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FHMS COVID-19 Resource Center:
EXAMINING LIABILITY FOR COVID-19 EXPOSURE CLAIMS IN NEW JERSEY

COVID-19 has been declared a communicable disease by New Jersey's Department of Health, subjecting its handling and response to state and local regulation. *N.J.S.A.* 26:4-1, *et seq*.; *N.J.A.C.* 8:57-1, *et seq*. This article discusses a company's potential liability to customers and employees for claims related to exposure to COVID-19 in New Jersey.

New Jersey Tort Claims

In New Jersey, business owners have a duty to take reasonable measures to limit customers' exposure to dangerous conditions. A business owner must take reasonable or due care to provide a safe environment to their customers. This duty requires a business owner to discover and eliminate dangerous conditions, to maintain the premises in a safe condition, and to avoid creating the conditions that would render the premises unsafe.

Guidance on preventing exposure to COVID-19 has been issued by the CDC and New Jersey's Department of Health. There is currently no specific heightened or enhanced duty for a company to follow the guidance. However, we encourage businesses to follow those guidelines to ensure not only the health and well-being of their employees and customers, but also to protect the company from any potential exposure claims. Taking reasonable precautions will protect businesses, as a negligence claim requires the plaintiff to prove that it is more likely than not that the defendant was the proximate cause of his or her illness. Proving that someone contracted COVID-19 at a specific location will be a difficult burden and it may be exceedingly difficult to trace the source of infection.

New Jersey Workers' Compensation Claims

New Jersey's statutory workers' compensation scheme involves a trade-off whereby employees who are injured or contract a disease in the course of employment relinquish their right to pursue common-law remedies in exchange for automatic entitlement to benefits.

A "compensable occupational disease" is defined to include "all diseases arising out of and in the course of employment, which are due in a material degree to causes and conditions which are or were characteristic of or peculiar to a particular trade, occupation, process or place of employment." *N.J.S.A.* 34:15-31(a).[1]

[1] Relevant to COVID-19, the 1979 amendments modified section 31 in two ways. First, the Legislature deleted the pre-existing definition of occupational disease that included diseases "due to the exposure of any employee to a cause thereof arising out of and in the course of employment." *N.J.S.A.* 34:15-31 (1949), *amended by N.J.S.A.* 34:15-31 (1979). According to the Senate Committee: "The purpose of the deletion was to ensure that employers would be liable solely for those diseases "characteristic of and peculiar to a particular employment…"

The practical effect of the revision is best presented by an example. If an employee contracted pneumonia from working in a freezer, the condition would be compensable, because it would be due to a cause peculiar to the employment. If the same employee contracted pneumonia from a fellow employee, it will not be compensable if it was not due to a condition characteristic of, or peculiar to, the employment. Fred Kumpf, *Occupational Disease Claims Under the Workers' Compensation Reforms*, 12 Seton Hall L. Rev. 470, 473 (1982).

Second, the Legislature redefined a "compensable occupational disease" to restrict and broaden coverage. The new definition restricted coverage by requiring that the disease be "due in a material degree" to "causes or conditions…peculiar to the place of employment." In effect, the standard imposes a burden on the claimant to show a greater nexus between the malady and the employment. The amendment broadens coverage by adding the phrase "peculiar to the place of employment." For example, a teacher who develops asbestosis from working in a classroom with a flaking asbestos ceiling would be covered.

"Material degree" is "an appreciable degree or a degree substantially greater than de minimis." *Singletary v. Wawa*, 406 N.J. Super. 558, 565, (App. Div. 2009). Therefore, to establish a compensable occupational claim, a petitioner "must show that the alleged occupational exposure contributed to the resultant disability by an appreciable degree or a degree substantially greater than de minimis." *Id.* (citations omitted). In other words, the disease "must be due in some realistic sense…to a risk reasonably incidental to the employment." *Brunell v. Wildwood Crest Police Dep't*, 176 N.J. 225, 238 (2003).

To prove causation in an occupational disease claim, a petitioner must produce evidence to establish both legal causation and medical causation. Legal causation requires proof that "the injury is work connected." Medical causation requires proof that "the injury is a physical or emotional consequence of work exposure." The burden rests with the petitioner to "prove this causal link by a preponderance of the evidence." *Laffey v. Jersey City*, 289 N.J. Super. 292, 303 (App. Div.), *certif. denied*, 146 N.J. 500 (1996).

Based on the above, most COVID-19 claims will not be compensable under New Jersey's Workers' Compensation Act. An obvious exception exists for medical professionals and others whose job it is to treat and combat the disease itself. Public employee – first responders have the presumption of coverage. *N.J.S.A.* 34:15-31.5. Note, there is a potential for recovered COVID-19 patients claim that their working conditions re-activated or compounded their already-existing COVID-19 symptoms. *Bond v. Rose Ribbon & Carbon Co.*, 42 N.J. 308 (1964). Also, a New Jersey court may pierce immunity where the employer's intentional or reckless conduct leads to a "substantial certainty" that injury will occur, tantamount to an "intentional wrong." *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161, 171 (1985).

New Jersey's Family Leave Act

On April 14, 2020, New Jersey enacted S-2374, expanding New Jersey's Family Leave Act to provide family leave job-protection "during epidemic-related emergencies." The bill takes effect retroactive to March 25, 2020. The new legislation provides for up to 12 weeks within a 24-month period of unpaid "family leave" for an employee to provide care to a family member necessitated by the COVID-19 pandemic. Included in these leave scenarios are: (a) when the employee is required to provide in-home care or treatment for a child due to school or daycare closure by order of a public official; and (b) when, by issuance of a public health authority or recommendation of public health provider, an employee is caring for a sick or quarantined family member due to COVID-19. S-2374 also allows an employee to take intermittent leave for the scenarios outlined above, with prior notice to the employer and with best efforts to avoid workplace disruption where possible.

As always, we are available to discuss your questions or concerns. Please do not hesitate to contact us.

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