

Pandemic Risk: Workers' Compensation Point of View (POV)

A collaboration between NLC-RISC, NLC Mutual & Northshore International

The current COVID-19 Pandemic has presented many challenges to local governments across the United States. Among our many strengths is the ability to think collaboratively and to share information and ideas for the broader benefit of the governmental entities we serve. In our first Pandemic Risk POV, we hope to provide helpful ideas for your consideration as it relates to workers' compensation.

The environment and the nature of COVID-19 is dynamic with significant influence anticipated from federal and state legislatures, as well as the potential for judicial interpretation. We appreciate the distinctions and nuances that will arise within the individual jurisdictions. Each of our members should consider the following in the context of their own jurisdictions, coverage agreements, and membership by-laws.

State & Federal Legislative and Regulatory Efforts

While there will certainly be interpretation of the Occupational Disease provisions of Workers' Compensation Statutes, there are already presumptive efforts underway to expand coverage for first responders and health care workers in many states. The National Council on Compensation Insurance (NCCI) and the Reinsurance Association of America (RAA) offer tracking and overviews of state workers' compensation legislative efforts: [NCCI Legislative Activity Tracker](#) and [RAA Comprehensive Tracking Chart](#).

The expansion of workers' compensation laws for COVID-19 coverage includes several key elements which warrant further consideration and evaluation of potential impacts:

- **Definition of Occupational Disease:** Many presumption regulations or bills are expanding compensability for "personal injury" or "occupational disease." Typically, workers' compensation excludes ordinary diseases like colds and flu.
- **Front-line Workers:** There can be ambiguity in defining a "front-line worker," which will lead to efforts to interpret it as loosely as possible to afford maximum coverage.
- **"Remote worker" versus a "mandate to work from home" per executive orders.** If an employee is required to work from home and is exposed to a spouse, child or other family member living within the same household, the argument will rise that this exposure would be compensable under workers' compensation. Many jurisdictions contain statutory language reflecting that not only must an injury arise out of and in the course of employment, but the risk associated with the injury must be "inherent in the workplace." However, exposure to an infectious disease while working from home does not meet the "inherent in the workplace" standard and would not be compensable.

- **Special Employment Circumstance:** Jurisdictions apply a “special employment circumstance” that make working from home a necessity. Most often it is applied in cases involving snowstorms or weather conditions which prevent an employee from being physically present in the typical workplace. Since pandemics are atypical events, it provides further strength to the “special employment circumstance.” Once this is established, coverage applicability becomes subject to the precise work being performed and whether it meets criteria of “regular work duties.”
- **Quarantine and/or Positive Diagnosis:** While most state laws are focused on expanding coverage only for positive diagnosis of COVID-19, some states also are providing coverage for quarantine if there is a confirmed exposure (even if the employee themselves has not tested positive). Some members are considering alternatives to presumption, such as paid sick leave programs.

In states where there have not yet been legislative efforts to expand workers’ compensation for COVID-19, some Pools are taking proactive steps to cover COVID-19 claims for certain employees. State-specific nuances may or may not make this practical, including:

- Some states have Injured on Duty (IOD) statutes for police and fire, which may impact assessment of occupational disease;
- Other states may be covering treatments under the health program and not treating as occupational disease;
- What impact does the decision to accept coverage have on eroding presumption arguments; and,
- Whether covering COVID-19 as presumed to be an occupational disease may potentially help members avoid lawsuits and legal expenses.

To date, we are not aware of any federal efforts that would impact pool coverage for workers’ compensation but are monitoring potential developments.

Exposures are predominantly cases in which the burden of proof is upon the employee; however, we have seen a steady shift in expanding presumptions as it relates to cancer and PTSD for firefighters and other first responders. The response to a pandemic such as COVID-19 is unprecedented and far more extensive with the rapidly expanding number of cases, particularly those requiring extensive hospitalizations, and an increasing number of fatalities.

Keeping this in mind, Pools should balance whether to include, or not include, coverage for the COVID-19-related claims. By reacting too quickly, it can establish a precedent that may later be contrary to the position established regarding COVID-19-related cases, or exposure claims overall. From a workers’ compensation standpoint, monitoring the jurisdictional developments will be critical and should remain the focus for the handling and response to what is an extremely rapidly developing situation.

Potential Claim Trends

Mental Health and Stress Claims: Given the amount of stress the general public is experiencing around possible COVID-19 contamination, first responders are in a higher risk category for physical illness and mental illness claims. Consider the following:

- The possibility that under Presumptive Risk statutes for Mental/Mental (where there is no physical injury) there could be stress claims resulting from the potential risk of contracting the disease. Further, stress claims could ensue long after the pandemic has passed.
- What impact might repeated responses to the pandemic have on first responders already predisposed to developing PTSD?
- The Occupational Safety and Health Administration's (OSHA) requirements for recording workplace exposures and effectively tracking these developments, including OSHA's record-keeping requirements during the COVID-19 pandemic.
- What record-keeping protocols are in place to document date, time and to whom the stress claim is reported; and
- The possible role of your Employee Assistance Program (EAP) or telehealth in helping employees manage stress, anxiety and depression.

Information on OSHA's COVID-19 Standards can be found [here](#). The American Psychological Association (APA) also has information available on their [COVID-19 Information and Resources](#) page such as: [Quickly calming distress and improving mental health \(Psychological First Aid\)](#) and [Updated telehealth guidance by state during COVID-19](#).

Injuries Due to Poor Ergonomics: With a large amount of the workforce teleworking during the pandemic, consider the possibility of increased claims related to issues created by employees working at home without their normal ergonomic workstations:

- How do you best manage the potential risk for increased claims in these areas, especially as loss control field representatives may be subject to travel bans and also are working from home?
- What opportunities does video conferencing and/or trainings provide Pools to be able to conduct ergonomic assessments or reviews with members?

Access to Health Care and Treatment: With the health care system being overwhelmed with COVID-19 patients, many non-essential health care services have ceased or are being delayed. Consider this potential on claim volume and whether the number of workers' compensation claims may ultimately decrease. Also, consider what the lack of access to medical care and treatment means for existing workers' compensation claimants and their ability to get better and return to work?

- How do employees with existing workers' compensation injuries continue to make progress towards recovery, and what role does telemedicine and tele-rehab play in the management of these injuries?

Claims Reporting & Analysis

Because it is likely that information across Pooling Programs will need to be gathered for information sharing and analytical purposes, we suggest developing consistent coding that will allow identification and retrieval. We also suggest that the information be captured in a field (other than the Notes field) where the information is subject to the greatest variation and interpretation.

Most claims systems have major data fields for Coverage, Cause of Loss, and Nature of Injury. Some Pools may assign numeric identifiers for this purpose. WCIO and NCCI recommend – and many states have adopted – the following coding to better identify COVID-19 claims within workers' compensation:

- Cause of Injury Code - Pandemic (83); and
- Nature of Injury Code – COVID-19 (83)

Use of common coding will better position Pools to be able to analyze the impact of COVID-19 claims on the Pool and local government members. This will also allow us, as a state league risk pool community, to better aggregate and compare impacts across the country.

NLC Mutual is assisting its members by developing a projection model to help Pools estimate the cost range of expected workers' compensation costs directly attributable to COVID-19 infections and quarantining. To learn more, contact Chris McKenna, Vice President and Actuary, at cmckenna@nlcmutual.com.

Summary of Key Considerations

- Monitor state legislative changes expanding workers' compensation for COVID-19;
- Prepare a response for the possibility of increased mental health claims relative to COVID-19 triggers;
- Prepare for the possibility of increased claims related to ergonomic issues resulting from employees working remotely;
- Consider allowing alternatives to in-person treatment, including appropriate uses of telemedicine and tele-rehab;
- Implement appropriate coding standards within your claims system to allow for better identification and analysis of Pandemic and COVID-19 claims;
- Investigate all COVID-19 claims to determine appropriate acceptance or denial of coverage;
- Check with your reinsurers about their reporting requirements for COVID-19-related claims; and
- Share information! NLC-RISC and NLC Mutual exist to support you! By sharing information with us, we are better able to provide you the tools you need and connect you with the appropriate peers from across the country.