Armstrong Teasdale

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COVID-19 CLAIMS: NAVIGATING OSHA, WORKER COMPENSATION AND TORT LIABILITY TO ACHIEVE THE BEST OUTCOME FOR EMPLOYERS

Employers are being forced to make quick decisions regarding myriad COVID-19-related issues that were not even on the radar six weeks ago. Some decisions may seem good for the company now, but the sting may be felt down the road, and by then it will be too late to alter course. Simultaneously, governmental agencies are issuing guidance or emergency orders that further burden the employer.

Meanwhile, many workers' compensation carriers across the country are denying COVID-19 claims on the basis that the incidence of COVID-19 in workplaces is no greater than in the general population. That decision might be technically correct, since it may be impossible to determine whether an employee caught the virus in the workplace. However, the carrier's decision not to cover a claim could have a grave impact on the employer, because it potentially clears the path for the employee to file a civil negligence suit against the employer for failing to take proper precautions to prevent the spread of the disease in the workplace. An injury that is compensable under workers' compensation typically prevents a claimant from filing a separate civil negligence suit against the employer.

Negligence claims can have much higher damages potential than workers' compensation claims, particularly in plaintiff-friendly venues. If the employer is not in one of those venues, however, and if the employer has few or no other cases of the virus in its workforce, it may have strong enough evidence to prevail in a negligence suit and may be content if the workers' compensation claim is denied.

It is expected that in the not too distant future, a massive number of COVID-19 negligence lawsuits (not workers' compensation claims) will be filed against employers across the country. Many will seek punitive damages due to the

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employer's alleged failure to take reasonable precautions, such as those published by the CDC, to prevent the virus from spreading in the workplace. Employees might point to an employer's failure to comply with CDC recommendations or governmental emergency orders as evidence of negligence or even negligence *per se*. Proactive compliance with the recommendations and laws relating to COVID-19 is the best way to discourage such claims and ensure the best possible defense in the event a claim is filed.

This article offers some tips on how employers can minimize the risk of becoming the target of future litigation and best position themselves to defend against a lawsuit if necessary.

OSHA RECORDKEEPING GUIDANCE

On Friday, April 10, 2020, the federal Occupational Safety and Health Administration (OSHA) issued new guidance for recording cases of COVID-19 on the employer's OSHA 300 log. Prior to this guidance, OSHA had said little on the subject.

As background, under OSHA's existing recordkeeping regulations, covered employers (generally those with more than 10 employees and in higher hazard industries not exempted by OSHA in Appendix A to the regulations) must record work-related injuries and illnesses experienced by employees within seven calendar days after the employer receives information that the case has occurred. The purpose of these logs is to enable the employer (and OSHA, as an enforcement agency) to track injuries and illnesses at the employer's establishment, and eliminate hazards.

The regulations specifically exempt "the common cold and flu," as well as injuries and illnesses experienced as the result of eating or drinking in the workplace, but diseases "like tuberculosis, brucellosis, hepatitis A or plague are considered work-related if the employee is infected at work." 29 CFR § 1904.5(b).

The April 10 guidance recognizes that in areas where there is ongoing community transmission, employers other than those in the health care industry and emergency response industries *"may have difficulty* making determinations about whether workers who contracted COVID-19 did so due to exposures at work." The guidance further states that in light of those difficulties, OSHA will *not* enforce 29 CFR § 1904 for COVID-19 cases experienced by such employees, except where:

"1. There is *specific objective evidence* that a COVID-19 case may be work-related. This could include, for example, a number of cases developing among workers who work closely together without an alternative explanation; and

"2. The evidence was reasonably available to the employer. For purposes of

this memorandum, examples of reasonably available evidence include information given to the employer by employees, as well as information that an employer learns regarding its employees' health and safety in the ordinary course of managing its businesses and employees."

The guidance clearly signals OSHA's lowered expectation that COVID-19 cases should be recorded. Even so, employers should analyze all cases carefully, particularly where it has a large number of infected employees who work in close proximity to one another.

COVID-19 WORKERS' COMPENSATION CLAIMS

Employers should accept the OSHA guidance for the limited purpose for which it is offered: OSHA recordkeeping. This guidance does not affect workers' compensation coverage decisions. OSHA operates completely independently of state workers' compensation agencies and has no influence over them. In fact, Section 4 of the Occupational Safety and Health Act of 1970 (OSH Act) states:

"Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment."

Many employers mistakenly believe that if a case is recordable on an employer's OSHA log, it is also compensable as a workers' compensation case, and vice versa. But the determination of whether an injury or illness is recordable under OSHA regulations must be made *independently* from the determination of whether the case is compensable under a state workers' compensation law. This is because the applicability is based upon the unique language in either the OSHA recordkeeping regulation or the state workers' compensation law. It is possible that a case is not recordable under the OSH Act, because the regulation excludes it, but is compensable under state workers' compensation law, and vice versa. OSHA's April 10 guidance tells employers that it does not expect them to treat the typical COVID-19 case of a worker as work-related. Section 4 of the OSH Act tells employers that their recordkeeping decisions have no play in workers' compensation or negligence suits.

States are beginning to address COVID-19 workers' compensation claims through the administrative or legislative process, so it is imperative that employers remain up-to-date. As an example, on April 13, 2020, the Illinois Industrial Commission issued an emergency order creating a rebuttable presumption of compensability for COVID-19 claims filed by "First Responders or Front-Line Workers" in claims before the Commission. Front line workers include health care workers; workers in stores that sell food, medicine and

gasoline; financial institutions; hardware stores; laundry services; logistics and delivery services; home-based care and services; and manufacturing, distribution and supply chain for critical products and industries, among other sectors. While this emergency order may seem like a harsh move, it will likely influence workers' compensation carriers to cover COVID-19 claims, and may prevent civil negligence suits against employers in Illinois. On April 8, 2020, Missouri enacted a similar, albeit more narrow rule applicable to first responders.

NAVIGATION STRATEGY

An employer will best navigate this minefield by:

1) being proactive and taking precautions in the workplace to prevent the spread of the virus, generally as recommended by the CDC, but also as required by applicable statutes and emergency orders;

2) knowing workers' compensation laws and staying up-to-date on all orders, rules, laws and guidelines;

3) considering ahead of time whether it would prefer a workers' compensation claim to be handled through workers' compensation or a civil negligence suit;

4) having a strategy in place for how it will respond if an employee's workers' compensation claim is denied, depending upon whether it would prefer the claim to be administered through workers' compensation or through a negligence suit; and

5) in the event a claim is filed, communicating appropriately with workers' compensation and other insurance carriers, according to policy language, in order to preserve all possible coverages.