State Initiatives to Expand Workers' Compensation for COVID-19

By Janet E. Crawford & Hugh D. Hughes

In response to the COVID-19 pandemic, numerous states have mounted initiatives to expand access to Workers' Compensation benefits for workers affected by COVID-19, with new states joining every day. Among the states that have addressed the issue to date are Alaska, Arkansas, California, Florida, Illinois, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New York, New Jersey, Pennsylvania, Ohio, Utah, Vermont, Washington, and Wisconsin. But, what impact are those initiatives likely to have on the vast majority of employers, such as construction companies and large, commercial property owners? The answer depends on both the aggressiveness of the measure adopted and whether it was created by legislative act, administrative rule or executive order. A comparison among three states – Illinois, Kentucky, and California – shows that an aggressive approach, coupled with agency action, can result in the measure's failure (Illinois), while a more modest approach survives (Kentucky). California has only recently adopted an aggressive measure through its governor's executive order, and we will be interested to see how that measure fares. This article will be updated accordingly.

Illinois provides an example of the least successful approach: overreach followed by retreat. In Illinois, the Workers' Compensation Commission issued an emergency amendment to the Workers' Compensation rules of evidence, originally set to be effective April 16, 2020 and continue for 150 days. The emergency amendment created a rebuttable presumption that when "first responders" and "front-line workers" became ill with COVID-19, their exposure "arose out of" and "in the course of" their employment. Normally, workers must prove that their illness or injury was job-related. This burden would be difficult in COVID-19 cases because the disease is widespread, highly contagious, and features both an uncertain incubation period and poorly understood modes of transmission. Those factors make it virtually impossible to determine where and when a worker was infected. But Illinois's rebuttable presumption shifted the burden of proof from workers to employers and insurers.

The Commission made the impact on employers and insurers even more onerous by the wide array of "first responders" and "front line workers" it included within the emergency amendment. In addition to healthcare workers, the amendment included employees at pawn shops, bike shops, and dog kennels, along with workers in broadly defined categories such as "construction," "power plants," "essential government contractors," "painting services," and "real-estate services."

Moreover, the Illinois amendment would have applied to *all* Workers' Compensation benefits: temporary total disability, specific awards for injuries (including for the damage to the lungs, kidney, and heart that COVID-19 reportedly causes), medical bills, and disability awards once the employee has reached maximum medical improvement.

The public response was immediate and overwhelmingly negative. First, on April 14, the Workers' Compensation Commission held an emergency telephonic hearing followed by a short period of public comment. We attended that hearing telephonically and can attest that almost every member of the public who commented voiced vehement opposition to the measure. Afterwards, nine trade associations immediately issued a joint statement calling the measure "a drastic policy change that will significantly increase costs" at a time when many Illinois businesses were "struggling to stay afloat."

Then, on April 24, the Illinois Retail Merchants Association and the Illinois Manufacturer's Association obtained a temporary restraining order blocking the amendment. The TRO petition, supported by more than two dozen other business groups, asserted that the Commission had exceeded its authority under the Illinois Administrative Procedure Act and violated both the Workers' Compensation Act and Workers' Occupational Disease Act. Judge John M. Madonia agreed, holding that, while the Commission "was limited to procedural rule making," the proposed changes were "substantive, not procedural, as they create new substantive rights for employees and new liabilities for employers."

The next day, representatives from the governor's office stated that the Commission would withdraw the emergency amendment, review it, and attempt to reissue an order. In an April 27 tele-meeting, the Commission then officially repealed the measure.

In Kentucky, the governor took a more restrained approach. Governor Andy Beshear issued an April 9 Executive Order providing that any employee removed from work by a physician because of "occupational exposure to COVID-19" would be entitled to temporary total disability payments for the period of the removal. The order did not affect Workers' Compensation benefits for medical bills, disability awards after reaching maximum medical improvement, or death benefits. Unlike the Illinois measure, Kentucky's order did not affect the causation requirement. The burden was still on the worker to show a causal connection between exposure and work, so that the COVID-19 "can be seen to have followed as a natural incident to the work as a result of the exposure occasioned by the nature of the employment."

Thus, in providing solely for temporary total disability benefits for an employee removed from work because of occupational exposure to COVID-19, the Kentucky measure acted like a form of unemployment insurance for workers sent home for COVID-19 or a quarantine, as long as the nature of their work made COVID-19 exposure "a natural incident" to that work.

The Kentucky Executive Order also limited the eligible workers, as follows:

> employees of a healthcare entity; first responders (law enforcement, emergency medical services, fire departments); corrections officers; military; activated National Guard; domestic violence shelter workers; child advocacy workers; rape crisis center staff;

> Department for Community Based Services workers; grocery workers; postal service workers; and child care workers permitted by the Cabinet for Health and Family Services to provide child care in a limited duration center during the State of Emergency.

This is a much narrower group of workers than those covered by the Illinois amendment.

Because of the narrow range of workers affected, and the short period of removal that most workers will likely experience (i.e., for quarantine or mild disease), workers in Kentucky will likely find that the expense of proving their case before the commission outweighs the benefit of making a claim. The practical impact of the order is therefore likely to be relatively limited.

As of this writing, the Kentucky Executive Order has not been subject to legal challenge. We will continue to monitor for any developments.

California initially took a different approach, but later added a similar presumption regarding on-the-job exposure.

First, on April 13, California's State Compensation Insurance Fund ("SCIF"), a not-for-profit Workers Compensation provider, created two new $25 million COVID-19 relief funds. The Essential Worker Support Fund provided wage replacement for up to six weeks for "essential workers" who contracted COVID-19 or were ordered to self-isolate. The Fund was also designed to help cover medical costs for workers who lacked health insurance, to the extent they were not covered by other means. "Essential workers" were defined by Governor Gavin Newsom's March 19 "stay-at-home" order and an accompanying memorandum. Examples of "essential workers" included first responders, grocery workers and healthcare workers.

Initially, construction was deemed non-essential. But an April 28 revision to the memorandum included all construction workers, along with workers supporting the "supply chain of building materials from production through application/installation, including cabinetry, fixtures, doors, cement, hardware, plumbing, electrical, heating/cooling, refrigeration, appliances, paint/coatings," and repair-service workers. Workers "responsible for the leasing of residential and commercial properties" were also included.

Within a week, however, the Essential Worker Support Fund was effectively subsumed by another SCIF measure. The SCIF announced it would accept any Workers Compensation claim by an essential worker for COVID-19, regardless of whether the worker could prove on-the-job exposure, as long as the worker obtained a confirmed positive test and received a diagnosis during the period of the stay-at-home order. Since the Essential Worker Support Fund was limited to workers who were not otherwise covered, the follow-up announcement meant that the Essential Worker Support Fund applied only to workers ordered to self-isolate because of exposure without actual disease.

The second fund, the Essential Business Support Fund, provided grants to employers operating "essential businesses" to help defray the cost of precautions to protect workers from COVID-19. The grants could reach $10,000 or twice the employer's premium, whichever was less. This fund was limited to businesses deemed "essential," but as of April 28, construction companies and property owners were also eligible for grants under this fund. The business support fund was originally capped at $25 million, but the SCIF quickly increased that amount to $50 million.

Then, on April 20, the SCIF created a third fund, the Returning California to Work COVID-19 Safety Protocol Fund. This $50 million fund was similar to the business support fund, except that it was designed to help *non-essential* businesses return to operations upon lifting of the stay-at-home order. As with the business support fund, the returning-to-work fund offered grants to qualified policyholders to help defray the cost of safety measures designed to protect workers from COVID-19. Again, grants could reach $10,000 or twice the employer's premium, whichever was less.

Last, on May 6, Governor Newsom signed an executive order creating a rebuttable presumption that employees diagnosed with COVID-19 contracted the disease on the job under a specifically delineated set of circumstances:

- The employee tested positive or was diagnosed within 14 days after the employee worked at the employer's place of business (not at the employee's home) and at the employer's direction;

- The day the employee worked occurred on or after the date of the governor's March 19 stay-at-home order and up to 60 days after his May 6 rebuttable-presumption order (a period of 108 days);

- The physician who diagnosed the employee was licensed by a California Medical Board;

- The diagnosis was confirmed within 30 days of the original date of diagnosis;

- The employee must exhaust any paid sick-leave benefits before obtaining any temporary disability payments; If the employee tests positive or was diagnosed on or after the May 6 order, the employee had to be certified for temporary disability within the first 15 days after initial diagnosis, and recertified every 15 days thereafter, for the first 45 days following diagnosis. Employees who tested positive or were diagnosed before May 6 had to do the same within 15 days of the order. The certification also had to be made by a physician licensed by a California Medical Board.

While those parameters may have narrowed the reach of the order, it applied to *all* employees and *all* types of benefits: "hospital, surgical, medical treatment, disability indemnity, and death benefits." It also removed any waiting period for temporary benefits.

The Chamber of Commerce and some business and insurance groups have expressed anger at the order, arguing the order is overbroad and that it is unfair for the private sector to shoulder the burden of COVID-19 when it did not cause the pandemic. So far, there have been no reports of legal action taken against either the SCIF measures or the Governor's order, but we will be interested to see what develops.

SDV will continue to monitor these state initiatives for further developments. For more information, contact Janet Crawford at jec@sdvlaw.com or Hugh D. Hughes at hdh@sdvlaw.com.