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How COVID Changed the Worker's Compensation Game

I. The pandemics effect on the restaurant, retail, and hospitality sector and workers' compensation claims.

While it is not the only sector impacted by the pandemic, there is no denying that the restaurant, retail, and hospitality industry has faced unprecedented challenges because of COVID-19. By some estimates, hotel occupancy rates are improving but it could take years for the industry to reach pre-pandemic levels.¹ The American Hotel and Lodging Association conducted a survey in the fall of 2020 which revealed that more than two-thirds of hotels were operating with less than half their normal staff.² For their part, the National Restaurant Association determined that the food services industry lost \$130 billion in sales between March and October 2020. That industry suffered a loss of 2.1 million jobs by the end of 2020, along with the closure of 110,000 restaurants.³ And in the retail sector, experts anticipate permanent changes to the industry as more and more consumers flock away from traditional brick-and-mortar stores to ecommerce.⁴

This has had an equally significant effect on workers' compensation claims. As one might expect, the reduced workforce resulted in an overall reduction in workers' compensation claims in 2020.⁵ There are fewer employees working, and those that do get injured may fear retribution by filing a claim. With that said, however, the severity and length of those claims have

¹ <https://www.forbes.com/sites/lealane/2020/09/25/worlds-five-largest-hotel-chains-lost-over-25-billion-is-the-hotel-industry-on-the-brink-of-collapse/#260af7b189cf>

² https://www.workerscompensation.com/news_read.php?id=37132

³ <https://www.statista.com/chart/23765/impact-of-the-covid-19-pandemic-on-the-us-restaurant-industry/>

⁴ <https://advisory.kpmg.us/articles/2020/retail-after-covid-19.html>

⁵ "The Early Impact of COVID-19 on Workers' Compensation Claim Composition," Fomenko, Workers Compensation Research Institute, 2021.

increased.⁶ This could be due to several factors, but some experts argue that the remaining employees are typically higher paid and more experienced. In addition, there are fewer return-to-work options for those employees that do stop working because of an injury. Last, but not least, those employees that are receiving benefits may be more reluctant to return to work given the ongoing uncertainty in the industry.

With respect to actual COVID cases, the statistics vary widely by state, but outside of healthcare and first responders, no industry faces a greater risk than the retail, restaurant, and hospitality sector. By its nature, this industry relies upon interaction with the public. Even though vaccinations continue, the long-term effects of COVID are unclear, and as such, the exposure of COVID claims will remain for years to come.

II. The legal challenges that attorneys face litigating your claims in a post-pandemic world.

As one would expect, the practice of law has also changed because of the pandemic. This has a real impact on your claims.

It is now common to see courts to use teleconferencing and video technology in lieu of live hearings. One would expect that this trend will continue even after the pandemic is over. Use of video technology reduces costs and expenses associated with traveling to live events, and – in theory – allows judges and attorneys to practice in a more efficient manner.

With that said, most attorneys and judges will admit that there is no substitute for live events. Effective cross examination is much more difficult when you are not in the same room as the witness. Mediation and settlements suffer for the same reason. And even though the technology is widespread, there continue to be difficulties associated with conducted events over the internet. This can significantly hinder effective oral argument.

In many ways, these issues are unavoidable and, as with all industries, legal practitioners will adapt; however, employers and insurers benefit by understanding all aspects of their claims, including the difficulties their attorneys face during litigation.

III. The issues you as employers and insurers need to analyze when administering your claims.

With respect to workers' compensation, the single biggest issue affecting employers and insurers in a post-pandemic world is remote work. While the retail, restaurant and hospitality industry may not be as impacted as others, there are employees in every business that can work remotely. From a claim's perspective, there are several implications.

⁶ Id.

a. Difficulties with claims investigation.

First and foremost, the initial investigation of any injury is much harder. Not only is there less oversight on remote workers, but there are also typically no witnesses when an individual injures themselves at home. In addition, practitioners have seen increased delays and difficulties obtaining records to substantiate an injury. One would hope this improves over time, but it remains an issue, and could be the difference between accepting or denying an injury. Last, but not least, even when an injury is accepted, it can difficult – if not impossible – to conduct effective surveillance of a remote worker.

b. Change in at-home injuries.

Regarding the nature of injuries for remote workers, one can expect an overall reduction in the number of claims. In theory, a remote worker is working in a sedentary capacity and not under the same physical demands as someone working “on site.” With that said, the presenters expect that the type and duration of work injuries will change.

Clerical and office injuries – typically low back injuries and trip-and-falls – remain compensable even if they are sustained at home. These will continue. With that said, we anticipate an increase in the prevalence of mental health injuries.

The pandemic has had a real and significant effect on substance abuse and mental health. According to some studies, nearly forty percent (40%) of adults in the United States reported symptoms of anxiety and depression in January of 2021.⁷ This is up from ten percent (10%) of adults reporting the same issues from January of 2019. In addition, the use of alcohol and other substances, changes in sleep and eating patterns, and worsening chronic conditions have all increased.⁸ Beyond these statistics, remote workers face their own set of challenges unique to the home environment. Many workers must balance familial obligations and childcare issues. Others must adapt to the combination of their home and their “workspace.” Each employee is impacted differently, but these stressors are real, and employers ignore them at their own risk.

Mental health injuries have historically been difficult to defend in the workers’ compensation setting. Because they rely almost exclusively on the subjective reports of the worker, the injuries are difficult to disprove. The same is true when attempting to prove a recovery from a mental health injury. Oftentimes, the worker continues to treat and report

⁷ <https://www.kff.org/coronavirus-covid-19/issue-brief/the-implications-of-covid-19-for-mental-health-and-substance-use/>

⁸ Id.

symptoms. This can be very difficult to overcome. These issues are compounded when the line between “work” and “home” gets blurred.

c. Issues with traditional injuries as well.

When an employee works from home, it can be difficult to determine whether an injury occurred during the course and scope of employment. For example, if an employee injures themselves while walking from the kitchen to his home office to start his day, is that a compensable event? What happens when the employee takes a small break to walk their dog, and trips on the sidewalk? What if there is no single event, but the employee alleges a mental health injury related to the ongoing stress of working remotely? These questions are not purely academic. They have, and will, come up in your claims. Each state treats them differently, but in some cases, these types of injuries have been found compensable.⁹

Beyond the course and scope, employers and insurers will likely face additional challenges. Given the ongoing reduction in the workforce, typical modified-duty and return-to-work programs may not be available. This could result in an increase in the life of a claim, not to mention the overall cost as employers will be forced to continue paying wage loss benefits in those situations. In a similar vein, common vocational efforts, such as labor market surveys and earning power assessments, may not be a viable option when the industry at large remains depressed. For all these reasons, employers and insurers must reassess the value of settlement.

d. COVID cases.

By and large, the United States did not see the explosion of COVID litigation that some predicted. The statistics vary greatly by state, but in general plaintiffs face the same, underlying hurdle. The nature of the disease, as well as inconsistent testing and documentation, renders contact tracing an uphill battle for the average American. As a result, it remains extremely difficult, and at times impossible, to prove when and where the disease was contracted. Several states have responded to this issue by passing presumption laws. While common, they are not universal.

Even in those states, however, the cost of the average COVID claim is minimal. Most cases result in two to three weeks of lost time, coupled with a few medical appointments. There

⁹ Verizon Pennsylvania, Inc. v. WCAB (Alston), 900 A.2d 440 (Pa. Cmwlth. 2006)(Employee, working from home, fell down the stairs while attending to her personal comfort; injury found compensable); Baby’s Room v. WCAB (Stairs), 860 A.2d 200 (Pa.Cmwlth. 2004)(Employee who, while completing a furniture delivery, suffered a traumatic injury while attempting to jump and touch a basketball rim; injury found compensable because ‘leisure activity during the work day is deemed an inconsequential departure from the act of delivering furniture for the employer.’); City of Harrisburg v. WCAB (Gebhart), 616 A.2d 1369 (Pa. 1992)(An activity performed at home is *not* per se outside the course and scope of employment; a police officer shot while cleaning his weapon at home was in the course and scope of employment since the officer had no place to store the weapon at work.)

is simply no value in pursuing these types of claims. Unfortunately, insurers are not out of the woods yet.

There are currently seven (7) different strains of COVID circulating in the United States.¹⁰ Vaccines have not yet reached uniform adoption. And the long-term effects of the virus are still unknown. As a result, future exposure associated with COVID-related claims cannot be completely discounted.

IV. Our recommendations moving forward.

Taking all this information into account, employers and insurers must continue to be flexible. The industry, and its impact on workers' compensation, seems to evolve by the day. Regarding remote workers, employers are advised to be proactive and set them up for success. Provide them with the necessary equipment and/or oversight to prevent common injuries. Mental health concerns should be recognized and addressed. And last, but not least, the adage that "the best claim is a closed claim" remains sound. Given the ongoing uncertainty in the industry, settlement can often be the quickest – and cheapest – resolution of a workers' compensation claim.

¹⁰ <https://thehill.com/policy/healthcare/538867-seven-coronavirus-variants-potentially-similar-to-uk-type-have-been>