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Managing the Impact of COVID-19 on Workers' Compensation Claims in NE

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BE BAYLOR EVNEN **The Covid-19 Pandemic**


- Enough already
- Sorry – can't ignore
- Still way more questions than answers

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BE BAYLOR EVNEN **NIRMA Experience**

- Claims have been reported and considered
- Essentially all Covid-19 claims reported have been denied
- Experience of other political subdivisions in Nebraska


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Covid-19 in Other States

- Legislative and administrative changes making it easier to file claims and be paid benefits
- To an extent, overwhelming some employers with substantial claims

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Overview of Compensability

Compensability of COVID-10 claims:

- An EE bears the **burden of proof** to establish a causal relationship between the alleged injury and EE's employment
- EE must be able to show the occurrence of an **accident** or **occupational disease** that arose out of and in the course and scope of EE's employment

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Quick Overview of Compensability

- **Accident**
 - Difficult burden of proof for EE to meet
 - Does not involve damage to the physical structure of the body
 - Difficult to pinpoint/identify with any degree of medical certainty a specific or acute exposure at work causing the virus
- **Occupational Disease**
 - Difficult burden of proof for most EEs to meet
 - Difficult to show disease is peculiar to the employment and that virus was contracted at work
 - NE: must show that condition not an "ordinary disease of life"
- Most significant risk will relate to health care EEs assigned to work with COVID-19 patients, or other EE required to be on frontline in management of the virus.

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Compensability

What does a Coronavirus claim look like under the accident framework?

- Does the injury involve “violence to the physical structure”?
- How does an employee prove “suddenly and violently”?
- How does an employee prove it was a specific exposure at work?
 - As virus has become more widespread, increasingly difficult to pinpoint specific exposure at work as cause.
 - Experts likely to have difficulty providing opinions within any reasonable degree of medical certainty.
- Difficult burden of proof to meet for most employees.

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Compensability

What does a Coronavirus claim look like under the occupational disease framework?

- “Peculiar” to a particular trade or occupation?
 - Medical providers
 - Commercial travelers
- “Ordinary disease of life”?
- Is the general public exposed?
- Difficult burden of proof to meet for most employees.

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Managing Claims: FROI

- NEB. REV. STAT. § 48-144.01(1): Whenever an employer or insurance carrier in Nebraska has notice of a “reportable injury” *arising out of and in the course of employment*, it must report the injury to the Nebraska Workers’ Compensation Court within ten days of said notice.

- A ‘**reportable injury**’ means an injury or occupational disease that results in: death, time away from work, loss of consciousness, medical treatment other than first aid, or restricted work or termination of employment.
 - ‘Restricted work’ means that the employee is unable to perform one or more of his or her normal job assignments
 - ‘Medical treatment other than first aid’ means any treatment provided by a physician or other licensed health care professional.

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Managing Claims: FROI

- Questionable whether Coronavirus qualifies as an injury requiring filing of a FROI
 - Specific to individual circumstances
 - Need to be mindful of penalties
- Reasonable dispute will likely exist in majority of cases as to necessity of FROI
- Notice of a Diagnoses vs. Notice of a Claim
 - Notice that an employee has been diagnosed is distinguishable from notice from the employee that they contracted virus at work and/or that the employee wishes to make a claim

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Managing Claims: FROI

- Existence of Injury
 - Exposure vs confirmed diagnosis
- Statute of Limitations
 - Start running of the SOL
- Nature of Employment
 - Health care providers vs general office employee
- Public Documents
 - Common practice for NE for attorneys to send letters
 - Creating perception that Coronavirus is viewed as potentially compensable injury

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Managing Potential Claims

Investigation into Potential Claims:

- Information from county
 - Potential exposures
 - Safety precautions in place to protect employees
 - Activity of employee (at and outside of work)
- Statement from employee
 - Details of the alleged exposure
 - Acknowledgement of other potential exposures
- Obtain data and statistics available for that area through reliable sources at time of alleged injury
- Contact tracing – HIPAA issues?

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COVID-19 Complications

- It has potential to impact virtually every aspect of a claim.
- Most significantly impacted will probably be:
 - Temporary disability
 - Nature and extent
 - Permanent disability of BAW claims
 - Extent of Loss of Earning Capacity
 - Medical Treatment
 - Delays
 - Vocational Rehabilitation
 - Entitlement, nature and duration
 - Settlements
 - Opportunities for resolution
 - Challenges in approval

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Indemnity Benefit Issues

- **Temporary Disability:**
 - **Extent of TD** for EEs who are not at MMI and were:
 - Not yet working at time of layoff/termination/furlough
 - On light duty at time of layoff/termination/furlough
 - On full duty at time of layoff/termination/furlough
 - **Extension of TD** due to delays in medical care, causing delays in reaching MMI
 - **Entitlement to TD** during ER mandated quarantine for non-work-related COVID-19
- **Permanent Disability:**
 - **Timing of assessment of LOEC:**
 - During the pandemic when jobs are scarce, or
 - After pandemic when jobs are more plentiful?
 - **Extent of LOEC if assessed during pandemic** and:
 - EE able to perform work for ER but for layoff/termination/furlough
 - EE not able to perform work for ER regardless of layoff/termination/furlough


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Medical Management Considerations

- **Potential delays in medical care** as a result of COVID-19
 - Prolonged course of medical care may result in:
 - **Increased medical expense** with additional medical appointments, as well as nurse case manager expense
 - **Increased temporary disability benefits:** EE generally entitled to temporary disability while they are off work, or limited in ability to work, while still receiving medical treatment and recovering from injury. Inability to proceed with medical care will result in prolonged periods of temporary disability
 - **Increased permanent disability benefits:** Delayed medical care can impact recovery from the injury and extent of the ultimate permanency.

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Medical Management

Considerations

Employee related delays:

- How to manage delay due to EE refusing to attend doctor appointments because of health concerns
 - Non-compliance?
 - NE** unreasonable refusal can support denial of liability for associated aggravations of condition (§48-120(2)(c))
 - Need to evaluate the reasonableness of the refusal (EE or family member high risk, reside in area with increased exposure risk, etc.)
 - Engage in a dialogue in an effort to address concerns
 - Telemedicine, change of facility, assurances of safety measures in place, etc.
 - Documentation of offer of care and refusal of care and impact on benefits
 - EE refusing to proceed with treatment because tending to other family/friends
 - Non-compliance – similar assessment to the above
 - Activity while caring for others consistent with any assigned work restrictions

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Medical Management

Considerations

Medical facility related delays:

- How to manage delay in care due to doctor's office canceling appointments
 - Telemedicine
 - The remote diagnosis and treatment of patients by means of telecommunications technology
 - Real-time video interaction
 - Telephone
 - Increasingly accepted form of care (Medicare and Medicaid)

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Vocational Rehabilitation

Issues

- Entitlement** to VR of EEs who could have worked for employer but for layoff/termination/furlough
- Nature and duration** of plans given labor market
- Timing of determination** of duration of VR
 - During the pandemic when jobs are scarce, or
 - After pandemic when jobs are more plentiful?

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The Modern Work Environment

- Issues with Employees Working Remotely -
- Long term Effects
 - “I can continue doing my job from home”
 - As more people adapt to working from, the anticipation is that more people will work from home in the future whether permanently or occasionally
 - This in turn will increase the number of claims from people working at home or telecommuters

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General Framework

- In order to recover Nebraska Workers' Compensation benefits, a claimant must establish by a preponderance of the evidence that the injury arose out of and in the course of employment.
- The *arising out of requirement* refers to an accident and its origin—in other words, it is an assessment of whether the injury resulted from risks arising within the scope of an employee's job.
- The *in the course of requirement* refers to the time, place and circumstances of the accident.

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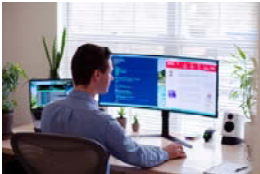



Arising Out of Employment

- Arising out of refers to the origin or *the cause of the accident*
- The question is whether the causative danger occurred as a result of an *employment-related risk*
 - In **NE** if a person's risk of injury is increased by the employment, it is likely compensable

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So how do injuries at home potentially become compensable?

- Accident
 - Was it on work premises or premises where performance of their job required them to be?
 - Is home sole premises?
 - Home as dual premises?
 - What about the effect of approval or acquiesce by employer?
 - What about exceptions to the going and coming rule?
 - Deviation from or incidental to employment?
 - Personal comfort or convenience
 - What about assault or 3rd party cause

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What about home as a second location?

- Home is Dual Premises (work performed both at employer's premises and at home)
- Injury in the home?
 - What if someone instructed to work at home?
- Injury going to and coming from the home?
 - Generally, where the home is a dual or second premises, trips to and from the main office or customers' locations are considered compensable.

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What about home as only location?

- If home is fixed site of employment
 - Injuries outside of the home
 - The going and coming rule likely applies
 - Basically if the employee has to run a “work-related” errand or travel, accidents are probably considered compensable

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What about home as only location?

- If home is fixed site of employment
 - Injuries inside of the home
 - If home is only site of employment, Courts generally treat it as “place of employment,” or the work premises
 - Look at precisely what the employee is doing at the time of accident and where the employee was
 - Was it a work related risk? Was it required as part of employment? Incidental to employment?
 - *Did it advance, directly or indirectly, employer’s interests?* Did the employer receive a benefit from that activity?


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What about home as only location?

- If home is fixed site of employment
 - Injuries inside of the home
 - What about personal comfort and convenience?
 - NE SC has previously said that injury while crossing street to convenience store for soft drink was matter of personal convenience and comfort normally expected and thus arose out of and in the course of employment
 - Is that any different than going downstairs for coffee?
 - What if the employee is also reading work emails on the cell phone and falls down stairs?
 - What about personal comfort and convenience?
 - Is an injury while getting a cup of coffee for the employee’s personal comfort and convenience?
 - MN Court said yes


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**Practical Tips to
Limit Exposure**

- Define** work hours
 - Require "clock in" & "clock out"
- Have employee **check in & check out**
- Encourage a designated work area
- If possible, do not require work at home
 - Allow employee the choice
 - If possible, encourage work in the office
- If necessary identify tasks employees are expected not to do while working
- Develop policy on expectations on working from home


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**Issues With Covid-19
Vaccinations**

- Impact of requiring employees to undergo vaccinations
- Impact of employee refusing vaccination who subsequently develops Covid-19 and makes a claim
- Impact of vaccinated employee reacting negatively


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**Issues With Covid-19
Vaccinations (cont.)**

- What if it is made clear that vaccinations are voluntary?
- What if vaccinations are voluntary but paid for by the employer?


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2021 Legislative Update

- LB 441 – Covid-19 bill providing rebuttable presumption**
- LB 441 is an effort to provide benefits to employees contracting Covid-19 at work. The bill provides a rebuttable “presumption” that if “essential workers” contract Covid-19, it is a compensable condition. The definition in the bill of essential workers is very broad (likely excludes only adjusters and attorneys).
- LB 441 provides that claims can be made retroactively to the beginning of the pandemic in March 2020


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2021 Legislative Update

- LB 441 creates a “retroactive Covid-19 claims fund” to pay for retroactive Covid-19 claims. The bill implies that the “claims fund” will access federal dollars from which benefits are to be paid.
- Unclear whether the establishment of the rebuttable presumption that Covid-19 was caused by an accident at work requires a funding source.


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How Are Covid-19 Claims Per LB 441 to be paid?

- LB 441 states the Department of Insurance will handle claims and that Covid-19 claims will not “increase or adversely affect” an employer’s insurance premiums or experience rating

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