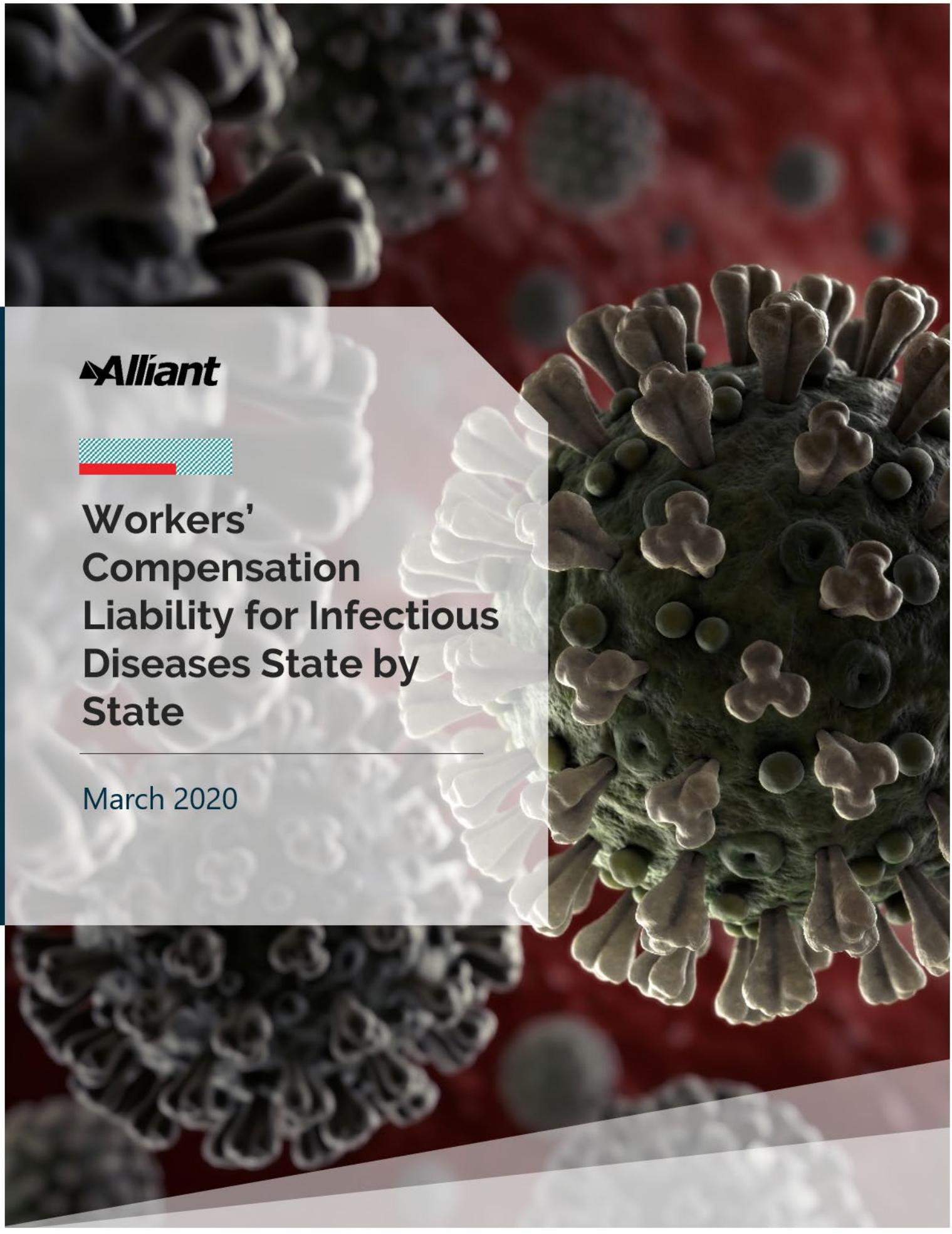

Alliant

# Workers' Compensation Liability for Infectious Diseases State by State

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## Workers' Compensation Liability for Infectious Diseases State by State

We have recently received questions from many employers and insurers regarding how to handle claims involving coronavirus/COVID-19. The analysis of compensability for infectious disease differs between each state. Such claims require close investigation of the actual exposure to the virus and the nature of the particular employment, as well as legal analysis of complex causation standards. All claims involving COVID-19 should be assessed on a case-by-case basis and our claims professionals are ready to assist you with any questions concerning your potential WC claims and the proper steps and documentation necessary to file a claim related to COVID19.

NOTE: THE STATE BY STATE WC LAWS PROVIDED HERE ARE BASED UPON THE CURRENT STATES' STATUTES. WE ARE CONTINUING TO SEE THAT EACH STATE MAY BE PREPARING TO PRESENT ORDERS FOR EXCEPTIONS FOR COVID19 CASES. IN ADDITION, THE VARYING STATE BY STATE SHUTDOWN ORDERS FOR CONSTRUCTION WHERE IT IS DEEMED ESSENTIAL MAY NOW OPEN UP WC COMPENSABILITY COVERAGE ARGUMENTS WHERE THE EXPOSURE TO A CONSTRUCTION WORKER IS GREATER THAN THE "NORMAL" PUBLIC. ADDITIONALLY, THE NOW WIDELY KNOWN DANGER ASSOCIATED WITH THE QUICK SPREADING INFECTION, THE PRACTICAL REALITIES OF AVAILABLE PPE, CONSTRUCTION SCOPES OF OPERATIONS, AND THE INABILITY TO PROTECT FROM THIS HAZARD IN A DYNAMIC CONSTRUCTION ENVIRONMENT – MAY PROMPT ALLEGATIONS OF EMPLOYER'S LIABILITY CLAIMS (Part B Coverage under WC)

### Alabama

Infectious diseases are covered under the definition of occupational disease, so long as there is "clear and convincing evidence" the disease is acquired as a direct result of the employment. The employee has the burden of proving a causal link between the employment and the disease.

Occupational disease is compensable where the employee establishes it arose out of and in the course of the employment and resulted from the employment OCCUPATIONAL DISEASE. A disease arising out of and in the course of employment, including occupational pneumoconiosis and occupational exposure to radiation as defined in subdivisions (2) and (3), respectively, of this section, which is due to hazards in excess of those ordinarily incident to employment in general and is peculiar to the occupation in which the employee is engaged but without regard to negligence or fault, if any, of the employer. A disease, including, but not limited to, loss of hearing due to noise, shall be deemed an occupational disease only if caused by a hazard recognized as peculiar to a particular trade, process, occupation, or employment as a direct result of exposure, over a period of time, to the normal working conditions of the trade, process, occupation, or employment.

### Alaska

Employees exposed to a serious risk of contracting a disease known to be highly contagious or infections and possibly deadly will be considered "injured" for purposes of the Alaska Workers' Compensation Act if the employee is able to demonstrate a link between working for the employer and the condition.

Occupational disease or infection that arises naturally out of the employment or that naturally or unavoidably results from an accidental injury has been considered as an injury under the Alaska Workers' Compensation Act and is considered compensable.

"Arising out of and in the course of employment" includes employer-required or supplied travel to and from a remote job site; activities performed at the direction or under the control of the employer; and employer-

sanctioned activities at employer-provided facilities; but excludes recreational league activities sponsored by the employer, unless participation is required as a condition of employment, and activities of a personal nature away from employer-provided facilities;

## Arizona

A.R.S. § 23-901.01 Occupational diseases:

A. The occupational diseases as defined by § 23-901, paragraph 13, subdivision (c) shall be deemed to arise out of the employment only if all of the following six requirements exist:

1. Direct causal connection between the conditions under which the work is performed and the occupational disease
2. The disease can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment
3. The disease can be fairly traced to the employment as the proximate cause
4. The disease does not come from a hazard to which worker would have been equally exposed to outside of employment
5. The disease is incidental to the character of the business and not independent of the relation of the employer and employee
6. The disease after its contraction appears to have had its origin in a risk connected with the employment, and to have flowed from that sources as a natural consequence, although it need not have been foreseen or expected.

In order to be found compensable, the C-19 must be "occupational" requiring that is arose out of and was in the course and scope of one's employment. The C-19 must also be "peculiar" to the employment generally meaning that it must be found almost exclusively in the particular field. The virus must also NOT be the type to which the general public are exposed.

The above factors must be met before l recommend accepting the claim for benefits.

lf an employee is exposed at work to C-19, testing and time lost benefits are NOT owed since exposures do not equate to an injury. Even if the employee develops the disease, they must also comply with the above requirements before the claim is compensable.

Of course, AZ courts will always look to find compensability when they can, especially if we are dealing with healthcare workers directly working with/treating C-19 patients. AZ's caselaw is not very extensive and l know that the national trend seems to support compensability. With that said, workers have a very high bar in proving a compensable C-19 claim.

## Arkansas

“Occupational disease”, unless the context otherwise requires, means any disease that results in disability or death and arises out of and in the course of the occupation or employment of the employee or naturally follows or unavoidably results from an injury as that term is defined in this chapter.

(B) However, a causal connection between the occupation or employment and the occupational disease must be established by a preponderance of the evidence.

(2) No compensation shall be payable for any contagious or infectious disease unless contracted in the course of employment in or immediate connection with a hospital or sanitorium in which persons suffering from that disease are cared for or treated.

(3) No compensation shall be payable for any ordinary disease of life to which the general public is exposed.

## California

The issue of the introduction of the Coronavirus entering the WC arena is a quickly developing topic, especially so in the Healthcare lndustry.

There are no cases as of yet on the Virus itself, but the attached cases serve as useful guides as to where the WCAB may go.

Essentially, Valley Fever/Coccidiomycosis was found to exist on an industrial basis in two Panel Decisions from the WCAB (Cruz and Abernathy).

The third case, Kane, *Canelo and Temple {/NA} vs. WCAB {Baker}* is a DCA decision from 1976 confirmed a WCAB decision finding that a legal secretary's death from pneumonia secondary to influenza was compensable where the evidence showed that there were wide variations of temperature in the employee's work environment and she missed many days of work because of colds and that she was more susceptible to colds than other employees because of myasthenia gravis, having a cold on the last day of work and the cold having lowered her resistance to influenza.

OSHA has deemed the 2019 coronavirus a recordable illness when infection occurs on the job.

An Employer may provide general information to employees to let them know that someone is infected with the Virus to allow employees to monitor themselves. HlPPA applies to the identity of the infected employee.

The following excerpt from an article co-authored by one of my colleagues at Bradford & Barthel, John Kamin has some additional helpful information relative to healthcare workers:

"This gives rise to the question about whether health care worker cases are deemed compensable. For these cases, it's important to note that health care workers already follow very stringent protocol to avoid spreading disease.

Therefore, the factual investigation should focus on whether there were protocols to avoid infection and whether there were lapses. lf there are no lapses in protocols to avoid infection, the defense against those claims becomes stronger.

The California Labor Code, with one exception, does not provide any statutory presumptions of compensability to health care workers regardless of the type of injury.

The one exception is found Labor Code Section 3208.05, which provides a presumption of injury for health care workers due to preventative care. This presumption of compensability may be triggered if a health care worker suffers an injury while undergoing care to prevent the development or manifestation of any blood-borne disease, illness, syndrome or condition recognized as occupationally incurred by Cal-OSHA, the federal Centers for Disease Control or other appropriate governmental entities.

This presumption specifically includes preventative care for, among other things, hepatitis and HlV. Arguably it would also apply to injuries that arise from preventative care for widespread contagions during an epidemic.

With regard to cheek swabbing in order to test for infection of coronavirus, we do not believe that this in and of itself would trigger obligations under the workers' compensation policy absent a secondary injury or infection that arises as a result of the cheek swabbing itself."

For quarantined workers the following recommendations are made:

> "For those who are exposed at work and wind up being quarantined, the question arises about whether the quarantine itself gives rise to workers' compensation benefits, such as temporary disability benefits. Please recall that just because someone is quarantined, that does not mean he is infected.
>
> There does not appear to be case law directly on point with quarantine situations being used as a preventative tool. However, that may support employers' position that a quarantine does not warrant TD benefits.
>
> The primary focus in this inquiry is whether there is evidence of an injury, something requiring more than just first aid. lf quarantine is done solely as a preventative measure and there are no active signs of infection at the outset, the quarantine is merely a public health action and as such would not rise to the level of injury, absent something more.
>
> ln that situation, there would be minimal likelihood of prevailing on a claim of entitlement to temporary disability benefits.
>
> Please note that if the employees are members of a union, we recommend double-checking whether the union contract speaks to such situations entitling them to wage replacement."

## Colorado

Occupational disease" means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

## Connecticut

In Connecticut, infectious diseases are generally not considered compensable. The exception to this general rule is occupational diseases which the statute defines as "any disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazard of employment." C.G.S. § 31-275(15). Case law has interpreted this provision to mean that occupational diseases are those diseases in which there is a causal connection between the duties of the employment and the disease contracted by the employment. The disease need not be unique to the occupation, but the disease needs to be distinctively associated with the employee's occupational that participation in employment activities increases the risk of exposure to the occupational disease. See Estate of Doe v. Department of Correction, 268 Conn. 753 (2004).

As with all cases, the employee will still have the burden of proving causation (i.e., that the employment is a substantial contributing factor to the disease). Based on current case law, some healthcare workers directly caring for patients with COVID-19 may be able to pursue a claim under the occupational disease statute if they are able to support their claim with medical evidence.

## D. C.

Under § 32-1501 (12) of the DC Code, "lnjury" is defined as an "accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of third persons directed against an employee because of his employment." (Emphasis added). Unless the person who contracts the disease is a researcher working with the virus (which would arise naturally out of the employment), the ordinary employee exposed to the virus at work would not fall within the definition of an infection that naturally arises out of the employment.

There are a couple of older administrative level decisions finding that enhanced physiologic reactions from work exposure which are a temporary aggravation of an underlying condition are not compensable because they are only temporary. By analogy, if symptoms from COVlD-19 are only temporary, they would not be compensable either (and probably not in the case of a researcher). ln addition, even if compensable, the claimant would have to prove the exposure occurred in the workplace and not out in the general public.

The bottom line is that COVlD-19 exposure in the workplace in DC is not compensable.

## Delaware

Employees are entitled to Workers' Compensation Benefits for injuries arising out of and sustained in the course of employment. Relates to the origin of the accident and its cause compensable if the injury arises from a situation which has a reasonable relationship to employment.

Employee must show that the injury would not have occurred "but for" the event at work.

1. Aggravations of Pre-existing conditions - Work event must be more than trivial contributor to the injury. Aggravations are compensable as new work injuries.
2. Cumulative injuries - Compensable if the ordinary stress and strain of the employment is a substantial factor in causing the injury
3. Mental Injuries – No physical injury involved, compensable if: Work conditions were actually objectively stressful; and work conditions were the substantial cause of the injuries

## Florida

The burden of proof on these types of cases is extremely difficult under Florida's Workers' Compensation Act.

ln general, diseases and sicknesses are excluded from Florida Workers' Compensation coverage. However, the statute does provide an exception to occupational diseases in Florida Statute 440.151, which states, in part:

> (1)(a)-Where the employer and employee are subject to the provisions of the Workers' Compensation Law, the disablement or death of an employee resulting from an occupational disease as hereinafter defined shall be treated as the happening of an injury by accident, notwithstanding any other provisions of this chapter, and the employee or, in case of death, the employee's dependents shall be entitled to compensation as provided by this chapter, except as hereinafter otherwise provided; and the practice and procedure prescribed by this chapter shall apply to all proceedings under this section, except as hereinafter otherwise provided. Provided, however, that in no case shall an employer be liable for compensation under the provisions of this section unless such disease has resulted from the nature of the employment in which the employee was engaged under such employer, was actually contracted while so engaged, and the nature of the employment was the major contributing cause of

the disease. Major contributing cause must be shown by medical evidence only, as demonstrated by physical examination findings and diagnostic testing. "Nature of the employment" means that in the occupation in which the employee was so engaged there is attached a particular hazard of such disease that distinguishes it from the usual run of occupations, or the incidence of such disease is substantially higher in the occupation in which the employee was so engaged than in the usual run of occupations. ln claims for death under s. 440.16, death must occur within 350 weeks after last exposure. Both causation and sufficient exposure to a specific harmful substance shown to be present in the workplace to support causation shall be proven by clear and convincing evidence .

(2)-Whenever used in this section the term "occupational disease" shall be construed to mean only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment, and to exclude all ordinary diseases of life to which the general public is exposed, unless the incidence of the disease is substantially higher in the particular trade, occupation, process, or employment than for the general public. "Occupational disease" means only a disease for which there are epidemiological studies showing that exposure to the specific substance involved, at the levels to which the employee was exposed, may cause the precise disease sustained by the employee .

As such, the starting point for an analysis of compensability is the occupation of the claimant. The disease must result from the "nature of the employment"; the claimant must actually contract the disease while working; and the nature of the employment must be the major contributing cause. For the coronavirus to result from the nature of employment means there must be a particular hazard of contraction specific to the claimant's occupation compared to other occupations, and the incidence of contraction in that occupation must be higher than in other occupations. The claimant has the burden of proving all of those items by a heightened standard of clear and convincing evidence (except for First Responders, who only require a preponderance of the evidence). ln regular Workers' Compensation claims, the standard is lower than in an exposure/ occupational disease case, or a preponderance of the evidence (a "more likely than not standard").

lt is important not to confuse occupation with job (where someone actually works), as it is the career that is the focus, and not the claimant's position with a specific employer. For example, if a carpet installer contracts the coronavirus, it would likely not be compensable because the incidence would not likely be higher in that occupation versus the general public.

ln *Seminole County Gov't v. Bartlett7*, the claimant, a firefighter, sought compensability of hepatitis C under the theory of an occupational disease. For the claimant to establish his hepatitis C was caused by his employment as a firefighter, he was required to establish causation by introducing clear and convincing evidence of each element of the four-part test. Although the claimant testified to needle sticks during his tenure as a firefighter, he did not know whether the sticks involved people infected with hepatitis C. The claimant also testified he had experienced episodes of blood-to-blood contact during his employment, but, again, did not know whether any particular individuals were hepatitis C-positive. The claimant could therefore not establish any exposure to hepatitis C during the course of his employment. None of the doctors could testify, within the scope of their expertise, how or when the claimant contracted the disease, based on a reasonable degree of medical certainty.

The testimony at the hearing was that the most common causes of hepatitis C were: (1) illegal intravenous drug usage, which accounted for approximately 70 percent of cases; (2) receiving blood transfusions prior to 1990, which accounted for approximately 10 percent of cases; (3) engaging in unprotected sex, which accounted for approximately five percent of cases; (4) unknown causes, which accounted for approximately four percent of cases; and (5) needle sticks, which accounted for one- to-two percent of cases.

Additionally, there was no evidence that firefighters contract hepatitis C more frequently than those

in other occupations. Significantly, the only expert testimony comparing the prevalence of hepatitis C in firefighters to that occurring in the general population was that the disease occurred in both with the exact same frequency. Consequently, there is no evidence that being a firefighter presents a particular hazard of contracting the disease, or that the incidence of the disease is substantially higher in firefighters than in the general public.

Based on the foregoing, the First District Court of Appeal reversed the Judges of Compensation Claims' determination of compensability as the claimant had failed to present clear evidence that he more likely than not contracted hepatitis C during his employment as a firefighter, or that the disease was actually caused by employment conditions characteristic of and particular to his employment as a firefighter. Speculation or a logical relationship between the disease and the claimant's work is insufficient to meet the required test.

## Georgia

ln order for contraction of COVlD-19 to be deemed a compensable work injury in Georgia, it must an "occupational disease" pursuant to O.C.G.A. §§34-9-280, et seq. An occupational disease is one which arises out of and in the course of a particular occupation. An occupational disease is not typically a cold or the flu as these conditions are not associated with a particular occupation. Examples of occupational diseases include, but are not limited to, asbestosis, silicosis, and mesothelioma.

There are 5 elements which must be proven to recover for an occupational disease: 1) A direct causal connection between the conditions under which the work is performed and the disease; 2) That the disease followed as a natural incident of exposure by reason of the employment; 3) That the disease is not of a character to which the employee may have had substantial exposure outside of the employment; 4) That the disease is not an ordinary disease of life to which the general public is exposed; and 5) That the disease must appear to have had its origin in a risk connected with the employment and to have flowed form that source as a natural consequence.

Also, O.C.G.A. §34-9-281(b)(1) provides additional prerequisites to employer liability for an occupational disease - An employer is liable for an occupational disease only where 1) the disease arose out of and in the course of the employment in which the employee was engaged; 2) was contracted while the employee was so engaged, and 3) resulted from a hazard characteristic of the employment in excess of the hazards of such disease attending employment in general.

ln my opinion, it will be very difficult for any claimant to make out a claim for contraction of COVlD-19, absent some unique circumstances. An example might be a medical provider or first responder who treats a patient known to have the virus. Otherwise, it will be almost impossible for an employee to prove where COVlD-19 was contracted. More importantly, given the rapid expansion of the virus in the general public, it will almost certainly be considered an ordinary disease of life to which the general public is exposed.

## Hawaii

[A]n occupational disease requires “a recognizable link between the disease and some distinctive feature of the claimant's job, common to all jobs of that sort.” An occupational disease cannot be “an ordinary disease of life to which general public was equally exposed outside of that employment,” and the disease must “have incidence substantially higher in that occupation than in usual occupations or, in case of ordinary disease of life, in general population.”

Influenza is a compensable injury. 59 H. 551, 584 P.2d 119. (case reference Priscilla A. LAWHEAD, Claimant-Appellee, v. UNITED AIR LINES)

(22) "Occupational diseases."

(a) "Occupational disease" means a disease due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment, but shall not include psychological injuries, disorders or conditions unless the conditions set forth in section 72-451, Idaho Code, are met.

(b) "Contracted" and "incurred," when referring to an occupational disease, shall be deemed the equivalent of the term "arising out of and in the course of" employment.

(c) "Disablement," except in the case of silicosis, means the event of an employee's becoming actually and totally incapacitated because of an occupational disease from performing his work in the last occupation in which injuriously exposed to the hazards of such disease; and "disability" means the state of being so incapacitated.

(d) "Disablement," in the case of silicosis, means the event of first becoming actually incapacitated, because of such disease, from performing any work in any remunerative employment; and "disability" means the state of being so incapacitated.

(e) "Silicosis" means the characteristic fibrotic condition of the lungs caused by the inhalation of silicon dioxide (SiO2) dust.

Idaho's workers' compensation law only provides coverage for those diseases defined by statute. Occupational disease and injury are mutually exclusive terms under Idaho's workers' compensation law. Idaho Code § 72-102(17)(c).

2.Idaho Code § 72-438 provides a non-exclusive list of occupational diseases covered under Idaho law. The list is not intended to be exclusive, and the statute expressly recognizes that there are a wide range of toxic substances that can lead to disease. The statute makes clear, however, that the disease cannot be one that is common to the public but rather is unique to the employment, occupation, trade, etc . . . of the worker.

3. The disease must actually be incurred on the job and within one year after the last injurious exposure. In the case of silicosis, the disease must occur within four years of the last injurious exposure. Idaho Code § 72-439.

4. The key to the compensability of an occupational disease is the existence of a risk for the disease within the employment that is peculiar to the occupation. It is not necessary for the risk of the disease to arise exclusively from the employment. Rather, it is sufficient if the nature of the employment makes it possible to differentiate its risks from the risks experienced by the public generally. *Bowman v. Twin Falls Const. Co*., 99 Idaho 312, 581 P.2d 770 (1978). Assuming the existence of such a link, the worker must show that they have become actually and totally incapacitated as a result of the disease from performing their work in the last occupation where the injurious exposure occurred.

OCCUPATIONAL DISEASES.[EFFECTIVE UNTIL JULY 1, 2021]

Compensation resulting from the following diseases:

Poisoning by lead, mercury, arsenic, zinc, or manganese, their preparations or compounds in any occupation involving direct contact there- with, handling thereof, or exposure thereto.

Carbon monoxide poisoning or chlorine poisoning in any process or occupation involving direct exposure to carbon monoxide or chlorine in buildings, sheds, or enclosed places.

Poisoning by methanol, carbon bisulphide, hydrocarbon distillates (naphthas and others) or halogenated

hydrocarbons, or any preparations con- taining these chemicals or any of them, in any occupation involving direct contact therewith, handling thereof, or exposure thereto.

Poisoning by benzol or by nitro, amido, or amino-derivatives of benzol (dinitro-benzol, anilin and others) or their preparations or compounds in any occupation involving direct contact therewith, handling thereof, or exposure thereto.

Glanders in the care or handling of any equine animal or the carcass of any such animal.

Radium poisoning by or disability due to radioactive properties of substances or to roentgen ray (X-ray) in any occupation involving direct contact therewith, handling thereof, or exposure thereto.

Poisoning by or ulceration from chromic acid or bichromate of am- monium, potassium, or sodium or their preparations, or phosphorus prepara- tions or compounds, in any occupation involving direct contact therewith, handling thereof, or exposure thereto.

Ulceration due to tar, pitch, bitumen, mineral oil, or paraffin, or any compound product, or residue of any of these substances, in any oc- cupation involving direct contact therewith, handling thereof, or exposure thereto.

## Illinois

On March 11, 2020, COVlD-19, also known as the Coronavirus, was declared a global pandemic by the World Health Organization. As a result, a question that inevitably arises is whether an employee's contraction of this virus while in the course and scope of employment, is compensable under the lllinois Workers' Compensation Act or lllinois Occupational Disease Act.

The lllinois Workers' Compensation Act is silent with regards to whether infectious diseases are compensable. However, under the lllinois Occupational Disease Act, (the "Act"), an "Occupational Disease" is defined as a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. 820 lLCS 310/1(d). Specifically, the disease shall arise out of a risk peculiar to or increased by the employment and not common to the general public. ld. Furthermore, an employee is deemed exposed to the hazards of an occupational disease when he or she is employed in an occupation or process in which the disease exists. ld. The disease must have its origin or aggravation in a risk connected to the employment and must naturally result from that risk. ld. However, the Act is clear that an employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists. 820 lLCS 310/1(d).

To prove that the disease is causally related to the workplace, an employee must show that the workplace caused the occupational disease and that the disease caused a condition of ill-being or disablement. 820 lLCS 310/7. To prove that an exposure at the workplace caused the disease, the employee would need a medical opinion causally relating the exposure at the workplace to the disease at issue. ld. The fact that the general public is exposed to a certain disease lessens the chances that a person's employment causes or aggravates a disease. *Downs v. lndustrial Com'n,* 143 lll.App.3d 383, 389 (5th Dist. 1986). However, there is no statutory language requiring proof of a direct causal connection, and the connection could be based on a medical opinion that an accident could have or might have caused an injury. Consolidation *Coal Co. v. lndustrial Comm'n*, 265 lll.App.3d 830, 839.

In *Omron Electronics v. llinois Workers' Compensation Commission*, the Court affirmed the decision of the circuit court as well as the Commission, that the petitioner contracted meningitis while on a work-related trip to Brazil. *Omron Electronics v. llinois Workers' Compensation Commission*, 2014 lL App (1st); ld. 45.

According to testimony from various doctors, meningitides can be contracted by contact with respiratory droplets. ld. at 41. While in Brazil, the petitioner interviewed multiple candidates for a general manager position and traveled around the city of Sao Paolo by taxi. ld. ln sum, his extensive travels throughout the city and meetings with various of people could have exposed him to meningitides. Although there were conflicting medical reports, the Commission found the testimony of Petitioner's treating physicians to be more persuasive.

ln *Sperling v. Industrial Com'n*, the lllinois Supreme Court affirmed the decision of the Commission, agreeing that the petitioner failed to show a causal connection between her employment and her hepatitis B*. Sperling v. Industrial Com'n*, 129 lll.2d 416, 423 (1989). That case involved an operating room nurse who contracted hepatitis B. ld. at 418. Both the arbitrator and the Commission held that the petitioner failed to establish the requisite causal connection between her employment and her contraction of hepatitis B. ld. The appellate court reversed. ld. The petitioner testified that she pricked herself with a sharp operating instrument that had been exposed to patients' blood. ld. at 419. Her supervisor affirmed. ld. The appellate court held that direct causation was not required, but the lllinois Supreme Court found that the Commission's decision did not go against the manifest weight of the evidence and disagreed that it should have been overturned. ld. at 422. The Court opined that Petitioner's failure to offer evidence that she had direct contact with a carrier of hepatitis B during her course of employment damaged her argument.

As of March 11, 2020, thousands of people across the world are confirmed to have contracted COVlD-19 with thousands more having died as a result of their symptoms. The virus appears to be spreading fast with no indication of slowing, and there is no reason to believe that a vaccine could become available anytime soon. As a result, employers have been asking: how will the lllinois Workers' Compensation Commission view cases involving employees who have filed claims alleging they contracted the virus while at the workplace? Our position is that regardless of the severity of the virus, it should be handled no differently than the contracting of any other disease while in the workplace.

What differentiates COVlD-19 from other diseases is how contagious it appears to be and how fast it has spread throughout the world. The wide variety of cases indicate that ordinary persons are contracting the virus within and outside of the workplace. Excluding the medical field and professions requiring international travel, we recommend the denial of claims involving the contracting of COVlD-19 in the workplace. As widespread as the virus currently is, a person in the workplace is at no greater risk than the general public who have been exposed at a variety of locations. An infected employee could argue that he or she was at greater risk of exposure by being present at work, but it would be difficult to prove that the risk was peculiar to that workplace that differentiates it from the general public. The disease "need not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence." See Sperling, at 421. A petitioner would have difficulty showing that the risk was causally related to the employment itself and to have flowed from that source.

lt could be argued that employees who are required to travel would be at greater risk of exposure than the general public, such as the petitioner in Omron Electronics. However, the petitioner in that case traveled outside of the country for his work. He was at greater risk than the general public in the United States because of his exposure to a disease more prevalent in Brazil. Our position is that employees who travel within the United States as part of their work are at no greater risk than the general public, especially with how prevalent the spread of COVlD-19 is at this point. lf an employee is required to travel to a country with greater exposure, such as ltaly or China, that employee would have a stronger chance of showing that he or she was at a greater risk than the general population here in the United States.

As severe as the virus has been, medical professionals and emergency responders are at a greater risk of exposure than the general public as they deal with the infected patients. Unlike those of the general population, medical professionals and emergency responders deal specifically with infection patients. As

stated above, a petitioner could likely show that the disease risk is causally related to employment in a medical facility and to flow from that facility as a result of all the infected patients. Thus, they would have a greater chance of showing that their workplace placed them at a greater risk than the general population of contracting COVlD-19.

ln summary, as general practice, we would recommend denial of claims relating to contraction of COVlD-19, with the exception of cases involving medical personnel in the healthcare industry, which would include emergency responders, and employees who are required to travel internationally to nations known to be dealing with the virus.

The situation involving COVlD-19 continues to remain in-flux. As government and medical professionals work on protecting the public, it is important that employers respond with caution. lf an employee is required to work with infected persons, we would recommend that the employee be kept away from the workplace if he or she shows any signs of sickness. Regardless of an employee's job duties, we would recommend that any employee that is sick be required to refrain from returning to work until a diagnosis is determined. Furthermore, if an employee has traveled outside of the country and shows sign of sickness, we would recommend that they be required to refrain from returning to work until a diagnosis is determined. Although COVlD-19 is a virus and would likely be treated by the courts like that of other viruses, its rapid spread places a greater number of people at risk of contracting the disease.

## Indiana

Under lndiana WC, a Claimant would have to prove that an exposure to a virus was specific to work and was not "an ordinary disease of life." This is a high standard, relatively speaking, and would likely require evidence of others in the same workspace contracting the disease and supporting documentation.

For example, in 2017, we successfully defeated a claim (*Willis, Ruthanna v. American Senior Communities*, C-221336, decision issued May 2017) concerning influenza in the workplace. There, the Claimant worked in a nursing home, and alleged an infectious epidemic of flu in January 2013. She claimed she caught the flu and it then developed into Guillian-Barre Syndrome (a rare disorder in which the body's immune system attacks the nerves, causing weakness; G-B Syndrome is often preceded by an infectious illness such as the flu or a respiratory infection). However, the Judge concluded that she could not prove her claim with evidence, because a) the medical records failed to corroborate that she had the flu (or complained of flu-like symptoms) before her diagnosis of G-B Syndrome; and b) there was no credible evidence that the viral exposure was rampant in the facility. Therefore, Claimant failed to meet her burden of proving by a preponderance of the credible evidence that her G-B Syndrome arose out of and in the course of her employment.

Coronavirus appears to be a global disease, and not restricted to a certain geographic area or in a certain industry. We are seeing the infection spread through churches, airports, schools, and other such places with a concentration of people. Also, it has a fourteen-day incubation period. lt will be very difficult for a Claimant to prove that an infection of Coronavirus solely arose out of and in the course of employment. However, it is conceivable such a claim might arise in the healthcare industry (like a hospital) where this virus is more prevalent.

## Iowa

ln lowa, compensability of a virus such as COVlD-19 would be most likely be evaluated as an occupational disease. Occupational diseases developed within the course and scope of employment are deemed compensable pursuant to lowa Code Ch. 85A.

The lowa Supreme Court has recognized that in order to prove causation in an occupational disease case,

the employee must establish the following: 1) the disease must be causally related to the exposure to harmful conditions of the field of employment and 2) those harmful conditions must be more prevalent in the employment concerned than in everyday life or in other occupations. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (lowa 1980). lowa Code 85A.12 further defines the employee's burden of proof. The employee must prove that the diseases was "due to the nature of an employment in which the hazards of such disease actually exist, and which hazards are characteristic thereof and peculiar to the trade, occupation, or process, or employment, and such disease actually arises out of the employment." (lowa Code 85A.12).

lt appears unlikely that any employee, perhaps with the limited exception of medical professionals treating patients with COVlD-19, could establish both that COVlD-19 exposure was related to their field of employment and that COVlD-19 was prevalent in their employment compared to everyday life or other occupations. Even then, those infectious disease medical professionals would have to establish that the exposure occurred at work as opposed to anywhere else outside of work where they might have been exposed. Therefore, it is unlikely that COVlD-19 exposure at work would be a compensable occupational disease under the lowa Workers' Compensation Act.

The lowa Supreme Court has also recognized a very limited exception in which exposure to infectious disease can be considered a workers' compensation "injury," as opposed to an occupational disease, that could apply to exposure to COVlD-19. The applicability depends heavily on the facts and circumstances surrounding the exposure. Exposure considered a workers' compensation "injury," as opposed to an occupational disease, is advantageous to the employee because it only requires the employee to prove that the exposure occurred while the employee was engaged in work duties and does not require the employee to establish that the type of exposure is peculiar to their profession.

ln *Perkins v. HEA of Iowa Inc.,* 651 N.W.2d 40 (lowa 2002), the employee was working as a nurse at a retirement facility. She was exposed to Hepatitis C when a shunt on a resident's leg exploded spraying blood all over the resident's room impacting employee on the mouth, face and eyes. The lowa Supreme Court concluded that the manner by which the employee was exposed to Hepatitis C met the definition of "injury" and not occupational disease within the terms of the lowa Workers' Compensation Act. The Supreme Court concluded that infectious disease can be an accidental injury in terms of the lowa Workers' Compensation Act if the germs gain entrance through a scratch or through unexpected or abnormal exposure to infection.

lt should be noted that based on Perkins that simple exposure to COVlD-19 while engaged in work duties is not sufficient to establish an "injury" as opposed to an occupational disease under lowa law. The exposure would have to occur by some unexpected or abnormal circumstances before it could be considered a compensable workers' compensation injury.

## Kansas

With the exception of medical professionals, we believe that that any Coronavirus related claims will be denied. K.S.A. 44-5a01(b) defines occupational disease as follows:

"Occupational disease" shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. "Nature of the employment" shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from

that source as a reasonable consequence of the risk. Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases, ..

The key terms are "nature of the employment", "special risk", and "ordinary diseases of life. As a general rule, virus related illnesses would not be viewed as compensable due to consideration as an ordinary disease of life and condition to which the general public is or may be exposed to outside of the particular employment. However, "nature of employment", i.e. medical professionals, can create a particular and peculiar hazard of disease in excess of the hazard of such disease in general. No published Kansas Court of Appeals or Supreme Court virus related occupational disease cases were found; however, the Appeals Board for the Division of Workers' Compensation has found compensability in a limited number of claims involving medical professionals.

ln *Amilio L. Rojas v. AD/A/Nursefinders* of Wichita, an Appeals Board for the Division of Workers' Compensation decision, claimant, a nurse's aide for respondent, worked with patients suffering from contagious shingles. Shingles stems from the same virus which causes chicken pox. Claimant's first known exposure appeared to occur on approximately March 20, 1993 with a second known exposure period alleged on April 17 or 18, 1993. Claimant became symptomatic with chicken pox on April 20, 1993. lt was claimant's contention that these exposures to shingles lead to his contracting of chicken pox which resulted in significant scarring on his face.

The Appeals Board found that the nature of claimant's employment did involve a particular and peculiar hazard the general public would not normally be exposed to or have personal contact with patients with shingles as a part of their employment. ln so finding, the Appeals Board held claimant did contract an occupational disease stemming from a special risk of such disease connected with claimant's employment and was therefore entitled to compensation.

ln *Susan D. Holcomb v. Olathe Medical Services, /nc.*, another Appeals Board for the Division of Workers' Compensation decision, claimant had been employed by respondent as a nurse practitioner since August of 2000. While working at one of respondent's facilities in April 2006, claimant was exposed to a patient that was diagnosed with the mumps virus. A few days after this exposure, claimant herself came down with the virus. Following her exposure to the mumps virus, claimant rather quickly lost her hearing and thereafter began to experience face pain (trigeminal neuralgia), vertigo and tinnitus. The claim was found to be compensable and benefits awarded.

Early claims involving business travel to hotspots and claims involving medical professionals having a greater incidence of exposure based on the nature of their role as a provider to coronavirus patients have a greater likelihood of being found compensable. However, with the increased reporting of community spread, the argument of special risk stemming from the nature of employment becomes diluted. Now reported as a pandemic with increasing odds of exposure, coronavirus should probably be argued to be an ordinary disease of life and any associated claims denied placing the burden of proof on the claimant to establish a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general.

To summarize, our position in Kansas is as follows:

1. Virus related illnesses are generally not compensable as workers' compensation claims;
2. We would therefore recommend that any claims made be denied;
3. We need to keep in mind that the coronavirus is creating a novel and fluid situation. While we stand by our position, we can foresee scenarios where the virus could create potential liability. Therefore, please feel free to reach out with specific scenarios and we will continue to update you.

## Kentucky

Communicable diseases are generally not compensable where the risk of contracting the disease is no greater for the employee than it is for the public at large. KRS 342.0011(1). If, on the other hand, the employee is at a greater risk of contracting the disease because of his or her work, the employer may be liable for benefits. See id.

As one example of work-related conditions resulting in compensable disease, where an employee is exposed to the cold and damp to a greater degree than the general public, pneumonia may be a compensable communicable disease. Dealers *Transport Co. v. Thompson*, 593 S.W.2d 84 (Ky. Ct. App. 1979). As the Court of Appeals explained in Dealers Transport, pneumonia is compensable as a work-related injury among dock workers "for the simple reason that the general public was not working on a loading dock . . . in cold and damp December weather." Id. at 89.

## Louisiana

There are cases in which a disease process is caused by a specific event but the exact date of the event or "accident" cannot be identified. For example, a firefighter who is exposed to hepatitis while providing medical assistance to various people over an extended time period may not be able to identify the particular event which caused the disease but there was such an event. *Price v. City of New Orleans*, 95-1851 (La. App. 4th Cir. 3/27/96), 672 So.2d 1045; See also *Landry v. Physicians Practice Management*, Columbia/HCA, 00-1298 (La. App. 3d Cir. 4/4/01), 783 So.2d 619 (a nurse employed by several physicians developed mononucleosis as a result of exposure to one of several patients).

These and similar cases would fall within the occupational disease law due to the problem of identifying an "accident" date and also because there is a need to distinguish between diseases one acquires at work because of the nature of the work from those diseases that one may have acquired at work but is not "peculiar" to the employment (e.g., exposure to flu virus).

1. Occupational Diseases—LSA R.S. 23:1031.1

Legislative Recognition of Occupational Disease Claims. The original Workers' Compensation Law did not recognize injuries that were not the result of an "accident" even if the condition was clearly work related. Occupational diseases first were accepted as compensable in Louisiana through a legislative amendment to the Louisiana Workers' Compensation Law in 1952. However, this law limited the claims to a specific list of diseases (e.g., silicosis).

**EXAMPLE:**

*Stucky v City of Alexandria, 81 So.2d 46* (La App 2d Cir 1955). A watchman at a zoo who claimed to have contracted "parrot's fever" (psittacosis) was not able to recover under the occupational disease law because it was not among the listed occupational diseases.

a. Legislative Expansion of Occupational Disease Claims

In 1975 the legislature amended the occupational disease act by removing the requirement that the disease fit the specific listing and substituting instead a broad definition of occupational disease.

However, under this more liberal definition was included the requirement that the disease be one that is "characteristic of and peculiar to" their job. La. R.S. 23:1031.1 Occupational Disease

b. An occupational disease means only that disease or illness which is due to causes and conditions characteristic of and peculiar to the particular trade, occupation, process, or employment in which the employee is exposed to such disease.

**EXAMPLES:**

- Asbestosis - *Hawkins v Johns-Manville Corporation*, 418 So.2d 725 (La. App. 4th Cir. 1982). Manufactured asbestos shingles.
- Silicosis - Schouest v J. Ray McDermott & Co., Inc., 411 So.2d 1042 (La. 1982). Painter/sandblaster.
- Bullous emphysema - *Zeringue v Fireman's Fund American Insurance Company*, 271 So.2d 613 (La. App. 1st Cir. 1972). Worked for lumber company, exposed to toxic substances used to paint wood products.
- Bronchial asthma - *Hebert v Lake Charles American Press*, 427 So.2d 916 (La. App. 3d Cir. 1983). Machine operator exposed to chemicals in printing.
- Myelogenous leukemia - *Stutes v Koch Services, Inc.*, 94-782 (La. App. 3d Cir. 12/7/94), 649 So.2d 987, writ denied, 95-0846 (La. 5/5/95), 654 So.2d 335. Truck driver exposed to Benzene when gauging, sampling and testing oil.
- Dermatitis - *Oliveaux v Riverside Nursing Home* 29,419 (La. App. 2d Cir. 4/2/97), 691 So.2d 340. Kitchen assistant, allergic reaction to latex gloves.

c. Cumulative Trauma as Occupational Disease

i) The occupational disease law also expresses a legislative exclusion of cumulative trauma disorders (e.g., "degenerative disc disease, spinal stenosis, arthritis of any type" La. R.S. 23:1031.1 B. The one exception to this limitation is the recognition of "work-related carpal tunnel syndrome" (La. R.S. 23:1031.1 B).

ii)Carpal tunnel syndrome (CTS) - This condition may be compensable as an "accident" if there is an identifiable event that preceded the onset of symptoms. *Smith v Tudor Construction*, 25,783 (La. App. 2d Cir. 5/4/94), 637 So.2d 666. Without the identification of an "accident", the Legislature specifically has excluded from the compensation system any conditions that are the result of "gradual deterioration or progressive degeneration". La .Rev. Stat. 23:1021(1). See e.g., *Balsamo v Jones*, 28,885 (La. App. 2d Cir. 12/11/96), 685 So.2d 1140.

## Maine

Maine also utilizes the "positional risk" doctrine. As noted above, the positional risk doctrine holds that an injury is compensable if it would not have occurred but for the fact that the employment placed the employee in the position where he/she was injured. Again, in order to prove a claim for COVlD-19 under the positional risk doctrine, an employee would be required to prove that they were at work when they contracted the virus.

## Maryland

The Maryland Workers' Compensation Commission and District of Columbia Office of Workers' Compensation are not likely to view the contraction of COVlD-19 as arising out of and in the course of employment for employees not subject to a unique risk for this illness.

To be sure, the Maryland Workers' Compensation Act specifically notes that disease or infection may predicate a claim for accidental injury.[13] Further, caselaw confirms that a compensable injury may be

found whenever an accidental physiological change is found to have arisen out of and in the course of employment.[14]

However, idiopathic claims are not compensable. An "idiopathic condition" is a condition that is personal to the claimant and unrelated to the employment that exposes the employee to risk from injury.[15] An injury that is precipitated by the claimant's ideopathy is not compensable unless the idiopathic event was aggravated or triggered by some facet of the employment, or the employment contributed to the hazard created by the idiopathic event.[16]

Unless there are some extenuating personal circumstances, the Commission is likely to find COVlD-19 claims compensable for employees who are at an increased risk of contraction of this illness, such as health care employees or emergency medical personnel. Many of our clients in these fields are approaching this situation by requiring their employees to use personal time when taking time off for screening of COVlD-19, but likely accepting those claims under workers' compensation when their employees test positive for COVlD-19.

The Commission will also likely consider employees who are required to travel and who contract COVlD-19 as being subject to a unique risk. Those employees who contract COVlD-19 will have an increased likelihood of their claims being found compensable.

*13 MD WC Act Section 9-101{b}.*
*14 Union Mining Co v. Blank, 181 Md. 62, 28 A.2d 568 {1942} {contracting typhoid fever by drinking contaminated water supplied by the employer is compensable}.*
*15 J Norman Geipe /nc v. Collett, 172 Md. 165, 190 A. 836 {1937}.*
*16 Watson v. Grimm, 200 Md. 461, 90 A.2d 180 {1952}.*

## Massachusetts

ln Massachusetts, the contraction of contagious or infectious disease is not considered a compensable injury unless the risk of exposure is "inherent in the workplace". Section 1(7A) contains a provision which states if the nature of the employment is such that the hazard of contracting such infectious or contagious diseases is inherent in the employment, then disability resulting from the disease is compensable. See M.G.L. c.152 §1(7A). Therefore, there is by statute limited exposure for employers and insurers for disability and medical expenses as a result of exposure to an infectious disease including COVlD-19 in the workplace. Even if an exposure may have occurred in the workplace, unless the risk of exposure is "inherent" in the actual workplace environment it is not a compensable injury by the limiting language in the statute. This would be the case for traveling employees as well as those attending seminars - there may be a work related possible exposure to an infectious disease while in the course of one's employment but the language in the statute limits the liability to those who are exposed because the risk was inherent in the workplace.

As a result, for most employments, coronavirus/COVlD-19 would not be considered a compensable personal injury. As noted above, § 1(7A). The most obvious example of such employment is the healthcare field (i.e., doctors, nurses, CNA's, phlebotomists, pulmonary therapists, physician's assistants, administrative and custodial staff at healthcare facilities). ln such cases, the employee must still prove that an exposure occurred in the workplace (i.e., a patient or co-worker testing positive for COVlD-19). Thus, the test is two-fold: (1) an exposure occurred at work, and (2) the risk is inherent in the employment.

For employments where the risk of contracting the COVlD-19 is not inherent, a claim would be non-compensable in Massachusetts even if the employee could prove the exposure actually occurred at work. ln Lussier v. Sadler Brothers, lnc., 12 Mass. Workers' Comp. Rep. 451 (1998), an employee's claim for tuberculosis was denied despite uncontroverted evidence that she contracted the disease from an infected co-worker. The Reviewing Board denied the claim because the employee worked as a machine operator and the risk of contracting tuberculosis was not inherent in her employment, even though she

did in fact contract the disease at work. The Reviewing Board reasoned, "We consider that the danger of exposure to germs from co-employees while working in close contact is a condition common and necessary to a great many occupations. Although it is undisputed that [the employee] contracted tuberculosis in the work environment, that fact is not enough. . . . lf it were, every bout of the flu contracted at work, resulting in more than a five days' absence from work would be a personal injury under the Act." ld. at 452.

## Michigan

According to the Michigan workers' compensation statute, "Personal injury includes a disease or disability that is due to causes and conditions that are characteristic of and peculiar to the business of the employer and that arises out of and in the course of the employment." Another way to describe these might be injuries or diseases that arise over time. Remember, the key with any injury is that it must be attributable to work. For example, the statute goes on to state that, "An ordinary disease of life to which the public is generally exposed outside of the employment is not compensable."

There are certain occupational diseases (and now injuries in certain industries) that are treated specially. Silicosis was a very frequent disease among foundry workers. When occupational diseases began to be covered by the law, there was concern that the foundry industry would go out of business if they had to pay full compensation. Accordingly the law was changed to provide special protection under those circumstances.

Under the present law, if you suffer from certain dust diseases or receive an injury while performing certain work in the logging industry, you receive exactly the same benefits as if the injury had occurred in some other way, but your employer receives special protection through reimbursement from a special fund to which all Michigan employers contribute.

The distinction between a traditional "occupational disease" and an "injury not attributable to a single event" has narrowed over past years but still remains slightly different. The language of the Michigan statute as interpreted by the appellate commission and in recent court cases would infer that the most critical factor in determining if the disability is an occupational disease is the degree to which the resulting disability is characteristic of a certain type of industry or employment. A determination of a claim being one incidental to an occupational disease becomes important primarily to the extent that there are certain alternatives available to the employer in terms of relief from the State of Michigan existent through certain state funds that have been constructed over the years to assist employers in compensation of these claims.

****Michigan filed an Emergency Executive order on March 18, 2020 establishing emergency rules for "first responders" under the Workers Compensation Act*

## Minnesota

Infectious Diseases are covered under the definition of occupational disease, so long as the disease is acquired as a direct result of the employment. The employee has the burden of proving a causal link between the employment and the exposure. An employer is not liable for workers' compensation for an infectious disease which cannot be traced to the employment as a direct and proximate cause or which results from a hazard to which the worker could have been equally exposed outside of employment. If immediately preceding the disablement or death, the employee was providing emergency medical care or the employee was working as a licensed police officer, fire fighter, paramedic, correctional officer, emergency medical technician or licensed nurse providing emergency medical care, and that employee contracts an infectious or communicable disease to which the employee was exposed in the course of

employment outside of a hospital, then the disease is presumptively an occupational disease and is presumed to have been caused by the employment. Any factors the employer uses to rebut this presumption known to the employer or insurer at the time of denial of liability shall be communicated to the employee with that denial.

A presumption also exists for fire fighters who are disabled by reason of cancer caused by exposure to heat, radiation or a known or suspected carcinogen defined by applicable agency. That cancer may be presumed to be an occupational disease.

Subd. 15.Occupational disease.

(a) "Occupational disease" means a mental impairment as defined in paragraph (d) or physical disease arising out of and in the course of employment peculiar to the occupation in which the employee is engaged and due to causes in excess of the hazards ordinary of employment and shall include undulant fever. Physical stimulus resulting in mental injury and mental stimulus resulting in physical injury shall remain compensable. Mental impairment is not considered a disease if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. Ordinary diseases of life to which the general public is equally exposed outside of employment are not compensable, except where the diseases follow as an incident of an occupational disease, or where the exposure peculiar to the occupation makes the disease an occupational disease hazard. A disease arises out of the employment only if there be a direct causal connection between the conditions under which the work is performed and if the occupational disease follows as a natural incident of the work as a result of the exposure occasioned by the nature of the employment. An employer is not liable for compensation for any occupational disease which cannot be traced to the employment as a direct and proximate cause and is not recognized as a hazard characteristic of and peculiar to the trade, occupation, process, or employment or which results from a hazard to which the worker would have been equally exposed outside of the employment.

## Mississippi

The MWCA does not specifically address injury or death which occurs as a result of infectious diseases. Infectious diseases, such as hepatitis, staph infection, etc., will be compensable if the employment risk analysis results in a finding that the work exposed the employee to a risk that is reasonably incidental to the employment or rationally connected to the employment.

## Missouri

Are contagious diseases, such as coronavirus, contracted in the course of employment generally compensable under Missouri workers' compensation law? If not, are there specific circumstances that would require compensability under Missouri law?

The compensability of a contagious disease is governed in Missouri by statutes. The Worker's Compensation Laws contained in the statutes define occupational disease as "an identifiable disease arising with or without human fault out of and in the course of employment." Mo. Ann. Stat. § 287.067.1. Further, the statute states, "[a]ny employee who is exposed to and contracts any contagious or communicable disease arising out of and in the course of his or her employment shall be eligible for benefits under this chapter as an occupation disease." Id. at 6.

However, the statute specifically denotes that "ordinary diseases of life to which the general public is exposed" are not compensable. Id. at 2. The only exception for ordinary diseases of life occurs when the "diseases follow as an incident of an occupational disease," no matter how short exposure to the disease

may be. ld; Mo. Ann. § 287.063.2. Thus, for a contagious disease to which the public is generally exposed, the claimant must be able to demonstrate that their "occupational exposure was the prevailing factor" for causation. Mo. Ann. § 287.067.2.

For an employer to be held liable for an employee's contraction of a contagious disease, the statute lays out to relevant factors: (1) the disease must "have had its origin in a risk connected with the employment" and (2) "have flowed from that source as a rational consequence." Mo. Ann. Stat. § 287.067.1. Missouri courts treat these factors as two-part test to determine compensation eligibility. Simmons v. Bob Mears Wholesale Florist, 167 S.W.3d, 222, 225 (Mo. App. 2005). The courts have consistently applied the second factor as inclusive of a "recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort." Kelly v. Bata & Stude Contr. Co., 1 S.W.3d 43, 48-9 (Mo. App. 1999).

Further, the employee's exposure through the course of their employment must be the prevailing factor for causing contraction of the disease. Mo. Ann. Stat. § 287.067.2 (2014). "'[P]revailing factor' is defined to be the primary factor" of the occupational disease, which may occur in conjunction with secondary factors. ld.

ln proving causation, the claimant bears the burden of proof to show a "recognizable link between the disease and some distinctive feature of the job which is common to all jobs of that sort." Vickers v. Missouri Department of Public Safety, 283 S.W.3d 287, 291 (Mo. App. 2009) (citing Jacobs v. City of Jefferson, 991 S.W.2d 693, 696 (Mo. App. 1999); Kent v. Goodyear Tire & Rubber Co., 147 S.W.3d 865, 867 (Mo. App. 2004)).

Missouri treats contagious diseases as potentially compensable if the employee can establish (1) a that their occupation created a greater risk of contracting the disease than the general public and (2) a link between the disease and a unique feature of their employment shared by all employed in that line of work.

This standard sets a difficult burden of proof for claimants when dealing with ordinary diseases of life because it is extremely difficult to pinpoint with any certainty where an individual contracted a virus or infection. Generally, Missouri courts do not award compensation to claimants who contract a virus, such as the flu, because the virus is so widespread and could easily be contracted in any location.

However, if the employee's occupation puts them at greater risk than the general public, the disease could become compensable. This provision is especially important for healthcare workers, who may be in direct and consistent contact with infected patients or bodily fluids. When the employee works in situations where their exposure is greater than that of the general public, the courts look to the conditions of their workplace. lf the conditions of their workplace are a direct cause of the employee contracting the disease, the courts may award compensation. *Kelly v. Bata & Stude Contr. Co.,* 1 S.W.3d 43, 48-9 (Mo. App. 1999).

As coronavirus continues to spread quickly throughout the country, employees would have a difficult time meeting the Missouri standard for compensation for an occupational disease. For the majority of employees, there is no greater risk of contraction within the workplace than in any other sector of life. This is because most employees are just as likely to contract the virus at public gatherings, taking public transportation, or visiting a grocery store as they are in the workplace. Thus, the risk to the individual in the workplace is no greater than the general public, failing to meet the Missouri standard.

This risk may increase, however, for those who must travel internationally for their employment. lf an employee has traveled to a country identified by the CDC as high-risk, such as China, lran, or ltaly, the employee would have an easier time making the argument that their business travel placed them at higher risk than the general public. lf the employee subsequently contracted the virus, they would likely be able to meet the Missouri standard for compensability.

Similarly, medical professionals could be considered at greater risk of exposure than the general public because they are coming into direct contact with people who may be infected with the virus on a consistent basis. Unlike the general public, who are largely trying to avoid the disease, medical professionals are not shying away from contact with COVlD-19. ln fact, they are required to deal with it due to their work. Thus, like international travelers, healthcare workers who are in contact with the virus could claim a greater risk of exposure to COVlD-19 it is likely that their claim would be compensable if they subsequently contract the virus.

With the exception of international travelers and medical professionals, whose claims should be evaluated on a base-by-case basis, the best practice at this point is for employers to deny worker's compensation claims stemming from contracting COVlD-19. However, if investigation points to those employees being at a greater risk than the general public of contracting the virus, or if a healthcare worker is exposed to a patient who has contracted the virus, those claims would likely be compensable.

A practice tip for employers with employees who have a greater risk of exposure to the disease is to create or update safety and hygiene policies for employees to match the recommendations by the CDC. Healthcare employers should have specific precautions in place for preventing COVlD-19 in the workplace, as well as protocols for treating COVlD-19 patients. Additionally an employer could limit the amount of required international travel as much as possible, especially to high-risk areas. lf travel to those areas is unavoidable, an employer should make sure safety protocols are in place to minimize the risk of exposure.

As an extra measure of precaution, employers should alert employees of expected practices to reduce the risk of spreading all communicable diseases. Setting hand washing guidelines, providing hand sanitizer, and permitting work from home options (if possible) are all ways to increase office safety and reduce any potential employer liability. Lastly, require sick employees to stay home until they have a confirmed diagnosis or have been symptom-free for two weeks, as indicated by the CDC.

Though courts will likely treat coronavirus the same as any other communicable diseases of life, the increased transmission across the country requires that employers, especially of high-risk employees, should have safety procedures in place to limit exposure in their workplace.

## Nebraska

Contracting COVlD-19 at work is unlikely to be a compensable occupational disease under the Nebraska Workers' Compensation Act. Although a limited exception could be possible for those infectious disease medical professionals specifically treating COVlD-19 patients, those employees would still have to prove by preponderance of the evidence that the exposure occurred at work. lt is more likely than not that COVlD-19 would be considered an ordinary disease of life and, therefore, not compensable under Nebraska law.

ln Nebraska, 'occupational disease' is defined in Neb. Rev. Stat. 48-151(3) as "only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment and excludes all ordinary diseases of life to which the general public is exposed." To further elaborate on this, an occupational disease must be a natural incident of a particular occupation and must attach to that occupation a hazard which distinguishes it from the usual run of occupation and which is in excess of that attending employment in general.The statue does not require that the disease be one which originates exclusively from the employment. The statute requires that the conditions of the employment must result in a hazard which distinguishes it in character from employment generally. Ritter v. Hawkeye-Security lnsurance Co., 178 Neb. 792,795, 135 N.W.2d 470, 472 (1965).

The Nebraska Supreme Court has not defined "ordinary diseases of life" in terms of 48-151(3). lt, however, has not been asked to address whether a virus is a compensable occupational disease. To date, the

Nebraska Supreme Court has only addressed compensability of exposure to latex (*Ludwick v. TriWest Healthcare Alliance*, 267 Neb. 887, 678 N.W.2d 517 (2004), silica *{Hauff v. Kimball*, 163 Neb. 55, 77 N.W.2d 683 (1956), asbestos *{Osteen v. A.C. and S., /nc.,* 209 Neb. 282, 307 N.W.2d 514 (1981), wheat dust (*Riggs v. Gooch Milling & Elevator Co.*, 173 Neb. 70, 112 N.W.2d 531 (1961), detergents (*Ritter v. Hawkeye-Security /ns. Co.,* 178 Neb. 792, 135 N.W.2d 470 (1965), and loud noises (*Risor v. Nebraska Boiler*, 277 Neb. 679765 N.W.2d 170, (2009). The Nebraska Supreme Court generally looks to the hazards of the employee's profession to determine if the alleged exposure is particular to the employee's particular trade occupation, process or employment.

The most instructive analysis provided by the Nebraska Supreme Court on how it might evaluate a virus like COVlD-19 can be found in *Risor v. Nebraska Boiler*, 277 Neb 679, 765 N.W.2d 170 (2009). ln Risor, the employee claimed exposure to loud noises as a boiler manufacturer was a compensable occupational disease. The Nebraska Supreme Court disagreed. lt reasoned that exposure to loud noises was too broad to make it peculiar to employee's employment as a boiler manufacturer specifically stating that other professions such as firefighters, police officers and others would be exposed to such a hazard.

An analysis similar to Risor is expected if the Nebraska Supreme Court would evaluate the compensability of COVlD-19. Risor suggests that exposure to COVlD-19, even by first responders and medical professionals generally, would be too broad to satisfy the requirement that the exposure be peculiar the employee's particular trade occupation, process or employment.

lt is possible that the Nebraska Supreme Court may recognize a limited exception regarding compensability exposure to COVlD-19 by infectious disease medical professionals specifically required to treat patients with COVlD-19. Even then, the employee would have to establish by preponderance of the evidence that the exposure occurred while the employee was engaged in employment related duties for the COVlD-19 exposure to be compensable under this possible exception. lt is unlikely that COVlD-19 exposure at work by any other employee in any other profession would be a compensable occupational disease under the Nebraska Workers' Compensation Act.

## Neveda

NRS 617.358 Compensation prohibited unless preponderance of evidence establishes that disease arose out of and in course of employment; rebuttable presumption if notice of disease is filed after termination of employment; exceptions.

1. An employee or the dependents of the employee are not entitled to receive compensation pursuant to the provisions of this chapter unless the employee or the dependents of the employee establish by a preponderance of the evidence that the employee’s occupational disease arose out of and in the course of his or her employment.
2. If the employee files a notice of an occupational disease pursuant to NRS 617.342 after his or her employment has been terminated for any reason, there is a rebuttable presumption that the occupational disease did not arise out of and in the course of his or her employment.
3. The provisions of this section do not apply to any claim filed for an occupational disease described in NRS 617.453, 617.455, 617.457, 617.485 or 617.487.

AND

NRS 617.440 Requirements for occupational disease to be deemed to arise out of and in course of employment; applicability.

1. An occupational disease defined in this chapter shall be deemed to arise out of and in the course of the employment if:

a. There is a direct causal connection between the conditions under which the work is performed and the occupational disease;
b. It can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
c. It can be fairly traced to the employment as the proximate cause; and
d. It does not come from a hazard to which workers would have been equally exposed outside of the employment.

2. The disease must be incidental to the character of the business and not independent of the relation of the employer and employee.
3. The disease need not have been foreseen or expected, but after its contraction must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a natural consequence.
4. In cases of disability resulting from radium poisoning or exposure to radioactive properties or substances, or to roentgen rays (X-rays) or ionizing radiation, the poisoning or illness resulting in disability must have been contracted in the State of Nevada.
5. The requirements set forth in this section do not apply to claims filed pursuant to NRS 617.453, 617.455, 617.457, 617.485 or 617.487.

## New Hampshire

ln New Hampshire, injuries that result from a "neutral risk" are generally deemed non-compensable. Neutral risks are risks that are the same as the general public. See Appeal of Margeson, 162 N.H. 273 (2011).

The New Hampshire statute includes "occupational disease" as a compensable injury. The definition of "occupational disease" is an "injury arising out of and in the course of the employee's employment and due to causes and conditions characteristic of and peculiar to the particular trade, occupation or employment." See RSA 281-A:2(Xlll). Arguably, the "occupational disease" provision will not apply to any cases of COVlD-19, as the risk of contraction is not "characteristic of and peculiar to" the employment. Perhaps a healthcare worker could make an argument that the occupational disease provision applies, but even in such employment, the virus itself is arguably not "characteristic of and peculiar to" the employment.

ln most cases, the contraction of COVlD-19 would be considered a neutral risk and generally non-compensable. An employee could theoretically shift the claim to a "personal risk" if they can prove a specific identifiable exposure within the work setting. The evidentiary burden on such a case would be very difficult for an employee to meet. Generally, COVlD-19 will be considered a neutral risk, and New Hampshire case law supports the utilization of the increased-risk test for neutral risk cases. Under the increased-risk test, an employee may only recover benefits if the injury results from "a risk greater than that to which the general public is exposed." Appeal of Margeson, 162 N.H. 273, 283 (2011). Thus, again the employee would be required to prove that his/her risk of contracting COVlD-19 was greater than the general public's risk. Healthcare workers are likely the only employees that may be able to establish this, but each claim must be evaluated on a case-by-case basis.

## New Jersey

The New Jersey Workers' Compensation Statute finds an injury compensable when it arises out of and in the course and scope of employment. "Arise of out" refers to causation. The New Jersey Supreme Court created a "but-for" test in analyzing whether the injury "arose out" of the employment. The court specifically developed a two-step approach in applying the "but-for" test.[21] The first is establishing the

positional relations of the employment to the injury. The second is determining the nature of the risk involved.

Establishing the positional relations of the employment to the injury requires asking the question of "whether it is more probably true than not that the injury would have occurred during the time and place of employment rather than elsewhere." Determining the nature of risk involved requires the consideration of three categories of risks that may arise in the workplace. The first two risks will result in compensable injuries. These are industrial risks which are clearly compensable when they occur at the place of and during the hours of employment, and neutral risks, which "may be defined as uncontrollable circumstances which do not originate in the employment environment but which happen to befall the employee during the course of his employment. The third category of risks "do not bear a sufficient causative relation to the employment and may not be said to arise out of the employment." These risks have been denominated as those personal to the claimant.

In the case of the COVID-19, a claimant would have to show that it is more probably true than not that they would have contracted the coronavirus at work than anywhere else, and show the risk of the employment for contracting the coronavirus falls in the first two "risk" categories discussed above. This is a very high and difficult standard for most employees to prove.

*21 Howard v. Harwood's Rest. Co., 25 N.J. 72 {1957}.*

## New Mexico

The occupational diseases defined in Section 52-3-33 NMSA 1978 shall be deemed to arise out of the employment only if there is a direct causal connection between the conditions under which the work is performed and the occupational disease and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment and which can be fairly traced to the employment as the proximate cause. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The disease need not have been foreseen or expected but after its contraction must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence. In all cases where the defendant denies that an alleged occupational disease is the material and direct result of the conditions under which work was performed, the worker must establish that causal connection as a medical probability by medical expert testimony. No award of compensation benefits shall be based on speculation or on expert testimony that as a medical possibility the causal connection exists.

Disease must be peculiar to worker's occupation. — In order for the Occupational Disease Disablement Law to apply, it must be established that the disease is peculiar to the worker's occupation and not merely to his workplace. Rader v. Don J. Cummings Co., 1989-NMCA-079, 109 N.M. 219, 784 P.2d 38, cert. denied, 109 N.M. 131, 782 P.2d 384.

In order for there to be an occupational disease, in addition to the requirement that it be peculiar to claimant's occupation, the conditions must attach to that occupation a hazard that distinguishes it from the usual run of occupations and is in excess of the hazards attending employment in general. Rader v. Don J. Cummings Co., 1989-NMCA-079, 109 N.M. 219, 784 P.2d 38, cert. denied, 109 N.M. 131, 782 P.2d 384.

lnjuries occurring in the general course are not compensable under the New York State Workers' Compensation system. The claimant must therefore satisfy the burden of showing that the injury arose in the course of employment.22 ln the context of an occupational disease that results from illness, this would require that the claimant establish a recognizable link between the condition and a distinctive feature of their employment.23 ln the context of an accidental injury, it has been held that an illness must be assignable to a determinate or single act, identified in space and time.24 This is also relevant in situations in which a claimant was traveling when they contracted an illness, elucidated below.

Once it is established that infection was acquired as a consequence of their employment, the claimant would need to establish by competent medical evidence that this conclusion is not pure speculation.25 That medical opinion need not be expressed with absolute or reasonable certainty, but there must be an indication of sufficient probability as to the cause of the injury, supported by rational basis and not a general expression of possibility.26 Mere speculation by a physician is insufficient to support a finding of causal relationship27, and credibility of evidence is an issue for the board to resolve.28

When evaluating COVlD-19 claims, there are some additional distinctions that should be made, both in terms of (1) the type of claim (accident v. occupational disease); (2) the category of the claimant's employment (health care v. non-health care); and (3) the nature of the employment (i.e, outside employment/traveling employees), as each will have different nuances and burdens. Based on what we do know about COVlD-19, any claims filed would likely be filed as an "accident." Pursuant to WCL § 2(7), "[i]njury" and "personal injury" mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom. Whether a particular event is an industrial accident is not determined by any legal definition, but by the commonsense viewpoint of the average person.29 Because workplace accidents must "arise out of" and "in the course of" employment, an infection must first and foremost be an inherent risk of the claimant's employment. For example, a retail worker who contracts COVlD-19 likely will not have a compensable claim, but a hospital worker who contracts it while performing their job likely will.

lnasmuch as no caselaw exists providing any specific precedent, we have to look to see how the board has dealt with other similar contagions to anticipate how they will address COVlD-19. Of note, there is no reference to "pandemic" in the New York Workers' Compensation-related caselaw, nor any reference associated with compensable claims from the last pandemic to hit the United States (Swine Flu). As such, the inquiry must be expanded to other viruses and communicable diseases in general. There is caselaw discussing compensability of "community acquired diseases" and the general rule is: if the time and space of the "entry" or contracture cannot be specifically identified, it cannot be compensable.

Under some circumstances, the contraction of an infectious disease can be found to be an accidental injury within the meaning of the WCL.[30] "As to infectious diseases contracted in the course of employment, the accident requirement has been interpreted to mean that 'the inception of the disease must be assignable to a determinate or single act, identified in space or time [internal citations omitted]"'.[31] "Compensation has been allowed for infectious disease in many cases, but only where there was some discrete event or series of events which could reasonably be deemed to mark the onset of the infection".[32]

*16 Employer: Am. Eagle Airlines, No. G031 2670, 2011 WL 2215346 {N.Y. Work. Comp. Bd. May 26, 2011}.*
*17Employer: Rosner Constr. Carrier: State /ns. Fund, No. 00754237, 2010 WL 1976543 {N.Y. Work. Comp. Bd. May 6, 2010}.*
*24 /d., citing Matter of Albrecht v. Orange County Community Coll., 61 AD2d 1068 {1978}, aff'd 46 NY2d 959 {1979}.*
*25 Matter of Williams v Colgate Univ., 54 AD3d 1121 {2008}.*
*26 Matter of Granville v. Town of Hamburg, 136 A.D.3d 1254, 1255, 25 N.Y.S.3d 746 {2016} {see Matter of Norton v. North Syracuse Cent. School Dist., 59 A.D.3d 890, 891, 874 N.Y.S.2d 302 {2009}}.*
*27 Employer: Savin Engineers, P.C., No. G075 1427, 2014 WL 5312651 {N.Y. Work. Comp. Bd. Oct. 9, 2014}.*
*28 Tucker v. City of Plattsburgh Fire Dep't, 153 A.D.3d 984, 985, 59 N.Y.S.3d 609, 611 {N.Y. App. Div. 2017}.*
*29 Matter of Middleton v Coxsackie Correctional Facility, 38 NY2d 130 {1975}.*

*30 id.; see also Matter of Connelly v Hunt Furniture Co., 240 NY 83 {1925}.*
*31 Matter of Albrecht v Orange County Community Coll., 61 AD2d 1068 {1978}, aff'd 46 NY2d 959 {1979}.*
*32 id. at 1069.*

A discrete event resulting in the onset of an infection sufficient to constitute an accidental injury has been found, for example, when the record contains evidence that the claimant was exposed to a person known to be infected **with the disease later contracted by claimant**[33], when a decedent contracted malaria from a mosquito bite[34], and when a decedent was infected though a cut on his hand while handling a gangrenous corpse.[35]

However, an infectious disease that is contracted through normal bodily processes (e.g., breathing), "at a time and place which cannot be specified," cannot be considered an accidental injury within the meaning of the WCL.[36]

ln Albrecht, the decedent, a professor, contracted polio and died while traveling in Africa during a sabbatical. The court in Albrecht concluded, based on the record before it, that because the decedent contracted polio through "normal channel of entry," at a time and place that could not be specified, he did not sustain in accidental injury.[37] This is the argument to focus on if any traveling employee contracts COVlD-19.

Currently, Gov. Cuomo's office is encouraging New York insurers to cover coinsurance, copays, and deductibles for COVlD-19 tests and treatment. ln addition, he is pushing an amendment to a bill to encourage or even require additional paid sick leave. With that, and the availability of job-protected and unpaid leave under the Family and Medical Leave Act

(FMLA), there are other avenues available to encourage claimants to process any costs through their private insurance, as opposed to filing a workers' compensation claim. ln addition, employees can collect FMLA benefits.

*33 Middleton, 38 NY2d 130 {1975}; Matter of McDonough v Whitney Point Cent. School, 15 AD2d 191 {1961}; Matter of Gardner v New York Med. Coll., 280 AD 844 {1952}, aff'd 305 NY 583 {1953}.*
*34 Matter of Lepow v Lepow Knitting Mills, 288 NY 377 {1942}.*
*35 Connelly, 240 NY 83 {1925}.*
*36 Albrecht, 61 AD2d 1068 {1978}, affd 46 NY2d 959 {1979}.*

## North Carolina

There is no longer any question about whether the coronavirus (COVlD-19) pandemic will affect North Carolina employers and employees. lt will - and probably in ways that cannot be fully predicted. lts invasion has begun, and all North Carolinians must transition from preparing for the contagion, to actively fighting it, and then, to recovering from it. Somewhere along the way, it seems likely that an employee will contract COVlD-19. And, somewhere along the way, it seems equally likely that an employee (or that employee's dependents) will file a workers' compensation claim against an employer, based upon exposure to COVlD-19. Are COVlD-19 claims compensable under North Carolina law?

Although legislators and judges have expanded the scope of its coverage over the last 90 years, The North Carolina Workers' Compensation Act (Act) is not a general health insurance plan. At its core, "the grand compromise" is intended to cover occupational risks, and to ameliorate occupational damages. A pandemic, by its very nature, involves a contagion that indiscriminately affects all types of people – whether employed or not. And, as to those victims who may be gainfully employed, COVlD-19 is not expected to be linked to any particular type of business, or to any particular set of working conditions, or for that matter, to any particular kind of laborer.

Because North Carolina is not a "positional risk" jurisdiction, an employee who contracts COVlD-19 probably does not suffer from a condition for which the employee's employer is responsible under the terms of The North Carolina Workers' Compensation Act. The conclusion that a COVlD-19 claim does not

fall within the coverage of the Act is based upon the fact that an employee asserting a claim for COVlD-19 must establish that it is an "injury by accident" and/or that it is an "occupational disease." Based upon what we currently understand about COVlD-19, it seems unlikely that an employee can make out a viable claim under either legal theory.

**Accident Theory:**

Fact patterns come in all forms, but it is hard to imagine a fact pattern where exposure to COVlD-19 meets the "injury by accident" criteria. The existence of an injury exists does not establish the existence of "accidental" circumstances. ln North Carolina, an "injury by accident" typically involves some kind of interruption in the employee's normal work routine.

With a COVlD-19 claim, the most common fact pattern will likely be where one employee unwittingly infects another, under typical working conditions, while performing typical work tasks, in the typical way. Even if the moment of transmission can be identified – which also seems like an unlikely circumstance — the transmission of COVlD-19 will most likely occur merely because an infected worker is in close enough proximity to a co-worker to allow it to happen. However, in North Carolina, an employee cannot establish legally sufficient causation by showing only that the place of employment provided a fortuitous opportunity for harm to occur ("positional risk").

**Occupational Disease Theory:**

lt seems more likely that an employee might pursue a COVlD-19 claim, contending that it is an occupational disease. The Act, however, does not cover all diseases just occupational diseases. lt is an employee's burden to establish a legally sufficient causal link between the employment and the condition in question to make it an occupational disease. Our statute lists 28 diseases that are occupational diseases, if there is a simple causal connection between the employment and the disease. COVlD-19 is not a listed occupational disease.

For any disease that is not specifically listed, North Carolina's occupational disease statute provides coverage only if an employee can satisfy the criteria set out in its "catch-all" provision, N.C. Gen. Stat. §97-53(13). (13) specifically excludes from its coverage all ordinary diseases of life to which the general public is equally exposed. To fall within the penumbra of (13), an employee's evidence on causation would have to show that there was something about the nature of the employee's employment exposed the employee to an "increased risk" of developing COVlD-19. Again, North Carolina is not a "positional risk" jurisdiction, so an employee's evidence that the employee worked near someone who was diagnosed with COVlD-19 is not legally sufficient evidence of "increased risk."

While it may be the case that we come to learn that specific jobs have particular characteristics and distinguishable hazards that place an employee at an "increased risk" of developing COVlD-19, in a pandemic situation, where a huge percentage of the general population is exposed, and actively transmitting COVlD-19, it seems like it will be a rare job that puts an employee at "increased risk." And, even if an employee pigeonholes the employee's claim into (13), the employee still has to prove causation. Causation is typically established through circumstantial evidence. ln a pandemic, regardless of the employee's employment, it seems unlikely that an employee will be able to establish, through lay evidence, where COVlD-19 was contracted, or that the employee will be able to rule out, through lay evidence, where COVlD-19 was not contracted. As for medical evidence on causation, North Carolina law is clear that medical evidence is insufficient if it offers only a temporal relationship between a work-related exposure and the development of the disease.

**Responding to COVID-19 claims:**

ln almost all cases, it is anticipated that an employer will have strong factual and legal bases for denying the compensability of a COVlD-19 claim brought in North Carolina, and at most, that an employer might

have altruistic or business reasons for deciding to handle a COVID-19 claim for North Carolina workers' compensation benefits on a "pay without prejudice" basis.

## North Dakota

*Is COVID-19 compensable under workers' compensation?*

Maybe. For an employee who is infected with COVID-19 to be covered by workers' compensation, the worker must establish COVID-19 is an "occupational disease" which means that exposure to the disease is something that is an essential part of the job (example: doctor or nurse) and not a result of incidental contact from a job that working with the public is expected (example: cashier or waiter). Further, to be eligible for workers' compensation benefits, an employee must be unable to work for at least 7 consecutive days.

"Occupational disease" is defined in SDCL 62-8-1(6) as: a disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment and includes any disease due or attributable to exposure to or contact with any radioactive material by an employee in the course of employment.

Furthermore, according to case law, a "[c]ondition is 'peculiar to a particular occupation,' within workers' compensation statute's definition of a compensable occupational disease, when it is the result of a distinctive feature of the kind of work performed by a claimant and others similarly employed. SDCL 62–8–1(6)." Sauer v. Tiffany Laundry & Dry Cleaners, 2001 S.D. 24, 622 N.W.2d 74. What this means is that a person's occupation must require that person to be exposed to COVID-19, otherwise, it is not compensable.

## Ohio

Generally, communicable diseases like COVID-19 are not workers' compensation claims because people are exposed in a variety of ways, and few jobs have a hazard or risk of getting the diseases in a greater degree or a different manner than the general public. However, if you work in a job that poses a special hazard or risk and contract COVID-19 from the work exposure, the Ohio Workers Compensation Bureau could allow your claim.

An occupational disease (OD) claim generally results from repeated work-related exposure per ORC 4123.01(F). The work-related exposure has a harmful effect on the employee and there is a causal relationship between the exposure and the harmful effect that is confirmed by a medical diagnosis. The conditions of the employment create a greater hazard to the worker than to the general public. Occupational diseases may be caused by exposure to:

- Dust, gases or fumes;
- Chemicals and toxic substances;
- Extreme changes of temperatures, noises or pressure;
- Physical vibrations, constant pressure and use, physical movement in constant repetition or radioactive rays;
- Infections and organisms; Radiation.

## Oklahoma

"Occupational disease", as used in this act, unless the context otherwise requires, means any disease that results in disability or death and arises out of and in the course of the occupation or employment of the employee or naturally follows or unavoidably results from an injury as that term is defined in this act. A causal connection between the occupation or employment and the occupational disease shall be established by a preponderance of the evidence.

1. No compensation shall be payable for any contagious or infectious disease unless contracted in the course and scope of employment.
2. No compensation shall be payable for any ordinary disease of life to which the general public is exposed.

## Oregon

Defines an occupational disease as any disease or infection arising out of and in the course of employment caused by substances or activities in which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment therein, and which requires medical services or results in disability or death, including: any disease or infection caused by ingestion of, absorption of, inhalation of or contact with dust, fumes, vapors, gases, radiation or other substances; any mental disorder, whether sudden or gradual in onset, which requires medical services or results in physical or mental disability or death; any series of traumatic events or occurrences which requires medical services or results in physical disability or death.

The distinction between an accidental injury and an occupational disease can be elusive, but whether a claim is brought as an injury claim or as a disease can significantly affect a worker's chance of recovery, because a worker's burden of proof is higher for an occupational disease claim. The primary distinction between an accidental injury and an occupational disease claim is "time-definiteness." *Smirnoff v. SAIF*, 188 Or App 438, 443, 72 P3d 118 (2003). Generally, an injury has a sudden onset, while an occupational disease develops gradually over time. The exception to this general rule is a mental disorder, which is classified as an occupational disease under the statute "whether sudden or gradual in onset." ORS 656.802(1)(A)(B).

A compensable occupational disease is any disease or condition from which a worker suffers and for which the worker produces medical and factual evidence meeting the definitional standard. The primary focus is medical evidence identifying the particular work environmental conditions acting as the major contributing cause of the worker's occupational disease. The first category of compensable occupational diseases contains those that arise from exposure to a substance. The statute defines this category as "[a]ny disease or infection caused by ingestion of, absorption of, inhalation of or contact with dust, fumes, vapors, gases, radiation or other substances

The general compensability standard for occupational disease is the "major contributing cause" standard. ORS 656.802(2)(a). See Dietz v. Ramada, 130 Or App 397, 401, 882 P2d 618 (1994) (major contributing cause standard requires that work conditions contribute more than all other causes); *McGarrah v. SAIF*, 296 Or 145, 171-72, 675 P2d 159 (1983) (employment conditions must contribute more than nonemployment conditions). The burden of proof required to establish an compensable occupational disease lies with the worker, who must prove by a preponderance of the evidence that the worker suffers a compensable disability caused in major part by employment. *Gormley v. SAIF*, 52 Or App 1055, 1059, 630 P2d 407 (1981).

## Pennsylvania

In Pennsylvania, an employer is liable for compensation for personal injury to or death of an employee from an injury in the course of their employment.[40] An injury need not be pinpointed to a specific event or definable incident as long as the injury arises in the course of employment and is related thereto.[41] The compensation is paid by the employer without regard to negligence.[42]

At a most basic level, the claimant's burden is to prove that their injury arose in the course of employment and was related thereto.[43]

"That burden is satisfied if he proves his alleged disability either 'results from the injury or is aggravated,

reactivated or accelerated by the injury'."[44] "Where medical testimony is necessary to establish a causal connection, the medical witness must testify, not that the injury or condition might have or possibly came from the assigned cause, but that in his professional opinion the result in question did come from the assigned cause."[45]

COVlD-19 does not meet the definition of an occupational disease under The Pennsylvania Occupational Disease Act.

The burden of proof is on the employee to establish that the injury (COVlD-19) was from work. Unless the initial source for the exposure was identified, it is going to be difficult to establish that the employee could only have been exposed to COVlD-19 at work. Further, if not all employees at work test positive, an initial source cannot be identified. lf the claimant's family members/friends test positive, it will further muddy the waters as to the source of COVlD-19. While those working in the medical file may be given the benefit of the doubt by the judges, we do not believe the presumption will extend to employees as a whole.

*40 Section 301{a} of the Act*
*41 WCAB {Young} v. Bethlehem Steel Corp., 352 A.2d 571 {Pa. Cmwlth. 1976}.*
*14 Section 301{a} of the Act.*
*15 Chik-Fil-A v. WCAB {Mollick}, 792 A.2d 678 {Pa. Cmwlth. 2002}.*

## Rhode Island

Rhode lsland follows the "actual-risk" doctrine, which means that an employee must show that the injury arose out of an actual risk of employment. ln claims of infectious disease, the employee must prove that the contraction of the disease is an actual risk of the employment. "ln order to establish a predicate for application of the actual-risk theory, the employee would be required to sustain the burden of showing that this risk, even though common to the public, was in fact a risk of his employment." *Dawson v. A & H Mfg. Co.*, 463 A.2d 519, 521 (R.l. 1983). This doctrine could potentially apply to healthcare workers, but for nearly all other employments COVlD-19 should be considered non-compensable.

## South Carolina

Infectious diseases are compensable pursuant to the following rule: “An external infection, which has been distinctly traced to a definite point of contact, such as a scratch or abrasion, and to a definite time, being of an unusual nature and generally happening suddenly or unexpectedly, is generally held to constitute an accident, or an injury by accident, within the meaning of the act.” *Alewine v. Tobin Quarries*, Inc., 206 S.C. 103, 33 S.E.2d 81 (1944).

*Alewine v. Tobin Quarries*, supra, 206 S.C. 103, 33 S.E. (2d) 81: There the employee was required by the employer to submit to a smallpox vaccination before he entered upon his work. Infection resulted, causing the employee's death. The facts disclosed that the employer directed that the vaccination be taken and that it was to the benefit of the employer that such be done. Compensation was allowed, the court holding that the infection of the vaccination wound was an accidental injury which arose out of and in the course of employment.

## South Dakota

“Injury” or “personal injury,” only injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:

(a) No injury is compensable unless the employment or employment related activities are a major

contributing cause of the condition complained of;

"Occupational disease," a disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment and includes any disease due or attributable to exposure to or contact with any radioactive material by an employee in the course of employment;

## Tennessee

The current version of the Tennessee Workers' Compensation Act provides that compensable injuries ""[d]o not include . . . [a] disease in any form, except when the disease arises out of and in the course and scope of employment." TENN. CODE ANN. § 50-6-102(12)(C)(i)(2013). Generally, this will only be occupational diseases. However, some case law has allowed the potential for recovery for actual exposure to HIV as a mental injury. See e. g., Guess v. Sharp Mfg. Co. of Am., a Div. of Sharp Electronics Corp., 114 S.W.3d 480, 487 (Tenn. 2003)

Under the Act, occupational diseases are "all diseases arising out of and in the course of employment." TENN. CODE ANN. § 50-6-301(12)(C)(i)-(ii) (2013). The Act lays out 6 criteria for determining whether the occupational disease arises out of employment:

1. It can be determined to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
2. It can be fairly traced to the employment as a proximate cause;
3. It has not originated from a hazard to which workers would have been equally exposed outside of the employment;
4. It is incidental to the character of the employment and not independent of the relation of employer and employee;
5. It originated from a risk connected with the employment and flowed from that source as a natural consequence, though it need not have been foreseen or expected prior to its contraction; and
6. There is a direct causal connection between the conditions under which the work is performed and the occupational disease. Diseases of the heart, lung, and hypertension arising out of and in the course of any type of employment shall be deemed to be occupational diseases.

## Texas

Ordinary diseases of life are not compensable injures based on the rationale that the employer should not be responsible for conditions which are the result of the claimant's exposure to conditions which affect the general population and do not have their origin in some specific work-related exposure or harm. The defense is based on the statutory definition of occupational disease which can be found at Tex. Lab. Code § 401.011(34). The definition of occupational disease necessarily excludes "an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease." This exclusion of ordinary disease of life is necessary to prevent a carrier from being liable for all conditions which an employee may contract while employed.

A successful defense of ordinary disease of life will normally focus on the fact that there is a causal link between the activity on the job and the resulting condition and that the condition is inherent in that particular type of employment as compared with employment generally. The employee is normally required to establish the causal link by reasonable medical probability, so a successful defense must likewise almost always be based on medical evidence. Proof of causation must be established to a reasonable medical probability by expert medical evidence where the subject is so complex that the fact-finder lacks the ability from common knowledge to find a causation connection. See Appeals Panel Decision

No. 110108. Neck and back problems resulting from repetitive driving, sitting, bending or riding are normally placed in the category of ordinary diseases of life. See Appeals Panel Decision No. 950071. Excessive amounts of walking are typically not compensable unless a specific incidence of injury can be pinpointed. If the risk was one that the employee would have encountered irrespective of her employment, the resulting injury is likely not compensable. Appeals Panel Decision No. 030033.

## Utah

If an employee is injured or killed arising out of the course of the employee's employment, the employee, or the employee's dependents, are entitled to receive compensation for the loss the employee sustained, which also includes medical or funeral expenses. Utah Code Ann. § 34A-2-401. Utah Courts have held that the words "arising out of" as used in this section refer to the origin or cause of injury, whereas the words "in the course of" refer to time, place and circumstances under which it occurred. Utah *Apex Mining Co. v. Industrial Comm'n*, 67 Utah 537, 248 P. 490 (1926). For example, an employee is deemed not to be within the course of his employment if he furnishes his own transportation and is injured while going to or from the place where he is employed. *Barney v. Industrial Comm'n*, 29 Utah 2d 179, 506 P.2d 1271 (1973).

When an employee interrupts or breaks the continuity of his employment for his own purposes, whether for recreation or pleasure, and an accident happens before he brings himself back into the line of his employment, the resulting injury is not compensable because it does not arise out of or in the course of his employment. *Sullivan v. Industrial Comm'n*, 79 Utah 317, 10 P.2d 924 (1932). The burden to prove that the injury arose out of or was sustained in the course of the employee's employment rests with the employee or the employee's dependents. *Higley v. Industrial Comm'n*, 75 Utah 361, 285 P. 306 (1930); *D.H. Peery Estate v. Industrial Comm'n*, 79 Utah 8, 7 P.2d 269 (1932). Additionally an employee with a preexisting condition must show that the employment contributed something substantial to increase the risk the employee already faced in everyday life due to the condition. *Sisco Hilte v. Industrial Comm'n*, 766 P.2d 1089 (Utah Ct. App. 1988).

A compensable occupational disease means any disease or illness that arises out of and in the course of employment and is medically caused or aggravated by that employment.

## Vermont

Vermont is a "positional-risk" doctrine jurisdiction. The positional risk doctrine holds that an injury is compensable if it would not have occurred but for the fact that the employment placed the employee in the position where he/she was injured. Thus, if the injury occurred at work, it is generally accepted as work-related, regardless of the risk to the general public. This doctrine is certainly a lower standard than some of the other jurisdictions; however, in cases of infectious diseases, an employee is still required to prove how and when they were infected.

## Virginia

Pursuant to Section 65.2-401, an infectious disease can be compensable if it was contracted in the course of the employee's employment in a hospital or sanitarium or laboratory or nursing home as defined in Section32.1-123, or while otherwise engaged in the direct delivery of health care, or in the course of employment as emergency rescue personnel and those volunteer emergency rescue personnel referred to in Section 65.2-101.

Such term shall include any injury, disease or condition:

1. Arising out of and in the course of the employment of (a) an employee of a hospital as defined in §

32.1-123; (b) an employee of a health care provider as defined in § 8.01-581.1; (c) an employee of the Department of Health or a local department of health; (d) a member of a search and rescue organization; or (e) any person described in clauses (i) through (iv), (vi), and (ix) of subsection A of § 65.2-402.1 otherwise subject to the provisions of this title; and

2. Resulting from (a) the administration of vaccinia (smallpox) vaccine, Cidofivir and derivatives thereof, or Vaccinia Immune Globulin as part of federally initiated smallpox countermeasures, or (b) transmission of vaccinia in the course of employment from an employee participating in such countermeasures to a co-employee of the same employer.

## Washington

"Infection" is explicitly included in the definition of "occupational disease" that may be covered by the Industrial Insurance Accident Bureau "'Occupational disease' means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title."

To establish an occupational disease, a workers' compensation claimant has to show her disorder arose both (1) "naturally" and (2) "proximately" out of her employment. Potter v. DLI, 172 Wn.App. 301, 289 P.3d 727 (2012). A disease is proximately caused by employment conditions, supporting a finding of "occupational disease," when there is no intervening independent and sufficient cause for the disease, so that the disease would not have been contracted but for the condition existing in the employment. Raum v. City of Bellevue, 171 Wn.App. 124 (2012). Examples of occupational diseases are lead poisoning, exposure to toxic substance, noise-induced hearing loss, etc. Prolonged standing or movement on cement floors may cause an occupational disease in someone who may be predisposed to foot problems. Simpson Timber Co. v. Wentworth, 96 Wn.App. 731, 981 P.2d 878 (1999). Emotional injury sustained from watching a coworker fall to his death was not "occupational disease" such that an application for disability benefits was governed by two year limitations period. Elliott v. DLI, 151 Wn.App. 442, 213 P.3d 44 (2009).

A worker may also receive compensation for "lit-up" pre-existing conditions. The lighting-up theory provides that if a pre-existing dormant or latent condition is activated or "lighted up" by an industrial injury or occupational disease, the worker is entitled to benefits for the disability. McDonagh v. DLI., 68 Wn. App. 749, 845 P.2d 1030 (1993).

## West Virginia

Infectious disease follows Occupational disease section

Occupational diseases are compensable only if they meet the following six requirements:

1. There is a direct causal connection between the conditions under which work is performed and the occupational disease.
2. It can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment.
3. It can be fairly traced to the employment as the proximate cause.
4. It does not come from a hazard to which workmen would have been equally exposed outside of the employment.
5. It is incidental to the character of the business and not independent of the relation of employer and

employee.

6. It appears to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction.

**W.Va. Code Section 23-4-1(f).**

## Wisconsin

In order to seek workers compensation benefits in Wisconsin, an employee must experience an injury or disease occurring either "in the course of" the employment or "arising out of" the employment. In theory, that means it would be possible to contract the novel coronavirus and seek benefits as a compensable Wisconsin occupational disease.

For employees who are self-quarantining as a precaution, there is no injury or disease causing lost time. An employee must sustain an injury, or physical or mental harm caused by an accident or disease, to be entitled to workers' compensation benefits under Wisconsin law. A sickness or flu may entitle an employee to sick pay benefits, but no injury or disease arose or was caused in the course of employment when an employee decides not to come into work for a sickness such as the flu. This means self-quarantining employees without a supported diagnosis are not entitled to workers compensation benefits.

In Wisconsin, if a claimant is pursuing a compensable disease like coronavirus, a causation test applies looking to whether work exposure was either "the sole cause of the condition" or "at least a material contributory causative factor in the condition's onset or progression." *Shelby Mut. /ns. Co. v. Dep't of /ndus., Labor & Human Relations of State*, 109 Wis. 2d 655, 659-60, (Ct. App. 1982). Even one day of exposure can lead to an occupational disease claim. *Guimeny v. Cty*. Concrete Corp. & Zurich American Ins., Claim No. 2004-017501, (July 11, 2006). The courts have found these tests to be satisfied even where work only furthers the disease progress by a measure of 5%. Thus, these tests are easy to satisfy.

However, there are major causation issues regarding exposure. It would be very difficult to show where the worker was exposed, absent circumstance such as working in healthcare caring for infected patients. In order to support a claim, a claimant needs medical support linking exposure to the workplace. With coronavirus, at this point, there is not enough known about the incubation period for a credible medical opinion to be provided. As the Court explained in *Pfister & Vogel L. Co. v. /ndustrial Commission*, "[i]t is often impossible to find the source from which a germ causing disease has come. The germ leaves no trail that can be followed. Proof often does not pass beyond the stage of possibilities or probabilities, because no one can testify positively to the source from which the germ came, as can be done in the case of physical facts which may be observed and concerning which witnesses can acquire positive knowledge. Under such circumstances the commission or the court can base its findings upon a preponderance of probabilities or of the inference that may be drawn from established facts." *Pfister & Vogel L. Co. v. /ndustrial Commission*, 194 Wis. 131, 133-134 (1927). "Preponderance of probabilities" meant that in a given situation the inferences are strong enough to point to a fact as a probability and not as a speculative possibility. Cheryl Gabriel, Applicant, No. 2005-010687, 2008 WL 412258, at *3 (Wis. Lab. Ind. Rev. Com. Jan. 31, 2008). Short of a single infected employee, even if multiple persons in a particular setting are sick, there may be a question as to who was the first, and from where the exposure arose. However, there are certain circumstances, such as exposure for employees in health care, where a claim is likely compensable and should be accepted. With that said, short of extraordinary circumstances or a credible medical opinion, claims related to coronavirus should be denied.

If an employee working in the healthcare field had direct contact with someone infected with the

coronavirus, their exposure likely arises out of their employment and they likely have a compensable claim for workers compensation benefits.

lf an employee must travel for work, there may be risk of exposure leading to a compensable workers compensation claim. Whether a traveling employee is deemed in the course of employment is based on a three-step analysis: (1) traveling employees are presumed to be in the course of employment at all times while on a trip (known as "portal to portal" coverage); (2) except when engaged in a "deviation for a private or personal purpose"; (3) and acts reasonably necessary for or incidental to living are not deviations. Wis. Stat. 102.03(1)(f). This means a traveling employee may be deemed in the course of employment during most of, if not all, of an employment-related trip, which greatly enhances the risk of exposure. Regardless, there are similar issues with causation and exposure for traveling employees, meaning without a credible medical opinion providing support linking exposure to the workplace or a specific setting where an employee was traveling, claims can likely be denied.

## Wyoming

The definition of compensable injury does not include any illness or communicable disease. However, an illness or communicable disease is compensable if the risk of contracting the illness or disease is increased by the nature of the employer. WYO. STAT. ANN. § 27-14-102(a)(xi)(A) (LexisNexis 2013).

(xi) “Injury” means any harmful change in the human organism other than normal aging and includes damage to or loss of any artificial replacement and death, arising out of and in the course of employment while at work in or about the premises occupied, used or controlled by the employer and incurred while at work in places where the employer’s business requires an employee’s presence and which subjects the employee to extra hazardous duties incident to the business. “Injury” does not include:

(A) Any illness or communicable disease unless the risk of contracting the illness or disease is increased by the nature of the employment;

## Conclusion

The compensability of coronavirus/COVlD-19 is a complex question involving varying evidentiary tests between the states and fact-intensive investigations of each case.

There is no comprehensive answer to the compensability question on COVlD-19, and each claim must be evaluated on a case-by-case basis.