to a fixed location before commencing work on the outside, does not qualify as an outside employee (so entirely work from home likely not covered by this exception, but what about hybrid work arrangements?)

Considerations for Hybrid Work

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- Issue addressed by New York Court of Appeals in 1968 when hybrid work arrangements were hardly a thought (and cited in Capraro)
- Hille v. Gerald Records, 23 N.Y.2d 135 (1968)
  - Test of the "mixed" or "dual" purpose doctrine, which *required* either a specific work assignment for the employer's benefit at the end of the homeward trip or so regular a *pattern* of work at home that the home achieved the status of a place of employment
  - The quantity and regularity of work performed at home; the continuing presence of work equipment at home; and special circumstances of employment that made it necessary and not merely personally convenient to work at home were helpful "indicia" of such status.
  - Court found this claim compensable (claimant was working on recording tapes at home), but cautioned against automatically applying to professional employees (e.g. teachers, doctors, lawyers)

Matter of Government Employees Insurance

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2021 NY Wrk. Comp. 2800004 (April 20, 2021)

- Only Board Panel Decision after Capraro to date. Claim still disallowed:
  - Claimant injured herself lifting her workstation at home.
  - Working from home due to the pandemic from 8:30 a.m. to 5:00 p.m. (schedule specifically noted in decision)
  - Purchased new work desk, delivered and assembled over the weekend
  - Citing to the weekend not being a “momentary deviation” the Board Panel found that the claim was not compensable.
- Likely demonstrates that the Board will continue to disallow work from home injuries that can be distinguished from Carpraro

Public Policy Considerations

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- Accident at home not truly within employer's control
  - Conditions of workspace
  - Staircases
  - No assistance available for lifting (e.g. desks/assembly)
- Possible new subrogation considerations
  - Accident in an area not controlled by homeowner/renter
- Encourages unnecessary control over employees (e.g. activity monitoring).

Please feel free to reach out to us directly

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Workers' Compensation Benefits For Employees Who Test Positive for COVID-19: California Law

Nice To Meet You!

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Frontline Presumption

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Frontline Presumption

- Labor Code Section 3212.87.
- Covers only certain employees.
- Covers COVID-19 related illness/death between July 6, 2020-January 1, 2023.

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Frontline Presumption

What does it say in a nutshell?

Certain frontline employees who suffer a COVID-19 related illness/death are presumed to have contracted the virus at work for purposes of awarding workers' compensation benefits if certain requirements are met.

Frontline Presumption

4 Requirements:

1. Must be a certain frontline employee;

2. Employee tests positive w/n 14 days after performing work at their place of employment at employer's direction;

3. The day the employee performed work was on or after July 6, 2020; and

4. Place of employment was not employee's home or residence.

Frontline Presumption

A closer look at the requirements:

1) Must be a certain frontline employee.

- Active firefighter
- Peace officer
- Fire and rescue coordinator

Frontline Presumption

- Employee who provides direct patient care at a health care facility
- Authorized registered nurse
- Emergency medical technician-I, -II, -paramedic
- Employee who provides direct patient care for a home health agency
- Provider of in-home supportive services when they provide services outside of their own home

Frontline Presumption

A closer look at the requirements:

2) Employee tests positive w/n 14 days after performing work at their place of employment at employer's direction.

- Suggests that if the employee goes into work (voluntarily, without direction of the employer) then not covered.

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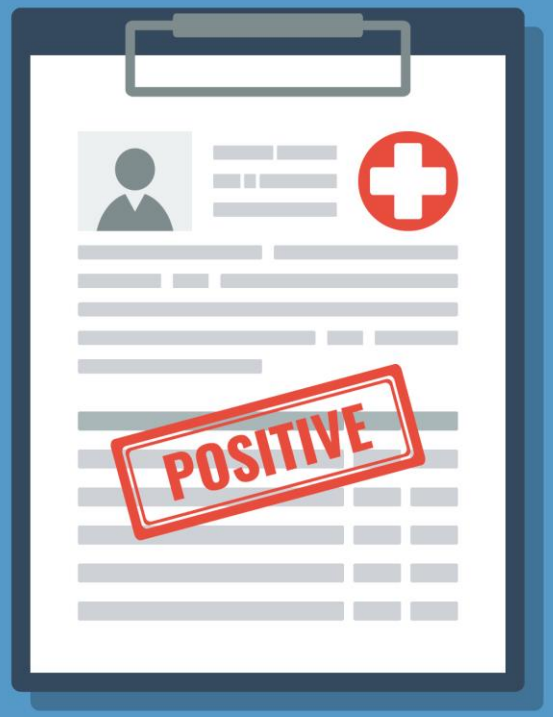
Frontline Presumption



- What type of positive “test” is required?
- A PCR (Polymerase Chain Reaction) test approved by the FDA, or any other viral culture test approved by the FDA that has the same or higher sensitivity and specificity as the PCR test.

Frontline Presumption

A closer look at the requirements:

3) The day the employee performed work was on or after July 6, 2020.

- Date of “injury” will be last date worked prior to the positive test.
- Unclear, but suggests that the last day the employee would need to perform work at their place of employment at employer’s direction prior to the positive test in order to be covered is January 1, 2023.

Frontline Presumption

A closer look at the requirements:

4) Place of employment was not employee's home or residence.

- Suggests that if employee worked from their home or residence, even at the employer's direction, then not covered.
- Recall first requirement re: certain frontline employees. Notes a provider of in-home supportive services would only be covered when they provide services outside of their own home.

Outbreak Presumption

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Outbreak Presumption

- Labor Code Section 3212.88.
- Covers employees who are not described under Frontline Presumption.
- Covers employers with 5 or more employees.
- Covers COVID-19 related illness/death between July 6, 2020-January 1, 2023.

Outbreak Presumption

What does it say in a nutshell?

Other, non-frontline employees who suffer a COVID-19 related illness/death are presumed to have contracted the virus at work for purposes of awarding workers' compensation benefits if certain requirements are met.

Outbreak Presumption

5 Requirements:

1. Employer has 5 or more employees;

2. Employee is not covered by the Frontline Presumption;

3. Employee tests positive w/n 14 days after performing work at their place of employment at employer's direction;

4. The day the employee performed work was on or after July 6, 2020; and

5. Positive test occurred during an "outbreak" at employee's specific place of employment.

Outbreak Presumption

A closer look at requirements 1 and 2:

1) Employer has 5 or more employees.

2) Employee is not covered by the Frontline Presumption.

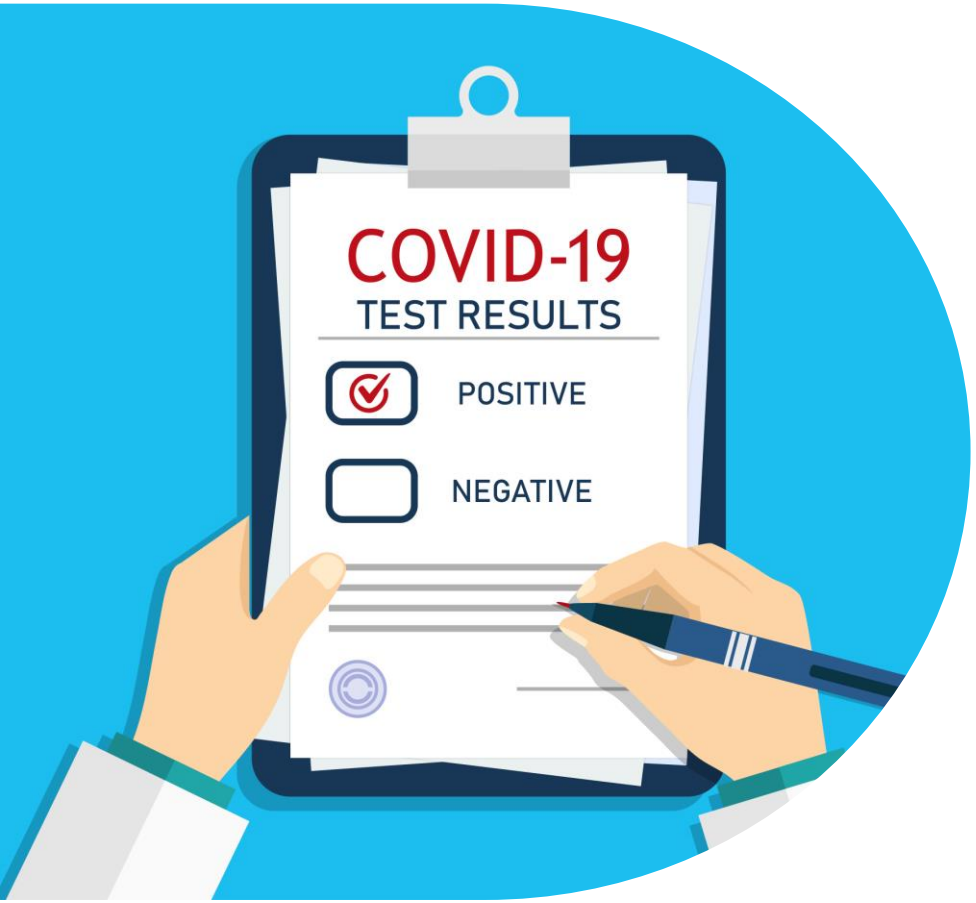
Outbreak Presumption

A closer look at the requirements:

3) Employee tests positive w/n 14 days after performing work at their place of employment at employer's direction.

- Suggests that if the employee goes into work (voluntarily, without direction of the employer) then not covered.

Outbreak Presumption



- What type of positive “test” is required?
- A PCR (Polymerase Chain Reaction) test approved by the FDA, or any other viral culture test approved by the FDA that has the same or higher sensitivity and specificity as the PCR test.

Outbreak Presumption

A closer look at the requirements:

4) The day the employee performed work was on or after July 6, 2020.

- Date of “injury” will be the last date worked prior to the positive test.
- Unclear, but suggests that the last day the employee would need to perform work at their place of employment at employer’s direction prior to the positive test in order to be covered is January 1, 2023.

Outbreak Presumption

A closer look at the requirements:

5) Positive test occurred during an "outbreak" at employee's specific place of employment.

- "Specific place of employment" = where the employee performs work at employer's direction.
- Not employee's home or residence unless employee provides home health services to another individual at their home or residence.

Outbreak Presumption

What is an “outbreak?”

- 100 or less employees at specific place of employment: W/n 14 days, 4 employees test positive; or
- More than 100 employees at specific place of employment: W/n 14 days, 4% of employees test positive; or
- W/n 14 days, the specific place of employment is ordered to close by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent due to a risk of infection with COVID-19.

Reporting Requirement

Reporting Requirement to Claims Administrator

- To enable the claims administrator to determine whether an “outbreak” has occurred.
- If employer knows or reasonably should know about a positive test from September 17, 2020 forward, employer has 3 business days to report in writing via fax/email:

(1) An employee tested positive (No PII);

(2) The date the specimen was collected;

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Reporting Requirement

Reporting Requirement to Claims Administrator

(3) The address(es) of employee's specific place of employment during the 14-day period preceding the positive test;

Note: If employee worked at more than one location for employer at employer's direction, then report each of those locations. Claims administrator will consider each of those locations in determining whether there is an "outbreak."

(4) The highest number of employees who reported to work at the employee's specific place of employment in the 45 days preceding the last day the employee worked at each specific place of employment.

Reporting Requirement

Penalties for Failure to Report

- Up to $10,000 penalty by Labor Commissioner.
- Citation by Labor Commissioner.

Practice Pointers

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Practice Pointers

Practice Pointers

Confer with insurance carrier to discuss these protocols/reporting requirements.

Remind employers not to retaliate against employees who file for workers' compensation.

Make sure to provide employees with mandated paid sick leave as required by federal, state, and local laws.

Thank you!

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Remote Workers, Working from Home, and COVID Exposure Cases

Presented by Lauren Motola-Davis

WFH, Hybrid Employees, and the Workers' Compensation System

Does Workers' Compensation Cover Remote Work?

Telecommuting Demographics

(The State of Telecommuting in the US Employee Workforce. 2017)

- The percent of women and men who telecommute is about equal.
- The average annual income for most telecommuters is $4,000 higher than that of non-telecommuters.
- Half of telecommuters are 45 years of age or older, compared to just 41% of the overall workforce.
- Telecommuters are, on average, more highly educated than other employees. Approximately 53% have at least a bachelor's degree, compared to 37% of non-telecommuters.
- Telecommuting is most common in Management occupations, but employees in Computer, Mathematical, and Military occupations work at home much more frequently than their peers.
- While the Professional, Scientific, and Technical Services industry has the highest percentage of telecommuters relative to its share of the workforce, the Management of Companies and Agriculture industries top the list because of an administrative job component.
- In more than half of the top U.S. metros, telecommuting exceeds public transportation as the commute option of choice. It has grown far faster than any other commute mode.

Has Telecommuting Increased? Before COVID-19?

- Regular work-at-home, has grown by 159% since 2005, note 11x faster than the rest of the workforce and nearly 50x faster than the self-employed population.
- 4.7 million employees now work form home at least half the time.
- Forty percent more U.S. employers offer flexible workplace options than they did five years ago.
- Larger companies are most likely to offer telecommuting options to most of their employers.
- New England and Mid-Atlantic region employers are the most likely to offer telecommuting options.

Source: GlobalWorkplaceAnalytics.com

COVID-19 & Beyond

- Companies from Nationwide Mutual Insurance Co. to Twitter Inc. plan to allow some or all employees to continue working remotely even after COVID-19 restrictions are lifted and businesses reopen.
- The experience of working remotely during the pandemic has shown that many tasks can be decentralized and handled using technological tools such as Zoom, insurance industry executives say.
- In addition, allowing workers the option of continuing to work from home will offer employers savings on real estate costs, they say.

Benefits of Working from Home
Employee/Employer

- Increased productivity (including better time management and work quality).
- Improved employee morale (including reduced stress and a better work/family balance).
- Reduced overhead and operational expenses of the employer including real estate associated costs.
- Improved employee retention and recruitment.
- Reduced use of sick or personal time among employees.

Risks of Telecommuting

- Productivity – The potential for distractions at home.
- Collaboration – Reduced exposure and interaction with co-workers.
- Accountability – Lack of supervisory control.
- Responsiveness – Difficulty in location telecommuters during work hours.
- Should not be a substitute for primary childcare or eldercare arrangements.
- Injuries at home when not work related. Not having control of the accident site for post-accident investigation.

Are employees working from home covered by workers' compensation?

- Generally speaking yes, though this requires further discussion. An employee is covered under their employer's workers' compensation insurance if injured while working from home so long as the employee meets their burden of proving the injury was work-related.

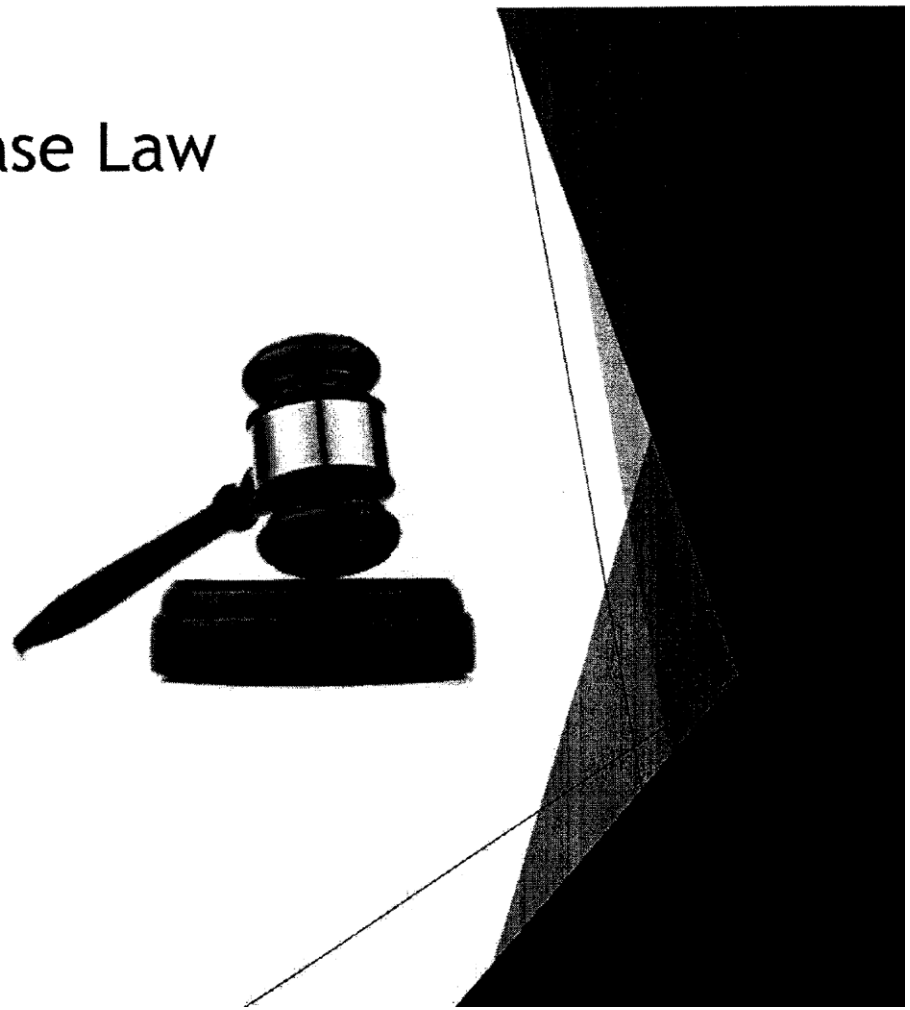
It is a state-specific inquiry.

- State laws govern workers' compensation, and workers' compensation laws vary state to state.
- "The heart of every compensation act, and the source of most litigation in the compensation field, is the coverage formula. **Forty-three states, and the Longshore and Harbor Workers' Compensation Act, have adopted the entire British Compensation Act formula: injury 'arising out of and in the course of employment.**' . . . West Virginia preferred 'resulting from'; Pennsylvania in 1972 adopted the phrase 'arising in the course of his employment and related thereto'." 1 Larson's Workers' Compensation Law § 3.01 (2021) (emphasis added).
  - Connecticut, the District of Columbia, Florida ("if the employee suffers an accidental compensable injury or death arising out of work performed in the course and the scope of employment" - Fla. Stat. Ann. § 440.09), Georgia, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island (through R.I.G.L. § 28-33-1), Tennessee, Virginia, all follow a version of this rule.
- While it is generally one test that must be met (that is, whether or not there's a "work connection"), "to make the task of construction easier, the phrase was broken in half, with the "arising out of" portion construed to refer to causal origin, and the "course of employment" portion to the time, place, and circumstances of the accident in relation to the employment." 1 Larson's Workers' Compensation Law § 3.01 (2021).

Workers Compensation Case Law

Verizon Pennsylvania v. Workers' Compensation Appeal Board (Alston), 900 A.2d 440 (Pa. Cmwlth. 2006), The teleworker went upstairs to the kitchen to get a drink of water.

The court determined that if the employee is working from home all injuries sustained are basically in the course and scope of employment.



Case Law…

Schwan Food Co., Et Al, v. Ryan Frederick, Md. App. LEXIS 512 (June 27, 2019)

Facts: Mr. Frederick used his employer-provided handheld computer to download his route for the day. His plan was to drop his son off at day care on the way to his first account, the Walmart in Ellicott City, Maryland. On his way out, he slipped on black ice on the sidewalk near his car in front of his home and suffered an injury to his right leg.

In Schwan, the Court outlined the parameters for what constitutes a home-based office for workers compensation purposes.

The court adopted a three-part test consisting of:

1. The quantity and regularity of work performed at home.
2. The presence of work equipment at home.
3. The special circumstances of the employment rendering it necessary, and not merely personally convenient, to work at home. In analyzing the third requirement the Court required evidence that the employer acquiesced to the employee's use of his or her home as a work site, or reasonably should have known the employee was regularly using the home as a work site.

“Arising Out Of”

- Generally, one asks: was the employee furthering the aims/acting in the interest of the employer at the time of injury?
- An employee carrying boxes of new home office furniture up the stairs in their home, after employer had specifically refused to purchase the new office furniture. The Supreme Court of New York remanded the case to the Workers’ Compensation Board to determine, consistently with precedent, whether or not the activity was “sufficiently work related” even though the employee was on a lunch break at the time of the injury. *See Matter of Capraro v. Matrix Absence Mgmt.*, 2020 NY Slip Op 06000, ¶ 1, 187 A.D.3d 1395, 1397, 132 N.Y.S.3d 456, 459 (App. Div.).
- An employee who fell and injured her ankle and knee after getting up from her recliner, while on the phone with a client, to retrieve her keys while planning to drive and pick up that client’s dental form was entitled to a rebuttable presumption that the fall occurred while she was engaged in a work activity. *See Bluegrass.Org v. Higgins*, No. 2018-CA-001262-WC, 2019 Ky. App. Unpub. LEXIS 413 (Ct. App. June 7, 2019).

Case Law…

Sedgwick CMS v. Valcourt-Williams, No. 1D17-96 (Fla. Ct. App. April 5, 2019). In this case the claimant tripped over her dog while working at home.

The court held that the claimant's accident did not arise out of her employment because the employment did not expose the claimant to conditions that substantially contributed to the risk of injury.

Valcourt-Williams Continued …

The court clarified that the question is not whether a claimant's home environment becomes their work environment but instead, whether the employment (whatever it is)…

"necessarily exposes a claimant to conditions which substantially contribute to the risk of injury."

According to the court, this risk of the claimant tripping on her dog existed whether the claimant was at home working or at home not working.

More on the “Place of Employment”

New York: “A ‘regular pattern of work at home’ renders the employee's residence ‘a place of employment’ as much as any traditional workplace maintained by the employer.” *Matter of Capraro v. Matrix Absence Mgmt.*, 2020 NY Slip Op 06000, ¶ 1, 187 A.D.3d 1395, 1397, 132 N.Y.S.3d 456, 459 (App. Div.).

Florida: Where employer knew and approved of the employee working from home, “[a]ccidents occur ‘in the course and the scope of employment’ when they occur ‘in the period of [] employment, at a place where [the employee] would reasonably be, while fulfilling her duties.’” *Sedgwick CMS v. Valcourt-Williams*, 271 So. 3d 1133, 1135 (Fla. Dist. Ct. App. 2019). The court here determined that a woman on a coffee break while working from home “was where she ‘would reasonably be. . . ’” (though tripping over her dog meant that her injury did not arise out of her employment).

Courts are likely to be less fact-intensive in this inquiry when the allegedly injured employee was working from home due to the pandemic, whether by reason of federal, state, or employer mandated orders and/or policies. The need to comply with these orders or policies, if such an order or policy is alleged, effectively establishes that the employee’s home is part of the place of employment.

“In the Course Of”

- Here, the inquiry looks at the time and place of injury (was it during work hours, for example?) and activity engaged in.
- Where an employee drove to a happy hour at the Tilted Kilt in his work van after leaving a work-sponsored event and then got into a motor vehicle accident on his way home, that employee’s activities at the time of the accident were “not in the course and scope of his employment.” *See Peters v. Workers ' Comp. Appeal Bd. (Cintas Corp.)*, 214 A.3d 738, 743 (Pa. Commw. Ct. 2019).
  - **With the pandemic though, and many people working outside of their normal work hours, can the time of day be used to support or oppose the claim**?
  - **Does the phrase “work hours” mean only those hours in which the employee is performing work or labor on behalf of the employer**? What about a lunch break? What about a shorter break to have a coffee or snack? What is the point of separation from the course and scope of the employment?
  - **Must the injury occur within a designated home office, or can it be in the kitchen while on a short break to grab a coffee? This could change during the work from home period associated with the pandemic.**

Case Law…

Kirchgaessner v. Alliance Capital Management Corp., 39 A.D. 3d 1096 (N.Y. 2007), Decedent was fatally injured after being struck by a tractor trailer while crossing a street on her way from home to work.

The Court denied benefits, compensation was not available when the employee only worked from home a few days per month, and the employer encouraged employees to come into the office as often as possible.

The court also added a factor to make work from home injuries compensable "special circumstances of the particular employment which make it necessary, as opposed to personally convenient, for an employee to work at home."

Doctrines We See Often

Personal Comfort Doctrine – activities necessary for personal comfort and/or welfare do not remove an employee from being considered “at work” in jurisdictions applying the doctrine. Ex: lunch, food or beverage breaks, bathroom breaks, etc.

Going and Coming Rule – Generally, a WC principle that denies compensability for injuries sustained going or coming from work or home in jurisdictions applying it. With the pandemic and hybrid working, where one’s place of employment is both at work and at home, ***some of these previously non-compensable injuries will now be compensable***: traveling to/from work and home is then within the course and scope of employment!

Case Law…

Bentz. V. Liberty N.W., 311 Mont. 361, 2002.
A home-based employee was required to visit the employer's local office at least one a week to perform some of his work functions. On the way home from the employer's premise he sustained injuries when he slipped on ice as he checked his mail, after reaching his driveway.

Court held that the employee sustained a compensable injury and was not barred by the coming and going rule.

The Court indicated that the employment arrangement created two work sites… the home-based office and the employer's ordinary local office. Travel between the two was not a commute.

Some Important Workers Compensation Doctrines Associated with Injuries at Home

- The Premise to Premise Rule
- The Going and Coming Rule
- The Comfort Doctrine
- The Deviations Rule
- The Work from Home Rule…to be determined?

COVID Exposure Cases in Workers' Compensation Court

A Rhode Island Case Study

Does COVID exposure in the workplace come under the workers' compensation laws?

- Generally, we now know the answer is YES.
- In jurisdictions that define and include occupational illnesses/diseases, COVID exposure claims typically fall under this category of injuries.

Rebuttable Presumptions

- Some jurisdictions provide a rebuttable presumption that the COVID exposure occurred at work – most of these are by legislation or by Executive Order.
  - For example, California's governor issued an Executive Order providing this presumption.
- The rebuttable presumption is generally provided to certain workers, namely first responders/healthcare workers, as they deal with the already-weakened and immunocompromised on a regular basis, and because of the nature of spread in a hospital, nursing home, etc.
- Some workers' compensation carriers have internal policies providing a rebuttable presumption as well.
  - In Rhode Island, the largest workers' compensation carrier in the state has such a presumption.
- This presumption is rebuttable: an employer or carrier may defeat the presumption using evidence that the employee likely contracted COVID outside of work. This could be a positive test result in an individual the employee lives with, contact tracing that shows the employee attended an event where they were directly exposed, etc.

Rebuttable Presumptions

- *See, e.g.*, Governor Newsom's Exec. Order N-62-20 (May 6, 2020) for California. Kentucky is one example where the categories of workers entitled to the rebuttable presumption are listed specifically. *See* Governor Andy Beshear's Exec. Order 2020-277 (April 9, 2020). Most states have done so through enacting new legislation (9 total).
  - "In total, 17 states and Puerto Rico have take action to extend workers compensation coverage to include COVID-19 as a work-related illness. Nine states have enacted legislation creating a presumption of coverage for various types of workers. Minnesota, Utah and Wisconsin limit the coverage to first responders and health care workers. Illinois, New Jersey and Vermont cover all essential workers while California and Wyoming cover all workers. Four states have used executive branch authority to implement presumption policies for first responders and health care workers in response to COVID-19. Another four states including California and Kentucky have taken executive action to provide coverage to other essential workers like grocery store employees." https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx#:~:text=States%20are%20taking%20action%20to,workers%20impacted%20by%20COVID%2D19.&text=This%20presumption%20places%20the%20burden,workers%20to%20file%20successful%20claims.

Rhode Island Occupational Diseases

- Rhode Island's workers' compensation laws state that occupational diseases are diseases "due to causes and conditions which are characteristic of and peculiar to a trade, occupation, process, or employment." R.I. Gen. Laws § 28.34.1(3).
- Further, the law defines specific illnesses/diseases that make up the workers' comp definition of occupational disease: to be compensable, the disease must be one of those specifically enumerated in R.I. Gen. Laws § 28-34-2. *Souza v. Raytheon*, 490 A.2d 500 (R.I. 1985).
- The list includes certain poisonings, hernias, dermatitis, frostbite, and a host of others, along with a "catch-all" provision for disabilities "arising from any cause connected with or arising from the peculiar characteristics of the employment."
  - COVID exposures tend to fall under this "catch-all" provision.

How does one prove a COVID exposure claim?

- The burden is on the employee to establish that he/she/they contracted the illness or disease at work. This is often difficult to prove, though, hence the list of specific illnesses/diseases which are deemed to be compensable.
- With COVID exposures in particular, the employee faces a high burden. He/she/they usually must first prove that they contracted COVID, almost always by presenting a positive test result. Typically, it would be a PCR test as opposed to an at-home test, given the at-home test efficacy rates and potential for false positives/negatives.
- The employee then must prove that they contracted COVID at work. Evidence supporting this includes: specific contact tracing related to a confirmed at-work exposure to a COVID positive individual, confirmed cases of coworkers/peers/supervisors around the same time as the employee's symptoms/positive result, and sometimes the specific type of employment of the employee (which may provide a rebuttable presumption).

COVID Exposure Claim Strategies

A. Often, an effective strategy in litigating these claims is settlement.
   - D&D
     - In cases where liability has not been finally established, the parties may submit a D&D (denial and dismissal) settlement proposal to the Court for approval.
     - D&D settlements are where the parties agree that liability is NOT established, and any payments made are not considered payment of workers' compensation benefits or an admission of liability, but rather a compromise payment of a disputed claim.
     - Generally, an employee will sign a release of liability in connection with the settlement, and MAY sign a voluntary resignation, depending on the parties' negotiated arrangement and the jurisdiction (RI allows this, MA for example would not). Further, employers are not required to pay medical bills related to the treatment.

   - Lump Sum or Structured Settlement/Commutation
     - Where liability has been established, and after payments have continued for at least six months, the parties may submit a petition for an order approving settlement of future liability.
     - Typically, medical bills will be paid by the employer/carrier up to the time that the settlement is approved by the Court.
     - After the settlement is approved, all payments related to the settlement and all outstanding medical bills up to the date of approval must be paid, and then the parties file a Final Decree. Upon entry by the Court of the Final Decree, the employer/carrier is absolved of any future liability as relates to the claim/injury.

COVID Exposure Claim Strategies

A. For Defense, surveillance can also be helpful.

    A. Conducting some surveillance on employees claiming a disability based on COVID can be a helpful strategy in attempting to prove that he/she/they are no longer disabled. This is particularly true in cases where liability is not/cannot be contested.

Example Cases

A. One case we have been working on remains in active litigation currently. The employee alleges he contracted COVID at work in a non-healthcare field, while working a front desk position with customer interface. The employee subsequently suffered a COVID-related stroke. At this point, litigation is hotly focused on whether or not the employee's contraction of COVID was causally related to his employment or to some non-work related exposure to the virus.

B. In another case, we represented the employer/carrier in a claim by an employee who worked in a healthcare field (and therefore could use the rebuttable presumption that he contracted COVID at work). In this case, several of the employee's co-workers and two of the patients he was in direct contact with around the time of symptoms/positive test result had also tested positive for COVID. Two medical professionals provided opinions, to a reasonable degree of medical certainty, that the employee contracted COVID at work and that he continued to have long-haul COVID symptoms. In the end, the matter settled after surveillance of the individual resulted in evidence that he was capable of more activity than he had represented to his PCP and the other physicians providing opinions.

C. In one final case, we represented the employer/carrier in a claim by one employee who alleged a COVID exposure at work, but who had not produced a positive test result. We were able to reach an agreement to settle the matter by way of a D&D after the employee's petition was denied at the pretrial stage and was pending at trial.

Questions?

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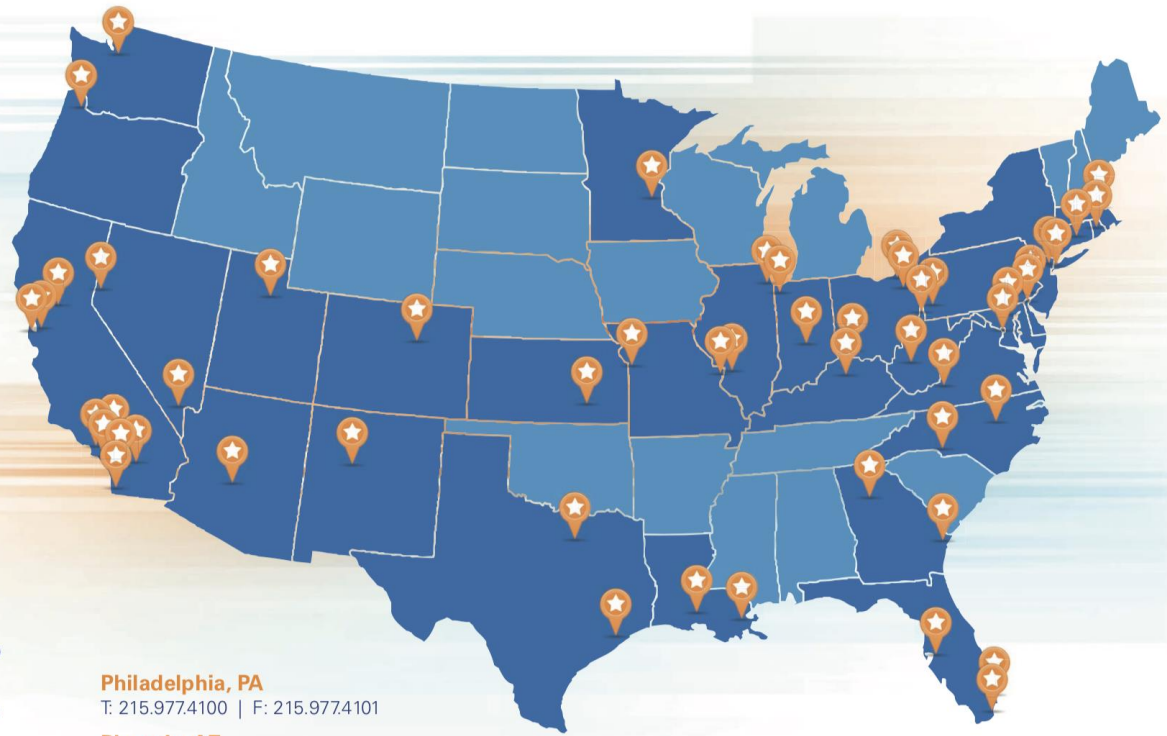

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