Workers' Comp

How COVID-19 Presumption Laws Might Affect the Workers' Compensation Industry

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The COVID-19 pandemic has brought the discussion of presumption laws to the forefront, as states examine whether workers' compensation should cover workers if they contract COVID-19 on the job. Many states have passed legislation or executive orders requiring insurers to cover essential workers who test positive for the virus. Depending on the state, the definition of "essential worker" might be limited to just healthcare and frontline workers, or it may include a wide range of occupations. Regardless of the jurisdiction, though, the expansion of presumption laws to include an infectious disease such as COVID-19 will affect the workers' compensation industry. By how much will depend on each state and the trajectory of the pandemic. This article will cover what presumption laws are, how the pandemic plays into the future of presumptions and how insurers should navigate the rapidly changing landscape.

What are presumption laws and how does COVID-19 fit in?

A presumption law describes the conditions where an injury to a certain worker is presumed to have happened on the job and should be compensated. The burden of proof for the source of a presumed injury, which normally rests on the injured worker, in this case falls on the employer. For example, LexisNexis states, "N.Y. Work. Comp. Law § 21(1) provides that once an employee has shown the employer-employee relationship exists and that there was a causal connection or nexus between the accident and the employment, the Workers' Compensation Board should apply a presumption that the claimed injury is compensable under the Workers' Compensation Law insofar as the injury arose out of and in the course of the employment." Presumptions have historically covered injuries such as cancer or PTSD for firefighters or first responders, since one can reasonably presume that they developed those diseases or sustained those injuries in their line of work. Each state looks at this issue differently. In Colorado, SB20-026, creating a presumption for first responders, passed both houses and was sent to the governor for his signature on June 15, 2020. The Missouri legislature is considering HB1263, which would create a presumption for first responders to include air ambulance pilots and air ambulance nurses.

In contrast, this year the New Mexico legislature failed to pass a PTSD presumption bill. West Virginia considered, but did not pass, a similar bill. In total, nineteen states cover cancer for firefighters and nine currently cover PTSD for first responders. In recent years, several lobbying groups have been working to expand PTSD presumptions to other groups of workers such as health care workers and teachers. However, a key exclusion for nearly all presumption laws in the past was that they have not covered infectious diseases, since proving that a person was infected on the job is typically very difficult, if not impossible. The language used to define those diseases that are covered by workers' compensation is often along the lines of, "the disease is not an 'ordinary disease of life.'" Infectious diseases such as the annual flu would fall under the category of "ordinary disease of life" and therefore would not be covered. This precedent changed with COVID-19. As of June 12, 2020, more than 635 healthcare workers have reportedly died of COVID-19. The CDC has recorded more than 71,000 health care workers falling ill, but that is likely an undercount. In May, more than 4,300 of LA County's health care workers and first responders had tested positive for the disease. With so many frontline healthcare workers and other essential workers infected with COVID-19, many states are moving to add the infectious disease to their list of presumptions.

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Most presumption laws, including COVID-19 presumptions, are rebuttable. This means that the employer can refute a presumption claim, but that they have to prove the injured worker did not sustain the injury or contract the disease on the job. The presumption bill that passed in Illinois creates a defense for the employer if they can prove that they took all the safety precautions outlined in the legislation to prevent employees from contracting the illness at work. Some states are considering conclusive presumptions, which means that the employer would have to cover the claim regardless of whether they can prove the injured worker contracted COVID-19 somewhere other than at work. As of early June, fourteen states have expanded presumption coverage to include COVID-19. Some of these states, including Alaska, Minnesota, Utah and Wisconsin, limit the coverage to healthcare workers and first responders, while other states such as Illinois and Wyoming have expanded their presumptions to include a wide range of workers. California's presumption coverage created under the governor's executive order expands presumptions to a wide range of workers deemed "essential," including grocery store employees. State legislation continues to change, so be sure to check your jurisdiction's updates regularly. For example, Utah just passed changes to its presumption law to tighten the definition of health care worker.

How do COVID-19 presumptions laws affect workers' comp?

Overall, we still don't know how greatly COVID-19 presumption laws will affect the industry. Some states have reported a few thousand claims, with varied outcomes. The California Workers' Compensation Insurance Rating Bureau places estimated costs of COVID-19 presumptions in the state between $600 million and $2 billion. The cost of presumption laws will vary from state to state depending on the scope of occupations covered, the length of the presumption window and the strength of the presumption language. Additionally, there is still a lot we do not know about the novel coronavirus, especially as it relates to long-term health effects. Estimates are so fluid that the National Council on Compensation Insurance (NCCI) built an interactive tool allowing users to add their own variables to estimate cost. As reported in the April 25, 2020 issue of "Claims Management," Assured Research, LLC, an insurance industry research group and proponent of presumption laws generally, estimates the national cumulative cost to be around $10 billion as compared to pre-COVID annual premiums of roughly $63 billion. Most of these studies do not anticipate any permanent disability claims as a result of the virus. The California Workers' Compensation Insurance Ratings Bureau (WCIRB) made a mid-range estimate for permanent disability at 20,300 of 472,900 COVID-19 claims. This total came from an assumption that 20% of

critical COVID-19 claims will result in a form of permanent disability, and this would lead to an average of $22,000 in indemnity costs.

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Most cases for COVID-19 are mild, meaning that presumption coverage will likely be minimal. Many people, while still very sick, are able to recover at home. However, the hospitalization rate as of June 12, 2020, is 89.3 per 100,000 people according to the CDC. CWCI has estimated that "80 percent of COVID-19 cases do not require hospitalization. Of the 20 percent who do need to be hospitalized, about a third will require admission to an intensive care unit." It is in those few cases that require hospitalization and treatment that coverage payments could balloon dealing with side effects and their costs. (Read the CWCI Report Integrating COVID-19 Presumptions into the California Workers' Compensation System here). So where are we as of late June? There are some early indications in a couple of cases that show how this may affect workers' compensation. Let's consider two large states: Florida and California.

Florida

Healthcare and protective services workers (those considered in a presumptive group) accounted for 83.3% of COVID-19 indemnity workers' compensation claims filed from the start of the pandemic.

California

Between January and May, 2020, 5,000 COVID-19 claims had been filed in California, according to CalMatters. Overall workers' compensation claims plunged in that same timeframe, from 50,000 in January to a little over 1,000 in May. One thousand of the 5,000 COVID-19 claims had been denied, most before the May presumption executive order passed by the governor. The chart below outlines the percentage of claims accepted, denied and under investigation through May 1, 2020. This was before the executive order passed by the governor. Read the full report by CWCI. Average Billed Days for US by Region AAverage Billed Days for US by Region*California COVID-19 presumption claims through May 1, 2020. Source: California Workers' Compensation Institute (CWCI).*

Today, it is extremely difficult to anticipate the number of infections, let alone how many of those would be covered through presumption laws. Additionally, there are related issues to consider like the mental toll on first responders and healthcare workers throughout the pandemic. Recently, a workerscompensation.com article quoted several attorneys predicting that the psyche portion of COVID-19 claims will have the "most significant" effect. Insurers should be prepared for an increase in COVID-19 claims as well as claims dealing with the side effects of the illness in the upcoming months, especially as states begin to reopen.

What is the future of presumption laws and what should insurers be on the lookout for?

COVID-19 has changed many facets of our lives, from new standards for remote working to new considerations for workers' compensation. Will COVID-19 change how infectious diseases are covered in workers' compensation? Thus far, there is no certain answer. Many of the COVID-19 presumption laws have an expiration date, but the sweeping adoption of these rules may usher in a reassessment of other diseases that could be presumed to have occurred at the workplace. For now, we recommend that you consider the following:

- As the pandemic progresses, be sure to stay up-to-date on the latest presumption rules in each state. NCCI provides a comprehensive list of presumption laws by state.
- Evaluate claims as they come in, starting with whether they have a positive test.
- Consider adjacent issues such as mental health and PTSD as you support workers on the front lines.
- Follow COVID-19 geographic spread to prepare your team for influxes of claims.

Time will tell if these pandemic-era rules continue to shape workers' compensation presumptions. For a deeper dive into presumption rules by state, watch our latest legislative webinar.



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