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New Jersey Workers' Compensation Alert - May 8, 2020 Update

The much anticipated legislative proposal that would have a significant impact on the NJ Workers' Compensation statute pertaining to essential employees who contract COVID-19, has now been introduced in both the Senate and Assembly chambers.

Senate bill S2380, sponsored by Senator Stephen M. Sweeney, along with a companion bill introduced in the Assembly, A3999, by Assemblymen Thomas P. Giblin and John J. Burzichelli, both introduced on May 4th, 2020, seeks to amend the NJ Workers' Compensation statute by creating a presumption of compensability for essential employees who contract COVID-19. The presumption is defined as a "prima facie presumption," meaning that if the employee meets the criteria of being an "essential employee," and that individual contracts the coronavirus, that illness would then presumptively be considered as a compensable work-related illness. That would entitle the individual to all of the benefits of workers' compensation, that is, medical care, temporary disability benefits, and potentially permanent disability benefits.

The legislation does allow the employer to rebut the presumption of compensability by the legal standard known as a "preponderance of the evidence," establishing that the worker was not exposed to or did not contract the disease in the workplace.

The bill defines an essential employee as any health care worker, public worker and any employee considered essential "in support of gubernatorial or federally declared statewide emergency response and recovery operations," or an employee in either the public or private sector with duties and responsibilities that are considered "essential to the public's health, safety and welfare." With this definition in place, the scope of this coverage can potentially cast a rather wide net over several areas of employment where jobs are critical to the public welfare.

While talk of this proposed legislation has been growing daily, it was not introduced earlier than May 4th because the legislature was not in session. Earlier drafts of this bill were slightly more burdensome upon the employer as it proposed a presumption that could only be rebutted by "clear and convincing" evidence that the worker was not exposed to the disease.

If this legislation becomes law, a covered essential employee who becomes ill with the disease and must remain out of work due to hospitalization, or time of quarantine, will be considered out on "duty time" and cannot be required to use any paid leave or other contractual time off from work, and will be considered as "emergency hazard health duty" during such loss time.

It is important to note for insurance carriers that such claims of compensability are considered as "catastrophic" events, and will not go against an employer's experience rating.

Many employers and insurance carriers have raised concern over such a difficult carve-out to a workers' compensation statute that already provides benefits to individuals who can establish that a disease was contracted in the workplace. A good example is the line of cases that have found individuals who work out in fields and wooded areas that have contracted Lyme's disease through tick bites. That burden of proof is that the exposure at work was "more likely than not" the cause of the disability.

More importantly, New Jersey was on the forefront in creating protection to first responders, including first-aid and rescue squad members, police, correction officers, nurses, medical technicians and other medical personnel with the passage of the Canzanella Act in July 2019. This act creates a rebuttable presumption of workers' compensation coverage who can establish evidence of exposures to communicable diseases in

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the work place. This Act is currently being applied to the COVID-19 pandemic.

While there is certainly a lot to gain politically by this proposed legislation, changing the statute that already provides reasonable protection to those individuals who are most at risk with this current crisis is unnecessary, and could have a further devastating effect on the economy. Understanding the economic impact of this legislation needs to be investigated before any action on this legislation is taken.

Comment: The pandemic caused by COVID-19 is a rather unique, and hopefully a once in a lifetime catastrophe, requiring selective safeguards that are tailored directly to the crisis at hand, and not by making knee-jerk changes to well-established laws that already provide appropriate protections to the public at large, and to those who are at the greatest risk due to their chosen profession. We have seen such legislation already swiftly acted upon, such as the CARES Act intended to protect a wide range of businesses and individuals, including essential employees. We need to focus on the immediate needs of the essential employee, and not change laws that already provide adequate protection for those impacted by work-related injuries and illnesses.

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