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To the Clients of Klauke Law Group

ILLINOIS LEGISLATURE PASSES COVID-19 LAW CREATING PRESUMPTION THAT IT WAS CONTRACTED AT WORK

I predicted that the April 15, 2020 Emergency Rule from the Chairman of the Illinois workers' Compensation Commission was going to be struck down. Before the courts formally struck the Rule down, the IWCC withdrew the Emergency Rule. I did not think that was the end of the story and in fact, it was not. Today, the Illinois legislature passed an amendment to the Illinois Workers' Occupational Disease Act. Specific wording of the change is attached.

The Occupational Disease Act now defines a new class of employee called a "COVID-19 first responder or front-line worker". This new category of employee includes: "all individuals employed as police, fire personnel, emergency medical technicians, or paramedics; all individuals employed and considered as first responders; all workers for health care providers, including nursing homes, rehabilitation facilities, and home care workers; corrections officers; and any individual employed by essential businesses and operations and defined in Executive Order 2020-10 dated March 20, 2020 as long as the individuals employed by essential businesses and operations are required by their employment to encounter members of the general public or to work in employment locations of more than 15 employees. For purposes of this subsection only, an employee's home or place of residence is not a place of employment, except for home care workers."

If you participated in the webinars I have conducted about this, you know that Governor Pritzker's Executive Order 2020-10 dated March 20, 2020 makes just about everybody a "front line worker" except anyone in the fun industry like bars, restaurants, sports teams, casinos, amusement parks, theaters, movie theaters and let's not forget churches. These things are not essential according to the Executive Order but just about everything else is. The one limitation in the legislation is that

even essential workers as defined in the Executive Order may not be able to claim a work related presumption of COVID-19 unless they encounter members of the general public or work with more than 15 employees. I can see lots of litigation over this exception.

Those of you who think that the legislature does not care about Illinois employers or Illinois businesses, take note. The new legislation provides examples of ways to defeat the presumption.

A. Proving that the employee was working from home or was on leave for a period of 14 or more consecutive days immediately prior to the injury, occupational disease or period of incapacity resulting from COVID-19.
B. Proving the employer was engaging in and applying to the fullest extent possible or enforcing to the best of its ability industry-specific workplace sanitation, social distancing and guidance issued by the CDC and the IDPH or was using a combination of administrative controls, engineering controls, or PPE to reduce the transmission of COVID-19 to all employees for at least 14 consecutive days prior to the employee's injury, occupational disease or COVID-19 incapacity.
C. Proving that the employee was exposed to COVID-19 by an alternate source.

The rebuttable presumption applies to all cases tried after May 22, 2020 and in which the diagnosis of COVID-19 was made on or after March 9, 2020 and on or before December 31, 2020. A special provision regarding application of the presumption was carved out for those diagnosed with COVID-19 on or before June 15, 2020. In those cases, an employee must provide a confirmed medical diagnosis by a licensed medical practitioner or a positive laboratory test for COVID-19 or for COVID-19 antibodies. For COVID-19 diagnoses occurring AFTER June 15, 2020 an employee must provide a positive laboratory test for COVID-19 or for the antibodies.

The date of injury will be considered the date the employee was unable to work because of COVID-19 even if diagnosed later.

If an employee fails to establish the rebuttable presumption, he or she is not precluded from filing for compensation under the Occupational Disease Act or the Workers' Compensation Act.

The employer will be allowed credit for other benefits paid to the employee under federal or state law like sick leave, FMLA expansion, Emergency Paid Sick Leave Act, Families First Coronavirus Response Act etc.

In additional to all of the other information your defense counsel needs, they will also need.

1) The diagnosis date of COVID 19 and how it was diagnosed. If diagnosed before June 15, 2020 proof of the diagnosis is relaxed as the only requirement is a diagnosis, not necessarily a positive test. After June 15, 2020, the employee needs a positive test either for COVID-19 or the antibody. (How accurate are these tests? What about false positives?)
2) The workplace protocol for sanitation and PPE. As you may know from the webinar I recommended a daily log of sanitation protocols and efforts to keep employees COVID free as well as a daily log of no COVID symptom reports as well as writing down any comments about where an employee expected of having COVID had contracted the virus/who they were with etc.
3) The work from home instruction and log of work from home. On the webinar I advised that it is best not to allow workers to occasionally go to the office or workplace as it could create doubt about when and how an infected employee was infected. Prescient, I know.
4) Are workers 'required' to engage the general public and if so, how often and under what circumstances. What were the precautions etc.
5) Payments to a COVID-19 employee regardless of what program they were paid under. This will be an important credit for employers.

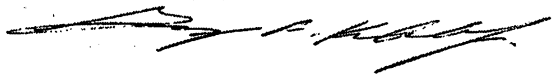
The good news is that most individuals that contract COVID-19 recover without complications or permanent damage in fact some people don't even know that they have it. However, we still do not have a very good grasp on what hidden long term problems may occur. Therefore, these are dangerous cases. In addition, we have all been bombarded with the death count from COVID-19 so there are those that succumb to the virus. A co-morbidity will not help an employer as a defense. As we have all heard many times, the employer takes their employees as they find them. It also does not help that the State of Illinois characterizes any decease with a positive COVID-19 test as a COVID death.

My suspicion regarding workers' compensation litigation on this issue is that arbitrators and commissioners will be quite willing to apply the presumption even if the employer is able to establish an iron clad sanitization protocol and PPE

regimen for the employees. Even in circumstances where the presumption of compensability fails, the arbitrators and commissioners may still award benefits especially in cases with severe symptoms, long-term problems or death. In general, if your employees can work from home, require it until a vaccine is available. Why take the risk of an employee contracting a world wide pandemic virus that is highly contagious and claiming it happened at work.

Almost everything outlined in the prior COVID CONUNDROM article applies. I will attach that as well. Please do not take any of this as legal advice for your specific issues. We represent many different types of employers in the State and each has its own set of issues. In fact, each case has its own set of issues, investigation strategies and legal recommendations. We are here to assist you if you have any questions or wish to discuss your particular situation in a general way. We are also happy to accept any assignments for defending your organization if you require defense counsel.

Very Truly Yours



George F. Klauke Jr.

(g)(1) In any proceeding before the Commission in which the employee is a COVID-19 first responder or front-line worker as defined in this subsection, if the employee's injury or occupational disease resulted from exposure to and contraction of COVID-19, the exposure and contraction shall be rebuttably presumed to have arisen out of and in the course of the employee's first responder or front-line worker employment and the injury or occupational disease shall be rebuttably presumed to be causally connected to the hazards or exposures of the employee's first responder or front-line worker employment.

(2) The term "COVID-19 first responder or front-line worker" means: all individuals employed as police, fire personnel, emergency medical technicians, or paramedics; all individuals employed and considered as first responders; all workers for health care providers, including nursing homes and rehabilitation facilities and home care workers; corrections officers; and any individuals employed by essential businesses and operations as defined in Executive Order 2020-10 dated March 20, 2020, as long as individuals employed by essential businesses and operations are required by their employment to encounter members of the general public or to work in employment locations of more than 15 employees. For purposes of

this subsection only, an employee's home or place of residence is not a place of employment, except for home care workers.

(3) The presumption created in this subsection may be rebutted by evidence, including, but not limited to, the following:

(A) the employee was working from his or her home, on leave from his or her employment, or some combination thereof, for a period of 14 or more consecutive days immediately prior to the employee's injury, occupational disease, or period of incapacity resulted from exposure to COVID-19; or

(B) the employer was engaging in and applying to the fullest extent possible or enforcing to the best of its ability industry-specific workplace sanitation, social distancing, and health and safety practices based on updated guidance issued by the Centers for Disease Control and Prevention or Illinois Department of Public Health or was using a combination of administrative controls, engineering controls, or personal protective equipment to reduce the transmission of COVID-19 to all employees for at least 14 consecutive days prior to the employee's injury, occupational disease, or period of incapacity resulting from exposure to COVID-19. For purposes of this subsection, "updated" means the guidance in effect at least 14 days

prior to the COVID-19 diagnosis. For purposes of this subsection, "personal protective equipment" means industry-specific equipment worn to minimize exposure to hazards that cause illnesses or serious injuries, which may result from contact with biological, chemical, radiological, physical, electrical, mechanical, or other workplace hazards. "Personal protective equipment" includes, but is not limited to, items such as face coverings, gloves, safety glasses, safety face shields, barriers, shoes, earplugs or muffs, hard hats, respirators, coveralls, vests, and full body suits; or

(C) the employee was exposed to COVID-19 by an alternate source.

(4) The rebuttable presumption created in this subsection applies to all cases tried after the effective date of this amendatory Act of the 101st General Assembly and in which the diagnosis of COVID-19 was made on or after March 9, 2020 and on or before December 31, 2020.

(5) Under no circumstances shall any COVID-19 case increase or affect any employer's workers' compensation insurance experience rating or modification, but COVID-19 costs may be included in determining overall State loss costs.

(6) In order for the presumption created in this subsection to apply at trial, for COVID-19 diagnoses occurring on or

before June 15, 2020, an employee must provide a confirmed medical diagnosis by a licensed medical practitioner or a positive laboratory test for COVID-19 or for COVID-19 antibodies; for COVID-19 diagnoses occurring after June 15, 2020, an employee must provide a positive laboratory test for COVID-19 or for COVID-19 antibodies.

(7) The presumption created in this subsection does not apply if the employee's place of employment was solely the employee's home or residence for a period of 14 or more consecutive days immediately prior to the employee's injury, occupational disease, or period of incapacity resulted from exposure to COVID-19.

(8) The date of injury or the beginning of the employee's occupational disease or period of disability is either the date that the employee was unable to work due to contraction of COVID-19 or was unable to work due to symptoms that were later diagnosed as COVID-19, whichever came first.

(9) An employee who contracts COVID-19, but fails to establish the rebuttable presumption is not precluded from filing for compensation under this Act or under the Workers' Compensation Act.

(10) To qualify for temporary total disability benefits under the presumption created in this subsection, the employee must be certified for or recertified for temporary disability.

(11) An employer is entitled to a credit against any liability for temporary total disability due to an employee as a result of the employee contracting COVID-19 for (A) any sick leave benefits or extended salary benefits paid to the employee by the employer under Emergency Family Medical Leave Expansion Act, Emergency Paid Sick Leave Act of the Families First Coronavirus Response Act, or any other federal law, or (B) any other credit to which an employer is entitled under the Workers' Compensation Act.

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To the Clients of Klauke Law Group

April 16, 2020

THE COVID CONUNDRUM

Klauke Law Group represents many different categories of employers. Hospitals, Nursing Homes, Construction Companies, Retail Shops, Manufacturing Companies, Distribution Centers, Warehouses, Food Service etc. Some employers will have a much higher incidence of potential exposure to COVID-19 than others and each employer may have unique challenges that need special attention and strategies. The strategies below may not fit all employer situations so if you have a specific situation you would like to discuss please email me and we can set up a conference. This document is not intended to be specific legal advice.

The Klauke Law Group Website has links to the Illinois Workers Compensation Act and the Illinois Workers Occupational Disease Act. You may download each as well as other valuable resources by visiting the website www.klaukelawgroup.com and navigating to the Related Links page in the Downloads section scroll down to the IWCA and Workers' Occupational Diseases Act to download.

The Illinois Worker's Occupational Disease Act (WODA) 820 ILCS 310 has been in place since 1951 in some form. It is a parallel statute to the Illinois Workers' Compensation Act but there are a few significant differences. For instance, the average weekly wage specifically includes overtime under the WODA. In addition, the causation standard is relaxed.

> (d) In this Act the term "Occupational Disease" means 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. Such aggravation shall arise out of a risk peculiar to or increased by the employment **and not common to the general public.** A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. 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.

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.

In addition, certain first responders (firefighters, EMT's, paramedics) are given specific rights under WODA, including a rebuttable presumption to causation of certain conditions namely bloodborne pathogen, lung or respiratory disease or condition, heart or vascular disease or condition, hypertension, tuberculosis, or cancer resulting in any disability. COVID would seem to fall into the lung or respiratory disease category for first responders. Nurses and other medical personnel are not specifically mentioned in the statute but certainly a rational mind would consider COVID to be an increased risk for such workers. The term Front Line Worker is not in the statute.

The Emergency Order (EO) of the Chairman of the Illinois Workers' Compensation Commission at the insistence of the Governor on April 13, 2020 and later corrected as of April 16, 2020, names a specific disease, COVID-19, as a compensable disease or condition and proclaims that someone who contracts that disease or condition enjoys a rebuttable presumption that the disease was caused by the employment if the employee is a front line worker. The definition of a front line worker in the order is very broad and states:

2) The term "COVID-19 First Responder or Front-Line Worker" means any individuals employed as police, fire personnel, emergency medical technicians, or paramedics and all individuals employed and considered as first responders, health care providers engaged in patient care, correction officers, and the crucial personnel identified under the

following headings in Section 1 Part 7, 8, 9 10, 11, and 12 of Executive Order 2020-10 dated March 20, 2020: "Stores that sell groceries and medicine"; "Food, beverage, and cannabis production and agriculture"; "Organizations that provide charitable and social services"; "Gas stations and businesses needed for transportation"; "Financial institutions"; "Hardware and supplies stores"; "Critical trades"; "Mail, post, shipping, logistics, delivery, and pick-up services"; "Educational institutions"; "Laundry services"; "Restaurants for consumption off-premises"; "Supplies to work from home"; "Supplies for Essential Businesses and Operations"; "Transportation"; "Home-based care and services"; "Residential facilities and shelters"; "Professional services"; "Day care centers for employees exempted by [Executive Order 2020-10]"; "Manufacture, distribution, and supply chain for critical products and industries"; "Critical labor union functions"; "Hotels and motels"; and "Funeral services".

Many commentators and interested parties believe that this emergency order will be struck down as an illegal overreach of the authority of the Commission. The fact that the emergency order is temporary, lasting 150 days, is little solace to employers. I happen to agree that order will eventually be struck down. Nevertheless, strategies for dealing with COVID claims under the new rules need to be implemented.

COVID DEFENSE STRATEGIES

Protection and Disinfecting Policy

The first step is to protect all employees and customers, vendors, etc. as best as possible. This includes the directions by the Governor for social distancing, PPE, hand washing and other disinfecting techniques. Rules for these actions should be developed and communicated to everyone.

Reporting and Classification issues

WC: At this time, Illinois presumes COVD 19 is work related. Therefore, as a cautionary measure, we recommend providing notice of potential claims to the WC carrier even if they are "information only" reports.

OSHA; The interim ruling by OSHA (https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19)

indicates reporting work-related COVID illness was not needed for businesses outside of the healthcare, emergency response and correctional industries (except when the general reporting/recording criteria has been met and there is objective evidence that the COVID was work related).

FMLA: This condition would be a serious health condition and would allow an employee to unpaid job protection for 12 weeks for employers with 50 or more employees. As of 4/2/2020, the FFCRA Families First Coronavirus Response Act temporarily altered FMLA by expand it to include all employers, even those with less than 50 employees AND requires that the leave for COVID is paid. Payments under this temporary expansion of FMLA are eligible for a tax credit as the law currently stands. Congress passed this law and it was signed by President Trump in late March, 2020.

Unemployment Compensation: the normal Illinois benefit is increased by the CARES Act in the amount of $600.00 per week called Federal Pandemic Unemployment Compensation which expires 4 months after March 27, 2020.

Short Term Disability is also a possibility if the condition is not work related. There is currently a substantial dispute on whether COVID falls under the application of WC or STD.

Front Line Workers

It will be very difficult to defend these cases. Basically, you must prove either that the facility has no cases of COVID and therefore it is impossible for the employee to have contracted the disease at work or that the employee does not have COVID. However, the wording of the Emergency Order of the IWCC seems to suggest that specific positive proof of COVID may not be required.

Once a claim is made, the reporting and classification issues need to be addressed. Obviously, isolation and testing need to be performed as well as a review of human distancing policies, and disinfecting protocols to avoid or prevent further spread of the infection.

Initial investigation is critical. Who has the employee been in contact with and when?

1. Is the facility COVID FREE?
    a. Keep a log of cleaning/disinfecting protocols

b. Keep a log for every day that there are no reports of COVID symptoms in the work area. Proving a negative in court is nearly impossible. A contemporaneous document showing no reports of COVID may help a defense, and we will be able to admit these documents into evidence under the "business records" exception to hearsay if the documents are kept in the ordinary course of business.
c. Implement a policy, even if temporary, that employees must not come to work if they have the symptoms of COVID or if they have had contact with someone who has those symptoms.
d. Designate a point person to direct all of the implementation and documentation.

2. Does the Employee really have COVID?
    a. Document the reporting of the symptoms from the employee.
    b. Obtain the testing documentation if available.
    c. If not available, still ask the employee for test results (in writing) and keep a copy of the writing as well as the date requested.
    d. Many people test negative and some might have false positives, so the testing is important as well as follow up testing, especially as it relates to the presumption that the condition is work related.
    e. Antibody testing is just beginning and such testing will verify if an employee had the virus whether symptomatic or not. If no antibodies, no COVID. However, this is just being developed. The other issue is whether an employer can insist on the antigen test. It does require a finger prick which may be considered an invasive procedure that cannot be forced upon an employee. We just don't know at this point.

    NOTE: Some KLG clients report that employees claim to have COVID but have not been tested. Some employees have had telephonic examinations with a diagnosis but no testing. Others claim to be tested positive, but they don't have the results to document it. The WC carrier and the group disability carrier will require documentation of the condition claimed to cause the off work status. It will be interesting how the IWCC handles these situations if the emergency order is upheld. Either way, someone reporting symptoms cannot be let back to work unless they have a negative test result and maybe after self-quarantine period as well.

3. Determine if there were alternate potential places or people that the employee may have encountered to contract COVID.
4. Get the employee's detailed schedule, when working, where working, who may have come in contact with, when not working, when at home, when shopping, who is at home who did they visit or come in contact with outside the home, etc.

Non Front-Line Workers

The recommendation is to perform similar investigation for non-front-line workers for the protection of other workers in the facility or any clients they may come in contact with. However, if the employee is classified as something other than a front line worker, they will have to show that the condition arose out of and in the course of employment to recover benefits. And under the occupational disease Act, they will need to prove that COVID is not a disease common to the public. Given the global spread of the disease and the 6 foot social distancing guidelines, it certainly seems to be common to the public. On the other hand, the IWCC may not be very strict in the application of the statutory wording.

Stay at Home Workers

Non-essential workers or those that have been directed to stay home are still covered under the Illinois Workers' Compensation Act and the Workers' Occupational Disease Act for injuries or exposures that arise out of and in the course of the employment. Stay at home orders pretty solidly mean that the employee will be "in the course of" employment when working from home. The question will be whether the injury or exposure arose out of the employment. They could also be classified as traveling employees if they are occasionally going back and forth to the work place. This then increases the exposure for work related injuries that would otherwise be excluded as "going to or coming from" work. However, specifically relating to COVID exposure, requiring employees to stay home reduces exposure for claims. Allowing employees to travel to the office occasionally increases the possibility of exposure and claims.

Permanency

The main reason for all of the investigation is to isolate the virus and restrict the spread to others so overall claims are reduced. Permanency under workers compensation will vary from minimal or even just TTD and Medical expense to enormously expensive for potential death claims. Remember, you take your

employees as you find them. Any underlying conditions or co-morbidities that contribute to death in a COVID situation are irrelevant to the courts.

The Self Insured

The most difficult decisions rest with companies and employers that are self-insured. All employers have a duty to their employees to provide a safe work environment and they also need to make a profit to meet expenses especially payroll. Is it possible to provide a safe work environment during a pandemic? If the Governor and the IWCC can proclaim that a virus running rampant throughout society will be defined as work related and essentially eliminate all defenses normally in place for employers, can employers continue to operate? One employee death from COVID-19 that is deemed a compensable work-related event can bankrupt the employer. So, the question during this crisis and starting today with the new IWCC rules is whether it is worth it to continue operating. If the business shuts down temporarily, they are insulated from worker compensation claims.

Another question is whether it is possible to continue to operate and move employees most vulnerable from the workforce to protect them without discriminating against them? How do you know which employees have underlying health issues that may increase their chances of death from the virus? The one obvious risk factor that can officially be known by an employer is age. Are you discriminating against older workers if they are furloughed to save their life and the companies life? Allowing employees to collect unemployment might be better than risking death and the companies demise.

There are no correct answers here. Employers need to balance the risks and make their best guess at the proper strategy to protect their employees and their business. Employers with employees that are most vulnerable to COVID-19 might risk a discrimination lawsuit and furlough them rather than subjecting them to the virus and almost certain liability for workers' compensation.

Public Policy

The way to keep business open, especially those that the Governor deems essential is to provide them more protection, not less. Employers, especially those that are self-insured, need immunity from lawsuits for injury or death caused by a virus spreading through the world. Even businesses that have insurance to cover work related injury and exposures will see premiums skyrocket if an employee succumbs to the virus and claims it is work related. Those businesses may see costs increase to

the point that they cannot continue. The pandemic was not caused by employers in the State of Illinois and they should not shoulder the entire cost.