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NJ Legislature Passes COVID-19 Presumption Law for Essential Employees

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

Senate bill S2380, passed both houses on Thursday, July 30, 2020, by votes of 27-12 in the Senate, and 42-27-6 in the Assembly. The legislation will amend the NJ Workers' Compensation statute by creating a presumption of compensability for those defined as "essential employees" who contract COVID-19. The rebuttable presumption in the law means that if the employee meets the criteria of being an "essential employee," and the individual contracts COVID-19, the illness will be covered for benefits afforded through workers' compensation. This includes medical care, temporary disability benefits, permanent disability benefits and potentially dependency benefits to dependents of an essential employee whose death is caused by the virus.

The legislation creates what is called a rebuttable presumption of compensability. This means if a covered employee contracts the disease, it establishes a prima facie case of compensability. The burden of proof then shifts to the employer who can rebut the employee's entitlement to benefits by establishing that the worker was not exposed to, or did not contract the disease in the workplace, by a preponderance of the evidence.

The bill rather broadly defines essential employees in both the public and private sectors. This includes any public safety worker or first responders, such as fire, police and other emergency responders, and individuals who provide medical and other healthcare services, including emergency transportation, social services, and services provided in healthcare facilities, residential facilities and homes. Those in the private sector covered under this legislation, in addition to individuals in the business of healthcare, are those individuals who perform functions that involve physical proximity to the public at large and provide functions essential to the public's health, safety and welfare. This would include transportation services, hotel and other residential services, financial services, and the production, preparation, storage, sale and distribution of essential goods such as food, beverages, medicine, fuel, and supplies. A catch-all provision is contained in the bill to include any other employee deemed to be essential by the public authority declaring the state of emergency. One small exception to the definition of an essential employee is any employee of the State who is offered the option of working at home but refuses to do so.

If enacted into law, the legislation will not only take effect immediately, but will be retroactive to March 9, 2020, when the Governor first declared the public health state of emergency. The presumption will remain in effect during the declared state of emergency.

For public employees covered by this legislation, the rebuttable presumption is also in effect for the benefits provided to those covered by the ordinary and accidental disability retirement laws, and any other benefits provided by law to those individuals suffering an injury or illness through the course of their employment.

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It is important to note for insurance carriers, that claims paid under this legislation cannot be considered in calculating the employer's experience rating. This may provide some protection to employers against increasing premiums, but is certainly no guarantee that premiums overall will increase because of this legislation.

Many employers and insurance carriers have raised concern over this "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 individuals who work in fields and wooded areas and have contracted Lyme's disease through tick bites. The standard burden of proof is that the exposure at work was "more likely than not" the cause of illness or injury.

More importantly, New Jersey was at the forefront of 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 to establish evidence of exposures to communicable diseases in the workplace. This Act is already being applied to the COVID-19 pandemic.

While this legislation has passed both houses, mostly along party lines, it is unclear whether the Governor will sign it into law. One of the telltale signs against this becoming law is the fiscal estimate statement prepared by the Office of Legislative Services (OLS). This office found the legislation will most likely result in increased annual costs to both state and local entities due to this shift of the burden of proof and increased claims for workers' compensation benefits. The OLS fiscal analysis indicated the legislation might result in an "indeterminate" increase in expenditures and an "indeterminate" increase in PERS contributions for certain public employers. In the final analysis, the OLS could not find any independent actuarial information to analyze and determine the impact of the possibility of increased claims, and the total cost of such claims. This uncertainty to the costs to both the public and private sectors may give the Governor some pause in signing it into law. With the current financial crisis this pandemic has already created, the Governor may not want to add to the burden.

If this legislation becomes law, employers will have a tough choice to make. If one of their "essential employees" contracts COVID-19, should they immediately consent to provide workers compensation benefits or attempt to fight it by denying the claim at the outset. Employers will then likely face the filing of an emergent motion in the Workers' Compensation Court that would subject the employer and insurance carrier to additional costs and counsel fees if it is unable to establish proofs to rebut the presumption. We suggest a vigorous and swift investigation into the claim regarding other sources of exposure. Without any evidence of similar exposures outside of work, making it more likely than not that the exposure is from work, we suggest accepting the claim without prejudice. You have 30 days to make this determination absent an Emergent Motion being filed. If evidence of exposure comes to light after you provide some benefits, you can determine whether the claim should be denied outright.

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Comment: The pandemic caused by COVID-19 is a rather unique, and hopefully a once in a lifetime catastrophe, that has already caused governments to enact selective health and financial safeguards tailored directly to the crisis at hand. Creating this carve-out to well-established laws that already provide appropriate protections to employees who suffer from work-related injuries and illnesses, may only add greater instability to an already overburdened system of social benefits. Legislation, such as the CARES Act, are intended to protect a wide range of businesses and individuals, including essential employees, which is already in place for the public's good. The focus should be directed to 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.