



Worker's Compensation and Third-Party Liability for COVID-19

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As an increasing number of businesses reopen and call their employees back to work, questions have arisen as to whether, and to what extent, an employer may be held financially responsible if an employee becomes ill. This issue brief addresses what an employer's liability may be if an employee is diagnosed with COVID-19 after returning to work. This issue brief also addresses whether the doctrine of third-party liability may be used by an employee to obtain payment from his or her employer if the employee is diagnosed with COVID-19 after returning to work.

Under current law, an employee who is injured or becomes ill in the course of his or her employment may receive worker's compensation but cannot otherwise sue or hold liable his or her employer for the injury. An employee could bring an action against a third party¹ if the third party is at least partially responsible for the employee's injury or illness,² but the employer would not be responsible for any payments for which the third party was found liable.

WORKER'S COMPENSATION Exclusive Remedy for Employees

The Wisconsin Worker's Compensation Act functions as a no-fault insurance program and is the exclusive remedy for employees who sustain injuries related to their employment.³ Under current law, a worker who is injured in the workplace may be compensated for his or her lost wages, medical expenses, and other losses associated with the injury. With limited exceptions, employers are required to carry insurance intended to cover employees who sustain work-related injuries or to self-insure. However, if an employee is injured at work and his or her employer has not maintained the proper insurance, the employee may still receive worker's compensation benefits paid from the state's uninsured employers fund.

Physical harm caused by an illness or infection sustained at work is considered an "injury" for the purposes of worker's compensation.⁴ In order to receive compensation under the Worker's Compensation Act, an employee who becomes ill must prove that the illness is employment-related: that is, the employee became ill in the course of, or due to, his or her employment.

In response to the public health emergency caused by COVID-19, 2019 Wisconsin Act 185 created a presumption that a first responder's⁵ injury was caused by his or her employment if the first responder was diagnosed with COVID-19, the injury was found to be caused by COVID-19 during the public health emergency or within 30 days after termination of the emergency, and the first responder had been exposed to persons with confirmed cases of COVID-19 in the course of employment. An employer may overcome this presumption by demonstrating that the first responder's illness was caused by exposure to COVID-19 outside of his or her work for the employer. The public health emergency expired on May 11, 2020; the period of presumption that the injury to a first responder was caused by employment ended on June 10, 2020, 30 days after the expiration of the public health emergency. No other employees are covered by the presumption established in 2019 Wisconsin Act 185.

Therefore, in order to receive worker's compensation, an employee who receives a COVID-19 diagnosis after returning to work would have to prove that his or her illness was caused by exposure to the disease in the course of his or her employment. Absent this proof of a connection between the workplace and the illness, an employee is not covered by the Worker's Compensation Act. Because the Worker's Compensation Act is meant to provide an exclusive remedy for employees with respect to their

employers, an employee whose worker's compensation claim is rejected may appeal that decision but may not make any additional or alternative claims against the employer.

THIRD-PARTY LIABILITY

While the Worker's Compensation Act provides that an employee may not bring any additional or separate action against his or her employer for an employment-related injury, an employee may bring an action against a party that is not the employer (third party) if the third party is at least partially responsible for the employee's injury. Additionally, an employer or insurer who has compensated an employee through the Worker's Compensation Act may bring an action against a third party if the third party contributed to the employee's injury.⁶

Third-party liability cases differ in some significant ways from worker's compensation claims. First, an employee who files a worker's compensation claim need not prove that his or her employer was negligent or otherwise at fault for the injury; worker's compensation is a no-fault system where, so long as the injury is related to the employee's employment, it is covered by worker's compensation. In contrast, an employee or employer who brings an action against a third party must prove that the third party was negligent, and that the negligence caused the employee's injury.

Second, the Worker's Compensation Act provides coverage for lost wages, medical expenses, and certain other losses associated with the employee's injury, such as the cost of rehabilitative training, but it does not cover damages related to pain and suffering, loss of companionship, mental anguish, or similar losses. If a third party is found liable for an employee's injury, the third party may be responsible for compensating the employee for damages of these types.

However, even if a third party is found liable for an employee's injury and is required to compensate the employee beyond what the employee may receive under the Worker's Compensation Act, the employer would not be responsible for any additional payments to the employee. To the contrary, an employer or insurer who has compensated an employee through the Worker's Compensation Act is generally entitled to receive, as reimbursement, a portion of any award the third party must pay.⁷

CONCLUSION

In sum, an employee who returns to work and who is diagnosed with COVID-19 may be eligible to receive worker's compensation if the employee can demonstrate that his or her illness is employment-related. An employee who receives worker's compensation, or whose worker's compensation claim is rejected, may not seek any additional payment from his or her employer. An employee may seek additional compensation from a third party who negligently caused the employee's illness, but the employer is not liable for the acts or omissions of a third party and would not be required to pay any compensation related to the third party's negligence.

¹ With very limited exceptions, injuries caused by a coworker are covered by worker's compensation and are not subject to a third-party liability claim. [[s. 102.03\(2\), Stats.](#)]

² A third party could be any individual or entity that causes or exacerbates the worker's injury. In the case of an injury related to COVID-19, a third party could be an individual who spread the disease to the worker or any vendor whose equipment or services may have contributed to the spread of the disease to the worker.

³ See [ch. 102, Stats.](#), generally, and [s. 102.03\(2\), Stats.](#)

⁴ [Section 102.01\(2\)\(c\), Stats.](#)

⁵ The act defines "first responders" as an employee of or volunteer for an employer that provides firefighting, law enforcement, or medical treatment of COVID-19, and who has regular, direct contact with, or is regularly in close proximity to, patients or other members of the public requiring emergency services, within the scope of the individual's work for the employer.

⁶ [Section 102.29, Stats.](#)

⁷ [Section 102.29\(1\)\(b\)2., Stats.](#)