

## Updated Pennsylvania Workers' Compensation Practice and Procedure During the COVID-19 Emergency

Updated October 23, 2020

The Commonwealth of Pennsylvania workers' compensation system continues to function, with all of its stakeholders using technology and creative workarounds, none of which violate any governmental orders, even in a time of an uptick in COVID-19 cases and deaths. Throughout the Commonwealth, there remains a steadfast commitment to maintaining orderly access to civil justice for both injured workers and for their employers. There has been widespread concern about maintaining or lowering the burden of proof for COVID-19 cases.

1. The Pennsylvania Legislature has now completed its final week of scheduled voting session days for the 2019-20 session. For the broad cross-section of Pennsylvania employees and unlike what has happened in other states, there is still no change to Pennsylvania's Workers' Compensation Act to lower the burden of proof for COVID-19 cases where the allegation is that the virus was contracted as a result of work exposure. It is expected the Pennsylvania Legislature will return to work post-election for what is, without doubt, a rare "lame duck" voting session, and the voting agenda will be limited to budget issues and other, what is known as "must-pass", legislation. In the just completed session, there was one workers' compensation bill among the final bills sent to Governor Tom Wolf this week, [S.B. 94](#). The purpose of this bill is to extend workers' compensation coverage to volunteer fire companies. There was little lobbying engagement in opposition to this bill and, likely, there was no real opposition at all as the bill passed both the House and Senate unanimously.
2. Those who support workers' compensation/COVID-19 presumption legislation (that is, legislation intended to differentiate and, therefore, lower the burden of proof for certain groups of our Pennsylvania workforce who assert a work-related COVID-19 infection) continue to work toward their goal. But to date, legislation of this type has not made any headway. Lobbying continues on both sides of this issue. The United States Chamber of Commerce has assembled a PowerPoint setting forth discussion points on this important topic, which can be accessed by clicking [here](#) but cannot be considered legal advice of any kind. These slides were presented by the US Chamber to State Chambers across the country last week, as part of a national call and discussion on presumption legislation. They also give some idea of what is happening in various states as governments grapple with the presumption legislation topic. Returning to Pennsylvania and other workers' compensation issues, last week, the Pennsylvania Senate passed [SB 594](#), which would direct employers' Workplace Safety Committees to provide employees with "information regarding the risks associated with opioid painkiller use." This legislation includes language that directs the Pennsylvania Department of Licenses and Inspections to make resources available to assist with workplace compliance. Finally, pre-pandemic, there were legislative efforts underway to address recent case law results in *Tooey* (allowing latent occupational disease lawsuits against employers) and in *Whitmoyer* (disallowing some subrogation rights against future medical expenses), affecting price gouging legislation, and other topics. These efforts have been sidelined in the wake of the emergency pandemic response efforts and associated budget items related to the pandemic.
3. Pennsylvania Senate Bill [SB 1106](#) (COVID-19 Protection For First Responders) is scheduled to be considered by the full Senate today. Yesterday, Pennsylvania House Bill [HB 1189](#) was amended and the House passed it unanimously. Clearly, there is bipartisan support to amend the Pennsylvania Workers' Compensation Act to lower the burden of proof in COVID-19 cases for

Pennsylvania's first responders. The prediction is that some form of legislation will become law in the near future. In addition, some Representatives and Senators are proposing legislation for broader COVID-19 applicability among additional job classifications, including but not limited to employees of "essential businesses." This effort has been unsuccessful to date. Here is a sample of proposed language that has not yet gained traction: *Applicability.--The contraction of the COVID-19 virus by an essential employee shall be considered a personal injury to the employee under the act of June 2, 1915 (P.L.736, No.338), known as the Workers' Compensation Act. The fact that the essential employee contracted the COVID-19 virus shall establish a presumption that the injury arose in the course of the employee's employment within the meaning of the Workers' Compensation Act. The presumption shall not be conclusive but may be rebutted if the employer establishes that the employee contracted the COVID-19 virus prior to any job-related exposure.* Look for our podcasts and webinars as we continue to keep you updated.

4. Pennsylvania Senate Bill [SB 1106](https://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2019&sInd=0&body=S&type=B&bn=1106) passed committee unanimously today and is pending before the full Pennsylvania Senate. This bill adds COVID-19 to the PA Heart and Lung Act covering first responders. For additional details and implications, see paragraph 3 below. <https://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2019&sInd=0&body=S&type=B&bn=1106>
5. **Governor Wolf has suspended portions of Section 413 of the Workers' Compensation Act** (77 P.S. §§ 774.2 and 774.3), which require insurers to issue an Insurer's Affidavit in support of filing a Notice of Suspension or Modification in WCAIS.
6. **In the Pennsylvania legislature, members of both the House and Senate have proposed legislation to eliminate the burden of proof on certain workers who have contracted COVID-19.** Under this bill, coronavirus will be presumed to be an occupational disease for employees of life-sustaining businesses and occupations. The following occupations are being considered, though this is not meant to be an exhaustive list: Nurses, Doctors, Emergency Medical Technicians, Police, Firefighters, Pharmacists and Grocery Store employees. If this legislation passes the House and Senate and if it is signed into law by Governor Wolf, those who contract the virus in these employment fields will have the presumption of causation/work-relatedness. This presumption would then shift the burden of proof to the employer to establish that there is no work-relatedness. This change alters the present scenario in which workers in these industries must establish – in pandemic circumstances – that they contracted the virus at work as opposed to from other sources.
7. **Beginning March 30, all hearings will be telephonic using SKYPE and other technologies.** This has been road-tested in recent days with cooperating Judges on a limited basis and has been successful, resulting in state-wide implementation.
8. **Initially, non-contentious hearings will be followed by more complex ones.** We expect the first hearings to be pre-trial and status events, to be followed by hearings with testimonies as the backlog clears. We also expect more liberalized rules for depositions of claimants and fact witnesses.
9. **Compromise and Release hearings are proceeding with relaxed regulations.** Claimants will participate by phone from their homes without the need to have their signatures witnessed or notarized. Electronic signatures are allowed.
10. **All Petitions may be filed and processed.** Bureau staffing will assign petitions to Judges, and their staff will schedule telephonic hearings, using Outlook scheduling in addition to mailed hearing notices.
11. **Exhibits will be uploaded to WCAIS before any hearing.** The Bureau is seeking uniformity of Judge procedures in this regard.
12. **Mediations will continue.** Options include telephone conference or zoom video conference to allow

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for face to face interaction where needed.

13. **Policy announcements pending further discussion.** These include potentially relaxing current requirements for notarization of Notice of Suspension/Modification forms, potentially relaxing imposition of Penalties for COVID-19 related delays in check issuances due to business closures, and reviewing the appropriateness of continuing in-person IMEs and similar items.
14. **COVID-19 related claims are now being made.** While the burdens for these claims are high, you can expect to see them, whether in the form of claims for work-related infection or claims for work-related stress in certain industries.
15. **The Bureau of Workers' Compensation Conference scheduled for June 1 - 2, 2020, in Hershey, PA, has been canceled.** Conference registration fees and hotel reservation fees under the Hershey Lodge and Convention Center room block should be refunded automatically.

With these developments in place, and with technology implementation, clients with a need to see their cases move forward, their exposure levels reduced and their metric goals satisfied will have that ability.