

CALIFORNIA

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1. Would a claim for COVID-19 be considered a compensable occupational disease injury under the Workers' Compensation Act?

The compensability of an infection with COVID-19 will be decided on a case by case basis. There is no presumption of compensability nor is a COVID-19 infection given a special status in workers' compensation law. However, while case law has long held that common communicable diseases, e.g. colds and flu, are not compensable, there are circumstances in which infection with a communicable disease has been held to be a compensable industrial illness.

2. What is the jurisdictional rationale that makes the claim compensable? Provide all rules that would apply to make the claim compensable.

California law requires that an occupational illness arise out of and occur in the course of the employment (AOE/COE) to be a compensable event. In the case of a communicable disease found in the community-at-large a body of case law has arisen holding that AOE/COE may be proved if the employee's risk of contracting the pathogen from employment is medically probable or materially greater than from the general public. In *South Coast Framing, Inc. v. Workers' Comp. Appeals Bd. (Clark)* 61 Cal.4th 291, 297, a case involving an illness acquired from a soil spore commonly found in Southern California, *Coccidioides immitis* (the pathogen causing Valley Fever or coccidiomycosis), the Board explained what it deems necessary to link the disease to the employment. "In regard to industrial causation of a disease, the employee's risk of contracting the disease from the employment must be materially greater than the general public or more common at the place of employment than among the public." In contrast, in *Abernathy v. Harris Wolf California Almonds*, 2015 Cal. Wrk. Comp. P.D. LEXIS 571, the WCAB found a medical opinion on which the claimant relied did not sufficiently address when and where Applicant most likely contracted Valley Fever within reasonable medical probability, as he stated that Applicant could have been exposed at his current employment, prior employment, or where he lived, and did not assess whether the risk of Applicant contracting Valley Fever was made materially greater by his employment. The WCAB concluded that while Applicants are not required to establish medical certainty, they are required to establish that the employment caused or contributed to their coccidiomycosis to a reasonable medical probability.

3. If the employee is directed by the employer to quarantine due to possible exposure at work (and the employer is continuing full salary for 14 days), does the employer's direction make the claim compensable under the Workers' Compensation Act?

To be entitled to workers' compensation benefits the Applicant must establish he/she suffered an industrial injury or illness AOE/COE. In the absence of a diagnosed illness, there can be no industrial injury for which benefits would be payable. An employee ordered to take paid time off without a diagnosis of COVID-19 should not be deemed to have suffered an industrially related injury or illness.

4. Are "first responders" considered at greater risk than the general public under the Workers' Compensation Act?

As of April 1, 2020, no legislation has been passed to provide "first responders" a presumption of compensability should one contract COVID-19. Bills have been proposed to extend that benefit, so the status of the law must be confirmed should such a claim be made. In the absence of a legal presumption, the "first responder" is obligated to prove compensability under the legal theories described at Question 2 above.

5. Is "Pharmacy" considered a first responder under the Workers' Compensation Act?

There is no law that identifies a pharmacy or pharmacist as a "first responder" nor does any law provide any additional workers' compensation presumption in favor of compensability for a pharmacy worker.

6. Is the state calling for legislation that would eliminate the burden of proof for workers making a COVID-19 occupational disease claim? If so, please provide summary of what is being proposed.

SB 893 and SB 567 "would define "injury," for a hospital employee who provides direct patient care in an acute care hospital, to include infectious diseases and musculoskeletal injuries. The bill would create rebuttable presumptions that these injuries that develop or manifest in a hospital employee who provides direct patient care in an acute care hospital arose out of and in the course of the employment. The bill would extend these presumptions for specified time periods after the hospital employee's termination of employment."

7. Has the state governor issued an executive order allowing for COVID-19 cases compensable under the Workers' Compensation Act? If so, please provide copy of the executive order.

As of April 1, 2020, no executive order has issued nor has legislation been passed to provide a presumption of compensability should an employee contract COVID-19. Bills have been proposed to extend that benefit, so the status of the law must be confirmed should such a claim be made.

8. If COVID-19 claims are compensable under the Workers' Compensation Act, is the waiting period waived?

As of April 1, 2020, no law has been passed to create an exception for the waiting period for the commencement of indemnity payments for a compensable illness from COVID-19. In

light of the many legislative bills being proposed to respond to the crisis, the status of the law should be checked regularly.

9. If the claim is compensable under the Workers' Compensations Act and the Employer pays the employee their full salary for the first two weeks during quarantine, how does this affect the TTD benefits?

Labor Code Section 4650 provides that "If an injury causes temporary disability, the first payment of temporary disability indemnity shall be made not later than 14 days after knowledge of the injury and disability, on which date all indemnity then due shall be paid . . ." Disability is the concurrence of inability to work as a result of industrial injury and loss of earnings. While an employer may not require an employee to use sick leave or vacation pay to replace the employer's obligation to provide temporary total disability benefits, the employer may choose to provide wage continuation in lieu of temporary disability. Since the salary continuation in such a case is in lieu of temporary disability benefits the courts would be expected to hold that the salary continuation was paid during the waiting period and that all benefits due thereafter would immediately continue without further delay. The employer's payment would not delay the right to receive workers' compensation temporary disability benefit, but would likely be treated as an employee benefit in lieu of temporary disability.

10. Can the TTD benefits start be delayed if the employee's disability extends beyond 14 days if the employee receives their full salary for the first two weeks?

The right to receive temporary disability benefits arises on the first day of lost salary due to a compensable injury. The waiting period is a delay in the payment, not a delay in the right to the benefit. Therefore, the employer's payment of salary during the first 14 days of lost time is in lieu of temporary disability benefits and not a delay in the right to collect the temporary disability benefit. As soon as the salary ends, the temporary disability would commence, if the employee remains incapable of returning to paid work on the 15th day.

11. Can the TTD benefits be offset by the full salaried paid to the employee?

Yes, temporary total disability benefits (TTD) are payable when there is a loss of income due to a compensable injury within the time limits imposed by law. When the employer pays salary during a period of lost time due to an industrial injury, there is no loss of wages for which TTD is payable.