

COVID-19: U.S. Workers' Compensation FAQs

The following FAQs are provided as guidance on U.S. workers' compensation claims, and applicability and impact from COVID-19, with an understanding this is a dynamic and fluid subject. While the information provided is current at the time of publication (*May 2020*), changes are expected, and compensability determinations and decisions are evolving and will ultimately be tested in court.

Q Is COVID-19 a compensable Workers' Compensation claim?

A Highly dependent on the jurisdiction and the individual facts of the claim, as well as the worker's occupation. The question of compensability will likely fall under each state's respective occupational diseases act or supplement to their workers' compensation statute. In many states, the employee will need to prove the virus was contracted at work and that their work duties placed them at a greater risk to contracting the virus than the risk faced by the general public.

In states that have adopted a presumption clause either by executive order or rule amendment, the burden shifts from the employee to the employer to prove the illness is caused by something non-occupational. This expansion of a state's workers' compensation rule presumes the illness was contracted in the course and scope of work. While most states that have adopted a presumption clause allow a rebuttal, it could prove to be a difficult burden considering it is still unclear exactly how COVID-19 is transmitted. Workers considered "essential" will face a less difficult path in proving compensability.

Coordination of the investigation between the adjuster and Workers' Compensation carrier should focus on the following before any decision to accept or deny a COVID-19 claim:

- Determine if contracting COVID-19 is a risk inherent in the workplace (differs by state).
 - Determine the actual probability the exposure occurred while in the course of that employment.
 - Determine if this is an actual impairment/disability as a result of the exposure.
 - Determine if the disease was a "major cause" of any subsequent worsening or death caused by the infection for individuals with pre-existing personal conditions.
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Contact Us

Contact a claims professional from Aon's Global Risk Consulting business with questions.

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Q When should an employer report a COVID-19 exposure as a claim?

A What to report should be aligned with the business and potential “inherent” exposures of the employment. We recommend, subject to specific legal advice which should be sought with regard the reporting of any claim or the interpretation of any potentially available coverage and guidance provided by your insurers, the following:

- If the employee works in a healthcare, senior living, or other job that could be considered “essential”, report any case where the employee has tested positive for COVID-19 and is asserting a potential claim.
- For non-healthcare, report any case where an employee has a confirmed COVID-19 diagnosis and is asserting potential exposure due to work.
- Any case involving a death which may be related to a COVID-19 exposure should be reported.

Q What is best practice in terms of who within the organization should report, and to whom should he/she contact to report, COVID-19 cases to a TPA or carrier?

A A member of the Employer’s HR, Risk or Safety team should report the matter directly to the claims administrator.

Q Should we add a step to our claims reporting protocols to capture specific COVID-19 information to assist with tracking of COVID-19 matters?

A Best practice is to add COVID-19 questions to the reporting process. Below are examples of the type of information we recommend be collected at the time of the claim reporting:

1. Did the employee indicate she/he was exposed at work? Yes/No/Unknown
2. Did the employee indicate she/he has COVID-19 symptoms?
Yes/No/Unknown
3. Is the employee quarantined? Yes/No/Unknown
4. Was there a confirmed diagnosis for Coronavirus /COVID-19?
Yes/No/Unknown

Q Does an Employer have to file a First Report of Injury (FROI) if an employee is sent home for self-isolation but not yet tested?

A We expect that some states will require an employee to be paid during the quarantine period. The state of Kentucky implemented this amendment to its statute, requiring the payment of TTD during the quarantine, however, this is not an indication that any claim related to an alleged COVID exposure will be deemed compensable.

Q Do We Owe TTD to an Employee not at MMI, who had been Working Modified Duty, if our Workplace Closes by Government Mandate or based on a decision by our company to temporarily cease or scale back operations?

A The industry response to reinstate TTD varies by state and by carrier. Employers should work very closely with their carrier/TPA team and defense counsel and address this on a claim by claim basis.

Q Do We Owe TTD to an Employee Working Modified Duty, Who Elects to Stay Home While Our Workplace Stays Open?

A In most states, if work is available and within the employee's work restrictions, the suspension of TTD could be deemed proper.

Q Do We Owe TTD if an IME or Prescribed Medical Treatment is Delayed?

A In most cases of delay in prescribed medical treatment or a scheduled IME due to COVID-19, TTD benefits should likely continue.

Q Is TTD still owed to an employee who has been out of work (or had been working modified duty which was discontinued due to COVID-19 affecting our operations) when that employee has been released to full duty but is unable to return to work because our facility is still closed due to COVID-19?

A The industry response to stop TTD varies by state and by carrier. Employers should work very closely with their carrier/TPA team and defense counsel and address this on a claim by claim basis.

Q Can an employer be sued by an employee outside of the workers' compensation system for injuries related to COVID-19?

A Most states have some type of "exclusive remedy" provision in their statutes, however, many also have exceptions to the exclusive remedy protection. At least one lawsuit has been filed in a state court alleging an employer was negligent in protecting the health of their employees. The plaintiff is seeking to circumvent the exclusive remedy and recover special and general damages. It is possible that similar suits will be filed in the future alleging punitive damages.

Q What are some steps to take to manage non-COVID-19 claims costs during this crisis?

A Some steps to consider

1. If the doctor is not conducting in-office visits, encourage the adjuster and the injured employee to utilize Telemedicine to the greatest extent possible, including in-home exercise if that is a viable option for physical therapy, to move the claims forward.
 2. Ask the medical providers to update restrictions at each visit so modified duty job offers can be extended (where possible) as soon as work locations reopen.
 3. Keep the claims administrator updated on the status of the work location re-openings.
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Q What practices should be followed to attain a duty of care to employees as Employers re-open workplaces?

A The CDC has released recommendations and attached is the link. This is a very helpful and timely resource, providing specific direction, and the implementation of safety practices for critical workers.

Aon's Business Recovery Toolkit is intended to complement Aon's Business Continuity Tool Kit which focused on preparation and response stages, and Aon's Employer Best Practices-COVID-19 Screening document which recognizes that COVID-19 screening is a key part of any workforce and business resilience discussion. Taken together, all three documents form a view that helps enable an organization to flex to help address waves and enhance resilience. See link to Aon's Toolkit below.

<https://www.aon.com/event-response/coronavirus.aspx>

<https://www.aon.com/getmedia/fa48c655-2c97-438f-a863-7414c8b67f60/COVID19-Business-Recovery-Decision-Making-Tool-Kit-2020-05-04.aspx>

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