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PERSPECTIVE

Workers compensation and COVID-19

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The novel coronavirus disease, or COVID-19, is spreading rapidly across the world, throughout the United States, and into various communities in California. Beyond its potentially fatal consequences, it has already disrupted travel and the world economy, caused states of emergency to be declared in California and across the country, shuttered businesses, closed schools, cancelled sporting events and public gatherings, and taken a significant toll on public life — with more disruption likely to come. With businesses and individuals across the state trying to decide on next steps, and the potential for employer liability if they fail to take steps to protect their employees from the consequences of the disease, it is important to look at how California's workers' compensation system may play into these decisions.

COVID-19, as a widespread infectious disease, is likely to be considered a nonoccupational disease — one that is normally not compensable under the workers' compensation system because it is not contracted solely due to exposure at work or due to a specific kind of work. That is because the workers' compensation system only compensates injuries "arising out of and in the course of the employment." Labor Code Section 3600, *South Coast Framing, Inc. v. WCAB*, 61 Cal. 4th 291, 297 (2015); see also Labor Code Section 3208 ("'Injury' includes any injury or disease arising out of the employment....") (emphasis added).

In *Latourette v. WCAB*, 17 Cal. 4th 644, 654 (1998), the California Supreme Court discussed the noncompensability of nonoccupational diseases, stating, "the fact that an employee contracts a disease while employed or becomes disabled from the natural progress of a nonindustrial disease during employment will not establish the causal connection," necessary to invoke compensation. This rule arises from the "obvious problems of determining causation ... the product of invisible and often widespread viral, bacterial, or other pathological organisms," coupled with the "high costs of avoidance and treatment." *Id.*

But there are "two principal exceptions" to this general rule: "First, if the employment subjects the employee to an increased risk compared to that of the general public, the injury is compensable. Second, if the immediate cause of the injury is an intervening human agency or instrumentality of the employment, the injury is compensable." *Id.*

The first exception is seen in *City and County of San Francisco v. Industrial Acc. Commission*, 183 Cal. 273, 282–83 (1920), a case with particular echoes to the current outbreak. There, a hospital steward contracted the Spanish Flu in 1918, and unfortunately passed from the disease eight days later, with the widow receiving compensation benefits. The question posed to the California Supreme Court was whether such an infectious disease, despite the ongoing pandemic, was compensable. There, the evidence showed the steward had been required to handle at least 12 cases of influenza before he became ill, was only known to have been exposed through his employment, had been distancing himself in his personal life, and that the proportion of fellow healthcare workers who contracted influenza was between 50% to 85%, compared to 10% for the community at large. *Id.* Based on those facts, the worker "contracted the disease as a result of his peculiar exposure to it incidental to his employment"—with the disease being ruled compensable. *Id.*, *see also Pac. Emp. Ins. Co. v. Ind. Acc. Com.*, 19 Cal. 2d 622, 630 (1942) (injury to traveling salesman who contracted San Joaquin Valley fever was found to be compensable because if the employee's "duties had not taken him to the endemic area he would not have contracted the disease" and that his exposure was an increased risk, even from that of the local population, as he lacked any immunity, unlike the local communities).

Thus, if an employee can demonstrate that they had a greater risk of exposure at the workplace compared to the general public (such as a higher percentage of coronavirus cases than the community, or required travel to an outbreak location), the employer could be found liable for the injury and resulting treatment. Health care workers and those required to interact with large numbers of the public in particular might be able to argue they are subjected to an increased risk and that their injuries from coronavirus should be compensable.

The second exception is seen in *Maher v. WCAB*, 33 Cal. 3d 729, 732- 33 (1983). There, a nurse's assistant was required by her employer to undergo testing for tuberculosis. After testing positive, she was required to undergo treatment as a condition of continued employment. During treatment, she developed a significant adverse reaction. The California Supreme Court found that *employer-required* medical treatment for a nonoccupational disease arises out of the employment and is compensable. *Id.* at 738; *see also Roberts v. U.S.O. Camp Shows, Inc.*, 91 Cal. App. 3d 884, 885 (1949) ("'Incapacity caused by illness from vaccination or inoculation may properly be found to have arisen out of the employment where such treatment is submitted pursuant to the direction or for the benefit of the employer.'"); Labor Code Section 3212 (including "pneumonia" under the definition of "injury" for law enforcement and fire department personnel). Thus, an employer — even if they may not cause the initial infection — may be liable for aggravating the condition or requiring treatment that causes injury.

How these two exceptions will operate with respect to COVID-19 remains to be seen. But employers would be well advised to take action to protect their employees from the pandemic — particularly to ensure that employees who are infected or potentially infected with COVID-19 do not aggravate their conditions at work, do not cause additional infections at work, and do not further the spread of this already dangerous disease. That may include working from home for employees, even those with minor symptoms, prohibiting sick employees from working with the public, providing additional forms of disinfecting agents and hand sanitizer (if available), limiting physical contact, moving in-person meetings to teleconferences or email, restricting business travel, *particularly* to areas with active infections or quarantines, limiting convention attendance, and other steps to reduce the active spread or aggravation of the disease.

For many employers, this may drastically change the normal course of business. But to combat this pandemic, protect the public and employees, and avoid potential liability in the future, significant precautions should be taken. ■

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