

# Analyzing workers' compensation liability for COVID-19 infections

By Alan G. Brackett, Esq., and Daniel P. Sullivan, Esq., Mouldoux, Bland, Legrand & Brackett LLC

SEPTEMBER 13, 2021

In response to the COVID-19 pandemic, state legislatures across the country have acted to more clearly define how workers infected with COVID-19 in the course of their employment would be treated under state workers' compensation laws. For example, the State of Illinois enacted HB 2445, which created a rebuttable presumption that essential workers who contracted COVID-19 did so in the course of their employment and would be entitled to workers' compensation benefits.

---

## *Workers covered under Louisiana's workers' compensation laws continue to lose time due to this virus.*

---

During the 2021 legislative session, the State of Louisiana was unsuccessful in passing any legislation that provided special protection to essential workers. Senate Bill 475 would have provided that every essential worker — specifically those working in public safety, government, disaster response, health care, or private business designated as necessary — would be entitled to workers' compensation benefits as if the essential worker had sustained a bodily injury traditionally covered by workers' compensation law.

There has been no further movement to address COVID-19 under the Louisiana workers' compensation law: there is still no special categorization of essential worker, nor is COVID-19 an explicitly recognized injury under Louisiana workers' compensation law. With the general population becoming vaccinated and the COVID-19 virus becoming more manageable (notwithstanding the Delta variant), legislative intervention seems unlikely.

Workers covered under Louisiana's workers' compensation laws continue to lose time due to this virus. With no legislation fast-tracking the compensability of COVID-19 claims, employers, their workers' compensation carriers and administrators must look to a more traditional analysis of whether a workplace injury or illness is covered under the Louisiana workers' compensation statute. Specifically, defense stakeholders need to determine whether COVID-19 claims would be considered "accidental injuries" or "occupational diseases" in order to properly administer, and potentially defend, a COVID-19 claim.

## **Accidental injury versus occupational disease in Louisiana**

**Accidental injury.** The definition of an accident under Louisiana law is fairly broad. Louisiana Revised Statutes 23:1021 defines an "accident" as an unexpected or unforeseen actual, identifiable, precipitous event happening suddenly or violently, directly producing an injury. The worker does not need to prove that such an event was extraordinary or unusual, but the worker does need to identify what the actual event was that led to injury.

The statute also broadly defines "injury" as those injuries "by violence to the physical structure of the body and such disease or infections as naturally result therefrom." This provision of the statute specifically excludes degenerative disc disease, spinal stenosis, arthritis, mental illness, and heart-related or perivascular disease.

Notably, for an injury covered under this provision of the statute, the worker is afforded a presumption of causation. If an employee is in good health prior to an accidental injury, but disabling symptoms manifest after the accident, then there is a presumption that the injury is work-related. The presumption requires that there be sufficient medical evidence to show a reasonable possibility of causation between the injury and the workplace accident.

The three critical hallmarks of an "accidental injury" in the context of COVID-19 are: (1) an identifiable event that (2) results in an injury that (3) has a reasonable possibility of causal connection to that identifiable event. For a worker who can credibly identify a work-related source of infection, who contracts COVID-19, and who can demonstrate a reasonable connection between his infection and a condition of his employment, he will be able to demonstrate an accidental injury under La. R.S. 23:1021. This is supported in case law interpreting the act, as pneumonia infections and Hepatitis-C are viral illnesses that have been treated as accidental injuries in Louisiana.

**Occupational disease.** The science is certainly evolving on COVID-19. It is generally accepted that this coronavirus is primarily a respiratory illness that infects the lungs. But because COVID-19 is a respiratory illness that medically more closely resembles more traditional occupational diseases, it is plausible that the courts may treat COVID-19 as an occupational disease.

Louisiana workers' compensation law defines an "occupational disease" under La. R.S. 1031.1 as a disease that develops "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." The statute does not expressly enumerate which occupational diseases are covered under this provision. The diseases most frequently seen that are covered by this provision are asbestosis and mesothelioma.

The defining trait of an occupational disease under the Louisiana act is its relationship to a particular trade or industry. As we have seen since the beginning of this pandemic, no one is safe from COVID-19 infection. There is no industry that is more uniquely at risk for infection. COVID-19 infection has been a great equalizer and would not meet the key criterion found in the definition of occupational diseases. It is unlikely that the Louisiana Office of Workers' Compensation would treat COVID-19 as an occupational disease.

### Action by other states

Louisiana is not alone in failing to address these issues through its legislature or by other means. Alabama, Colorado, Delaware, the District of Columbia, Idaho, Indiana, Kansas, Maine, Mississippi, Montana, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee and West Virginia have either remained silent on special consideration for COVID-19 infections or proposed legislation failed to pass.

*COVID-19 infection has been a great equalizer and would not meet the key criterion found in the definition of occupational diseases.*

Legislation remains pending in several states in efforts to amend workers' compensation laws to include COVID-19 as a specific illness, including Georgia, Hawaii, Iowa, Maryland, Maine, Nebraska, New Mexico, New York, Ohio, Pennsylvania and Texas.

Several states have failed to pass legislation, but have adopted special rules through executive action, including Arizona,

### About the authors



**Alan G. Brackett (L)** is the Managing Member and **Daniel P. Sullivan (R)** is a Member of the New Orleans defense firm **Mouledoux, Bland, Legrand & Brackett LLC**. Their practices focus on the defense of claims arising under the Longshore and Harbor Workers' Compensation Act, Defense Base Act, War Hazards Compensation Act, Jones Act, and Louisiana Workers' Compensation Act. They can be reached at [abrackett@mblb.com](mailto:abrackett@mblb.com) and [dsullivan@mblb.com](mailto:dsullivan@mblb.com), respectively.

Connecticut, Florida, Kentucky, Michigan, Missouri, New Hampshire, North Dakota and Oregon. In general, those states provide a presumption for classes of workers. In general, first responders and public employees have the benefit of a presumption of coverage. Some provide a presumption for any worker required to interface with the public, or who work in locations with more than a set number of employees.

Those states enacting protections as part of their workers' compensation statutes include Alaska, Arkansas, California, Illinois, Minnesota, New Jersey, Utah, Vermont and Virginia.

### What can we conclude?

Where state legislatures have failed to address essential workers or COVID-19 infection specifically, employers and their carriers must look to a traditional accidental injury analysis in order to properly defend workers' compensation claims arising out of COVID-19 infections. In Louisiana, we expect that the Office of Workers' Compensation would treat COVID-19 as an accidental injury, as it has treated other viral infections. As of the publication of this article, there have been no COVID-19 cases that have been decided by the Louisiana courts of appeal.

To demonstrate a prima facie case that a COVID-19 infection is work-related, the worker would need to establish, through testimony or documentation, that she or he credibly sustained an identifiable exposure. If the worker can establish even circumstantial facts — working indoors, working in close quarters with co-workers, exposure to co-workers who also were diagnosed with COVID-19 — that may serve as the identifiable event required to be considered an "accidental injury." If the worker's positive COVID-19 test occurs after the incubation period following such an exposure, then that injury will be presumed to be work-related because of the presumption of causation.

The burden will ultimately shift to the employer to develop an alternative theory of exposure or provide rebutting evidence on the issue of medical causation. An employer should quickly investigate the worker's social activity to assess where else the worker may have put herself or himself at risk for infection. As with all litigation, this will be a risk-benefit analysis for employers and insurers on how to administer COVID-19 claims properly under the law and in a cost-effective manner.

This article was first published on Reuters Legal News and Westlaw Today on September 13, 2021.