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COVID-19: Insurance/Risk Management

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What's the Problem?

How does an employer determine if an illness is compensable under workers' compensation? And, what happens if it is not?

If an employer places an employee at risk of COVID-19 infection within the scope of the employee's work or travel there is likely no workers' compensation coverage for that employee. This is the case in Colorado and California as well as many other jurisdictions because COVID-19 is not distinctly associated with any particular occupation, perhaps with the exception of certain healthcare workers. Therefore, the threat of COVID-19 infection is common to the entire population of earth not only those workers at higher risk or those sent to a high-risk area. Under Colorado and California law, a disease is not compensable under workers' compensation coverage if it results from a hazard to which the employee would have had equal exposure outside of the employment. In other words, there is nothing unique about sending someone into a coal mine if the entire world is a coal mine. Simply put, an employer should not assume that its employees will receive the benefits of workers' compensation insurance for contracting COVID-19 while in the course of employment. Therefore, neither should an employer assume that it will be entitled to workers' compensation statutory immunity in the event an employee contracts COVID-19 and makes a claim against the employer.

If an employee cannot access benefits under workers' compensation laws, then that employee may seek damages against his or her employer directly. An employer will have no coverage under a typical commercial general liability policy pursuant to exclusion (e) which precludes coverage for injuries to an employee arising out of or in the course of employment (including sickness and disease). However, if the employer maintains the appropriate Employer's Liability coverage, a form of coverage designed to fill the gap between workers' compensation coverage and commercial general liability coverage in scenarios just like this, then the employer should be protected. Employer's Liability coverage is typically included with the purchase of workers' compensation insurance. It is designed to cover the gap between non-compensable workers' compensation claims and the lack of coverage for claims by an employee under the commercial general liability policy.

Things to Consider

We highly recommend that employers have their policy form reviewed to confirm they have this vital coverage to protect against the unique risk

exposure presented by COVID-19.

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