California Now Presumes Most Employees With COVID-19 Can Receive Workers' Compensation Benefits

Insights
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California Governor Gavin Newsom just enacted sweeping changes to the state's workers' compensation standards, providing that a broad swath of California workers who contract COVID-19 are presumed to have a workplace injury covered by the workers' compensation system. While as many as eight other states have recently established rebuttable presumptions that certain workers with COVID-19 have valid workers' compensation claims unless the employer can prove the employee contracted the virus outside of work, California took a giant step further. This Executive Order far outpaces any other state efforts in this regard in terms of both scope and coverage. What do employers need to know about this radical change and what can you do to both protect your workers and minimize your liability?

What Has Changed?
Under the existing California workers' compensation system, employees need to present some medical evidence that their illness or injury was related to work in order to qualify for benefits. To meet that important threshold, they need to establish some reasonable factual basis for asserting that the workplace caused their illness or injury.

However, the Executive Order turns that analysis on its head. Instead, if any "covered worker" contracts COVID-19, it would be automatically "presumed" to be work-related without the employee having to provide any further proof. Although this presumption is rebuttable – meaning you can controvert this position with other evidence – it is likely to be a high burden for employers to meet. With a communicable disease that can be contracted in a number of ways (many of which are outside your control), how do you prove that COVID-19 was contracted *outside* the workplace? It's a difficult task, meaning most claims are likely now going to be covered by workers' compensation.

Who's Covered?
The presumption applies to any worker who reported to work outside of the home at the direction of their employer and received a positive test or physician (licensed by the California Medical Board) diagnosis for COVID-19 within 14 days of the worker's last day working outside of the home. If the claim is based on a physician's diagnosis, it would require a subsequent positive test within 30 days to continue the claim. This coverage is far broader than similar presumptions established by other states, which have generally been limited to a narrow scope of front-line and other essential workers.

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Other Specifics

The Executive Order reduces the timeframe for insurers to make a compensability decision from the general 90 days to 30 days. However, the order permits denials after this period based on new information. This shortened timeframe will likely result in cost pressures to the system as a whole, and could result in delays for decisions on other non-COVID-19 related workers' compensation claims as insurers prioritize their workload.

The Executive Order also provides that compensation shall include all workers' compensation benefits, including full hospital, surgical, medical treatment, disability indemnity, and death benefits, which are generally available to injured workers under the current system. Injured workers are only eligible for temporary disability (TD) benefits after they use all of their state and federal sick leave benefits. In addition, the Executive Order requires TD recertification every 15 days (rather than the general rule of every 45 days). Death benefits are available but will not be paid when there are no dependents.

Cost Concerns

An obvious concern for employers is what this change will mean in terms of overall costs to California's workers' compensation system. The difficulty in being able to successfully challenge whether an employee contracted COVID-19 in the workplace or elsewhere means that this change essentially shifts much of the pandemic costs to the workers' compensation system. It's hard to see how that will not result in a massive increase in costs to that system, and thereby, California employers.

The California Workers' Compensation Insurance Ratings Bureau (WCIRB) recently completed a cost evaluation that estimated such a presumption could cost between $2.2 billion and $33.6 billion – and that was if the presumption were only limited to front-line and other essential workers. Now that the finalized order goes much further, the estimated costs could skyrocket from those initial figures.

What's Next?

California employers have significant concerns about the cost implications this Executive Order will have on the workers' compensation system. There is little doubt that these changes will result in additional costs to the system that will be passed through to all employers via increased premiums. However, perhaps of more importance are the more broad impacts to California's workers' compensation system as a whole. There have been some rumors that carriers may simply pull out of California and do business elsewhere – this could have dramatic effects on the system and California employers' ability to find coverage.

In addition, there could be legal challenges to the Governor's Executive Order, particularly regarding his ability to establish a workers' compensation presumption by executive fiat, rather than through a legislative change. A judge in Illinois recently granted a temporary restraining order, blocking enforcement of a similar workers' compensation presumption adopted on an emergency basis by the Illinois Workers' Compensation Commission. That litigation was brought by a coalition of

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basis by the Illinois Workers' Compensation Commission. That litigation was brought by a coalition of retailers, manufacturers, and other businesses. It seems likely that similar challenges could by mounted to California's new rule, but it remains to be seen how that will play out. We'll keep you updated on any legal challenges on this front.

What Should Employers Do?

California employers should take heed of this significant development. Above all, the establishment of a presumption for COVID-19 contractions underscores the need for you to closely follow CDC and OSHA guidance for minimizing or preventing exposures in the workplace. This development is even more reason for California employers to redouble those efforts in the hopes of preventing any contraction.

The shortened timeframes and other procedural changes to how COVID-19 claims will be handled also require immediate attention by California employers. You should consult closely with you carriers and employment counsel regarding these new timeframes and how to best manage claims handling starting immediately.

The Department of Industrial Relations (DIR) announced that additional guidance will be forthcoming in the coming days. Therefore, you should pay close attention to these additional details as they become available. We'll keep you posted as soon as more details and guidance become available.

Conclusion

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, any attorney in our California offices, or any member of our Post-Pandemic Strategy Group Roster. You can also review our FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers and our FP Resource Center For Employers.

This Legal Alert provides an overview of a developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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Benjamin M. Ebbink
Partner
916.210.0400
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