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Illinois Workers' Compensation Commission Emergency Amendments

In light of current events, the Illinois workers' compensation defense team at Kopka Pinkus Dolin wanted to share the Illinois Workers' Compensation Commission's Notice of Emergency Amendments due to COVID-19 as this will become prevalent in the coming months. Should you have any questions, please do not hesitate to contact us.

I. Illinois Workers' Compensation Commission Notice of Emergency Amendments

Effective 4/13/2020, the Illinois Workers' Compensation Commission ("IWCC") modified Section 9030.70 evidentiary rule to ensure that first responders and "front-line workers," who are considered to be most susceptible to COVID-19 exposure, are afforded full protection of the Workers' Compensation Act ("The Act") should they become exposed during the COVID-19 state of emergency.

Effective 4/16/2020, the IWCC modified Section 9030.70 evidentiary rule with additional explanation regarding the recent amendments. The emergency rule is effective April 16, 2020 and is effective for a maximum of 150 days. The IWCC specified the emergency rule will not expire before the end of the 150-day period. (September 13, 2020 is 150 days after April 16, 2020).

The IWCC explained that it issued the emergency rule because "going through the normal proposed rulemaking process . . . would create the potential for causing irreparable and irreversible harm to the public interest, public safety, and public welfare."

The IWCC cautioned that the emergency rule is narrowly tailored to *only apply* to:

1. Individuals who are first responders or essential front-line workers.
2. These individuals' employment as first responders or essential front-line workers; and
3. The exposures that occur during a COVID-19 related **state of emergency** declared by the Governor.

The IWCC advised:

> The emergency rule **does not guarantee or assure** an award of benefits to any individual who **suspects** he or she has contracted COVID-19 or self-isolates and self-quarantines due to an **alleged** or **suspected** exposure to COVID-19, but, instead, creates **a reasonable rebuttable presumption** that a first responder or front-line worker's **exposure** to the virus is connected to their employment.

The IWCC reassured that the emergency rule does not create or diminish any substantive rights of any party, but instead, speaks to the rules of evidence and procedural rules.

A. What does this Mean?

If a petitioner is a COVID-19 First Responder or Front-Line Worker and if the petitioner's injury or period of incapacity resulted from COVID-19 virus during the COVID-19 state of emergency, said exposure is rebuttably presumed to arise out of and in the course of Petitioner's employment.

What is a rebuttable presumption?

Rebuttable presumption is an assumption made by a court that is taken as true unless someone comes forward to contest it or prove otherwise. This assumption will stand as a fact unless or until contested or proven otherwise.

Typically, under the Act, it is Petitioner's burden to prove that he or she sustained a compensable work-related injury. However, under Section 9030.70, the burden shifts *away* from the petitioner. **Instead, the burden is placed on the employer to provide evidence disproving causal connection between Petitioner's condition of ill-being and his or her employment.**

How does an employer disprove a rebuttable presumption?

Rebuttable presumptions fall under 2 categories:

1. Ordinary: requires *some* contrary evidence; or
2. Strong: requires *clear and convincing* evidence.

Historically, when the Act itself does not specify which type of rebuttable presumption is required or how much evidence is needed to overcome said presumption, Courts have looked to two places to determine legislative intent: interpretation of the remaining language of the Act and procedural history.

Due to COVID-19's rapid and emergent nature, this emergency amendment did not come from the legislature. Instead, the IWCC issued the emergency amendment on its own volition under an emergency ruling.

The IWCC unequivocally stated that this amendment was enacted to provide first responders and front-line workers "the full protections of the Workers' Compensation Act."

Fortunately, the IWCC's second notice provided additional context regarding the purpose of the emergency rule. We know that the IWCC intends to provide the "full protection of the Workers' Compensation Act" to first responders and front-line workers. We know that the IWCC's overarching interest is to reduce public harm. We know the IWCC also expressed somewhat ambiguous language that cautions that there is no guarantee of an award for those individuals who only suspect or allege exposure to COVID-19. We also know the IWCC conveyed its intent that the emergency rule does not create or diminish any substantive rights, but rather addresses rules of evidence and procedural rules.

It is undetermined whether the COVID-19 cases will be viewed as "ordinary" or "strong" rebuttable presumptions. We will argue in favor of an "ordinary" rebuttable presumption. However, given the IWCC's own language, we recommend preparing each COVID-19 case for treatment under a "strong" rebuttable presumption.

How much contrary evidence is enough?

Again, the IWCC has not stated what it will take to disprove the above rebuttable presumption. Regardless, we recommend taking the following actions to defend against COVID-19 cases:

First, determine if the claimant has been medically diagnosed with a positive case of COVID-19.

The IWCC provided that the "emergency rule *does not guarantee or assure* an award of benefits to any individual who suspects he or she has contracted COVID-19 or self-isolates and self-quarantines due to an alleged or suspected exposure to COVID-19."

Please note that this statement does not conclusively deny an award of benefits. Just because an award is not guaranteed, does ***not*** *mean that a claim will not be brought or that ultimately an award will not be granted.* This is an important distinction. We anticipate that there will be claims by those individuals who self-isolate or self-quarantine due to an alleged or suspected exposure.

While the employer can argue that, at minimum, a positive diagnosis is required, it is still not explicitly stated in the Emergency Amendment and leaves open the possibility for a petitioner that he or she was exposed through circumstantial evidence.

Example: Employee A and Employee B work in a grocery store. Employee A, a cashier, tests positive for COVID-19 during the state of emergency. Employee B works next to Employee A, bagging groceries. Shortly after Employee A, Employee B develops symptoms indicative of COVID-19. Instead of getting tested, Employee B self-quarantines and misses approximately 14 days of work due to the illness and quarantine.

Employment policies and procedures aside, looking at this hypothetical from a workers' compensation perspective, it is plausible a petitioner files an Application before the IWCC, alleging employment-related exposure under Section 9030.70. This oversight, therefore, opens the employer up to additional potential exposure.

Next, investigate the claimant further:

- Is there evidence that the claimant was exposed to COVID-19 outside of work?
- Is there surveillance of the claimant? Does this surveillance provide us with anything that will help our defense of the case?
- Has a social media search of the claimant and the claimant's family members and friends been completed?
- Are there any witnesses familiar with the claimant that know whether the claimant was in close contact outside of work with a family member, friend, or member of the general public that was diagnosed with COVID-19?
- What do we know about the claimant's work schedule during the time of COVID-19? Secure time clock sheets to assess.
- What duties and functions did the claimant perform?
- What measures did the facility have in place to protect the claimant from COVID-19?
- What kind of PPE was the claimant required to wear at work during the state of emergency? Did the claimant wear the required equipment?
- When would the claimant have been exposed to the virus at work?
- If the situation warrants it, consider obtaining an Independent Medical Examination from a qualified doctor to address the issues of exposure, causal connection and nature and extent for the purposes of permanency.

What happens if an employer disproves the rebuttable presumption?

While this particular emergency amendment has not been litigated yet, historically in the context of rebuttable presumptions, the District Court of Appeals has considered that once evidence opposing the presumption comes into the case, the presumption ceases to operate, and the issue is determined on the basis of the evidence entered at trial as if no presumption had ever existed.

For the employer/Respondent in workers' compensation cases this means the ability to litigate and secure a zero with regard to permanency.

B. Who falls under the Emergency Amendment?

A COVID-19 First responder and front-line worker is any individual employed as:

1. Police;
2. Fire personnel;
3. Emergency Medical technicians;
4. Paramedics;
5. Individuals employed as and considered first responders;
6. Health care providers engaged in patient care;
7. Correction officers.

Under Section 9030.70(a)(2), "front-line workers" are crucial personnel employed in the following industries:

1. Stores that sell groceries and medicine;
2. Food, beverage and cannabis production and agriculture;
3. Organizations that provide charitable and social services;
4. Gas stations and businesses needed for transportation;
5. Financial institutions;
6. Hardware and supply stores;
7. Critical trades;
8. Mail, post, shipping, logistics, delivery and pick-up services;
9. Educational institutions;
10. Laundry services;
11. Restaurants for consumption off-premises;
12. Supplies to work from home;
13. Supplies for essential businesses and operations;
14. Transportation;
15. Home-based care and services;
16. Residential facilities and shelters;
17. Professional services;
18. Day care centers for employees exempted by the Stay in Place Order;
19. Manufacture, distribution and supply chain for critical products and industries;
20. Critical labor union functions;
21. Hotels and motels;
22. Funeral services.

If you question whether an individual qualifies as a "front-line worker," please do not hesitate to contact us to discuss further.

II. Exclusive Remedy Doctrine

Section 5 of the Act states that there is no common law or statutory right to recover damages from the employer for an injury or death sustained by an employee while engaged in the employee's line of duty. The Illinois Supreme Court has held that the Act is the **exclusive remedy** for the injured worker.

The exclusive remedy provision was intended to put into balance the sacrifices and gains of the employees and employers and remove the prospect of large damage verdicts in common lawsuits outside the framework of the workers' compensation system.

Practically speaking, that means the claimant must ordinarily pursue compensation under the framework of the Workers' Compensation Act. However, as in most areas of the law, there are exceptions to this rule.

To circumvent the exclusive remedy doctrine and pursue other common lawsuits, a claimant must allege and prove that the injury was either:

1. Not accidental; or
2. There was deliberate and specific intent to injure; or
3. Did not arise out of employment or was not incurred during the course of employment; or
4. Was non-compensable under the Act.

Under the first factor, regarding deliberate and specific intent, courts have found that actual intention to injure must exist to bypass the exclusive remedy doctrine. Knowingly permitting a hazardous work condition is not enough. Ordering a claimant to perform an extremely dangerous job is not enough. Willfully failing to furnish a safe place to work is not enough. Unlawfully violating a safety statute is not enough.

Is there any civil action that IS permitted?

Section 1.2 to the Workers' Compensation Act. Section 1.2 addresses permitted civil actions and provides that:

> Section 5 (a) and Section 11 do not apply to any injury or death sustained by an employee as to which the recovery of compensation benefits under this Act would be precluded due to the operation of any period of repose or repose provision. As to any such injury or death, the employee, the employee's heirs, and any person having standing under the law to bring a civil action at law, including an action for wrongful death and an action pursuant to Section 27-6 of the Probate Act of 1975, has the nonwaivable right to bring such an action against any employer or employers.

The March 14, 2019 Senate Transcript provides insight and discussion regarding Senate Bill 1596. Senator Sims described the purpose for Section 1.2 as a response to the request of the Illinois Supreme Court regarding the "glaring inequity" in workers' compensation laws that left workers exposed to asbestos or other cancer-causing materials without the ability to collect for their injuries.

Section 1.2 was intended to carve out exceptions to the Workers' Compensation Act and the Workers' Occupational Diseases Act where otherwise civil actions were not permissible. Specifically, Section 1.2 was meant to address issues where simply amending the statute of repose would not assist those currently suffering or those who had suffered previously. For context, the statute of repose under the Workers' Compensation Act is 25 years.

The transcript specifically discussed the legislature's intent to address *latent diseases* which do not manifest until thirty to fifty years after exposure, such as in the case of asbestos and mesothelioma, in which cases it is simply not possible for the claimant, or the claimant's heirs, to pursue compensation under the statutes of repose because "they didn't get sick or die fast enough."

We do not yet know the lasting effects of COVID-19. A vaccine for COVID-19 does not yet exist. We do not know for certain how long the current pandemic will last or when the pandemic will flare up once again. However, current information tends to insinuate that the symptomology of COVID-19 will manifest within the statute of repose and work to retain such cases within the framework of the Workers' Compensation Act, rather than allow ancillary civil lawsuits.

Despite the Section 1.2 amendment, current information tends to support that the exclusive remedy doctrine remains alive and well. As more information becomes available, we will keep you informed with our evolving insights and litigation strategies.

COVID-19 marks a new challenge to employment and will pose many challenges through litigation due its foreign nature. The IWCC's Emergency Amendment poses new obstacles for an employer to protect itself. It is our job to help you protect yourself from unprecedented, frivolous litigation and to help manage your risk with regard to COVID-19 exposure.

Should you have any questions, please do not hesitate to contact us. Our team is happy to assist you and answer any questions you may have. Stay safe and know that we are here for you.

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