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COVID-19 CLAIMS UPDATE MEMORANDUM

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LEGISLATIVE UPDATE

As we know, the Illinois Legislature passed workers' compensation legislation in response to the COVID-19 pandemic. The legislation created a rebuttable presumption in favor of certain workers if they contract COVID-19.

The Illinois Workers' Compensation Commission attempted to unilaterally create some new rules creating a rebuttable presumption of compensability in favor of front line/essential workers. Those rules were enacted on April 13, 2020 and met with immediate opposition from business groups and defense lawyers. After a lawsuit was filed by business groups opposing the rules, the Commission withdraw and repealed their rules on April 24, 2020.

It was expected that the Illinois Legislature would take action as many other states had done so. We expected the legislature to craft a statute to benefit at least first responders and healthcare workers. The statute enacted was essentially an agreed bill. The statute was drafted following an agreement between business and labor groups. The statute passed both houses of the legislature almost unanimously. The legislation passed the Senate by a vote of 50-4 and passed the House by a vote of 113-2. The statute passed both houses effective May 22, 2020. The Governor signed the legislation on June 5, 2020. (HB 2455).

The statute did not amend the Workers' Compensation Act, but instead created a new paragraph in the Illinois Occupational Diseases Act – Section 1(g). House Bill, passed on June 5, 2020, created a rebuttable presumption in favor of certain workers if they contract COVID-19. The presumption applied to any frontline or essential worker who contracted COVID-19 between March 9, 2020 and December 31, 2020.

On February 26, 2021, the Governor signed House Bill 4276 into law. House Bill 2476 extended the rebuttable presumption through June 30, 2021. There is no pending legislation that would extend the rebuttable presumption beyond June 30, 2021.

House Bill 4276 also amended the Chicago Police and Firefighter Articles of the Illinois Pension Code to include a rebuttable presumption that the death of a policeman or firefighter from COVID-19 was a fatal injury while in active service if they were exposed to and contracted COVID between March 9, 2020 and June 30, 2021.

There is a pending proposed House Bill that would amend the Workers' Compensation Act. House Bill 3654 would provide that "no compensation shall be awarded to a claimant for death or disability arising out of an exposure to COVID-19 if the employee has refused a vaccination." This House Bill was introduced on February 19, 2021. It is uncertain whether or not this will pass both the House or Senate and be signed by the Governor. This would be a step in the right direction if it were to pass.

REBUTTABLE PRESUMPTION

The statute enacted in 2020 by the legislature created a rebuttable presumption of compensability in favor of certain workers who contract COVID-19. The statute has a limited period of applicability. It is only applicable where a diagnosis of COVID-19 was made on or after March 9, 2020 and on or before June 30, 2021.

In order to prove a case for a diagnosis occurring on or before June 15, 2020, an employee must provide a confirmed medical diagnosis by a licensed medical practitioner or a positive laboratory test for COVID-19. For diagnoses occurring on or after June 16, 2020, an employee must provide a laboratory test confirming the COVID-19 diagnosis. A medical diagnosis by a licensed medical practitioner is itself insufficient.

The statute creates a rebuttable presumption of compensability in favor of certain workers. The types of certain workers covered is broad. It includes all first responders or front-line workers. The statute provides, "In any proceeding before the Commission in which the employee is a COVID-19 first responder or front line worker as defined in the subsection, if the employee's injury or occupational disease resulted from exposure to and contraction of COVID-19, the exposure and contraction shall be rebuttable presumed to have arisen out of and in the course of the employee's first responder or front line worker employment and the injury or occupational disease shall be rebuttably presumed to be causally connected to the hazards or exposures of the employee's first responder or front line worker employment."

The term COVID-19 first responder or front-line worker includes:

1. All individuals employed as police, fire personnel, emergency medical technicians or paramedics;
2. All individuals employed and considered as first responders;
3. All workers for healthcare providers including nursing homes and rehabilitation facilities and homecare workers;
4. Corrections officers;
5. Any individuals employed by essential businesses and operations as defined in Executive Order 2020-10 dated March 20, 2020 as long as individuals employed by essential businesses and operations are required by their employment to encounter members of the general public or to work in employment locations of more than 15 employees. An employee's home or place of residence is not a place of employment except for homecare workers. Front-line workers as defined by Executive Order 2020-10 includes workers at the following businesses:

    a. Stores that sell groceries and medicine;
    b. Food, beverage and cannabis production and agriculture;
    c. Organizations that provide charitable and social services;
    d. Media;
    e. Gas stations and businesses needed for transportation;
    f. Financial institutions which includes banks, currency exchanges and consumer lenders;
    g. Hardware and supply stores;

h. Critical trades which include building and construction tradesmen and also cleaning and janitorial staff, security staff and other service providers;
i. Mail, post, shipping, logistics, delivery and pickup services;
j. Educational institutions;
k. Laundry services;
l. Restaurants for consumption off premises;
m. Businesses that sell, manufacture or supply products to work from home;
n. Businesses that sell, manufacture or supply other essential businesses or operations;
o. Transportation companies;
p. Home-based care and services;
q. Residential facilities and shelters;
r. Professional services including law firms, accounting firms and insurance firms;
s. Daycare centers for employees exempted by the executive order;
t. Businesses that manufacture, distribute and are supply chain for critical products in industries;
u. Critical labor union functions;
v. Hotels and motels;
w. Funeral services.

How can the rebuttable presumption be overcome?

A rebuttable presumption creates a "prima facie case as to the particular issue in question and thus has the practical effect of requiring the party against whom it operates to come forward with evidence to meet the presumption." *Diederich v. Walter*, 65 Ill.2d 95, 2 Ill. Dec. 685, 357 N.E.2d 128 (1976). The presence of a presumption in a case only has the effect of "shifting to the party against whom it operates the burden of going forward and introducing evidence to meet the presumption." *Id.* If the evidence introduced is contrary to the presumption, the presumption will cease to operate. *Id.*

When the presumption is rebuttable, it can be opposed and defeated. Once evidence opposing the presumption comes into the case, the presumption ceases to operate and the issue is determined on the basis of the evidence adduced at trial as if no presumption ever existed. The burden of proof does not shift, but remains with the party who initially had the benefit of the presumption.

The rebuttable presumption created in the COVID-19 statute is an ordinary rebuttable presumption. Any contrary evidence is sufficient to successfully rebut the statutory presumption.

The statute specifically sets forth a series of three different ways, at a minimum, that the employer can rebut the statutory presumption.

1. The presumption can be rebutted by showing that the employee was working from his home for 14 or more consecutive days immediately prior to the injury, occupational disease or period of incapacity from COVID-19;

2. The employee was exposed to COVID-19 by an alternate source;

3. The employer was engaging in and applying to the best of its ability, industry specific workplace sanitation, social distancing and health and safety practices based on CDC Guidelines. The employer can rebut the presumption by showing that the employee had been protected consistent with the directives of the CDC for at least 14 days prior to the injury, occupational disease or period of incapacity. This would include the requirement of personal protective equipment, including but not limited to face coverings, gloves, safety glasses, safety face shields, barriers, shoes, etc.

INVESTIGATING AND DEFENDING COVID CLAIMS

The statute creates an ordinary rebuttable presumption. Such a rebuttable presumption is relatively easy to overcome with some contrary evidence.

The presumption can easily be overcome if the employee does not provide a positive laboratory test for COVID-19. For cases occurring on or before June 15, 2020, it is sufficient for the employee to provide a confirmed medical diagnosis by a licensed medical practitioner or a positive laboratory test. However, for cases occurring on or after June 16, 2020, a medical diagnosis by a licensed medical practitioner is insufficient. The employee must provide a positive laboratory test.

The presumption can also easily be overcome by providing evidence that the employee was either working from home for 14 or more consecutive days or at an alternative remote site immediately prior to contracting COVID-19 and receiving a positive laboratory test result.

The statute explicitly states that the employer can rebut the presumption by providing PPE equipment and following the guidelines established by the CDC to the best of its' ability.

Therefore, even if an employee has a positive diagnosis and was working at the employer's premises during the relevant incubation period, the employer can still overcome the rebuttable presumption by providing evidence of compliance with CDC guidelines for protection. Evidence of compliance would include showing that the employer provided face coverings, gloves, safety glasses, safety face shields, barriers, shoes, etc.

Employers can also overcome the presumption by demonstrating that the employee was exposed to COVID-19 from an alternate source. Employees are essentially required to prove that they very likely contracted the virus at work and, in turn, prove that they did not contract the virus anywhere else.

Employers can challenge a COVID-19 claim if they have reason to believe that the worker did not contract the virus at the place of employment. The employer would have to prove that the employee was exposed to COVID-19 somewhere else or from someone not related to the employment. Employers could likely produce evidence that the impacted employee attended a large gathering at which others who were proven to be infected were in attendance, or the employee lives with a large family whose members are known to have contracted COVID-19. The employer could also produce evidence that the employee regularly attended classes at a school or gym that had an outbreak of COVID-19. Every claim involving alleged exposure would be evaluated based on its own set of specific facts.

Once the employer can overcome the rebuttable presumption, we believe it will be difficult for an employee to establish a compensable Covid exposure claim. Covid was endemic for the most part of 2020. Many arbitrators have indicated, once we have argued that the presumption does not apply, that an employee will have difficulty proving by a preponderance of the evidence that Covid was contracted at work given how prevalent the virus was.

Therefore, it is vital that every effort be made to overcome the presumption – even if we cannot specifically identify another source of infection.