

WHITT & DEL BUENO

E-NEWSLETTER

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COVID-19 WORKERS' COMPENSATION CLAIMS?

Wondering if a COVID-19 workers' compensation claim is compensable? It depends. Here are several factors to consider to begin your analysis:

- If the claim is brought as an **occupational disease**, then it will be evaluated as an ordinary disease of life under Virginia Code § 65.2-401. To prevail, an employee must prove by clear and convincing evidence that:
 - 1) the disease exists, arose out of and in the course of employment, and did not result from causes outside of the employment, AND
 - 2) one of three situations set forth in the code section applies, with the most likely being that the claimant contracted the disease while employed by a hospital, sanitarium, laboratory, or nursing home, or while otherwise engaged in the direct delivery of health care, or while in the course of employment as emergency rescue personnel.
 - Employers and carriers should consider the prevalence of COVID-19 in the community at the time the employee allegedly contracted the virus.
- It is uncertain whether a COVID-19 claim could be brought successfully as an **injury by accident**, which would depend upon the facts of each case. In these types of cases, the employer and carrier should consider whether the employment creates an increased risk of infection due to the nature of employment, and not that the employment merely placed the employee in a position where they were exposed. One should assess whether the employee can meet their burden of proving specifically when and how they contracted COVID-19.
- For all cases, consider the timing of the alleged exposure vs. appearance of symptoms, whether the employer's safety protocols were followed by the employee during the period of possible exposure, and whether the employee had any risk factors outside of the employment for developing COVID-19.

GENERAL ASSEMBLY UPDATE

The 2020 Virginia General Assembly session ended in early March, with numerous workers' compensation law changes being sent to the Governor's desk for his approval, including:

***House Bill 46:** When employee files a claim, an employer is required to advise employee within 30 days of their intent to accept or deny claim or of their inability to make a determination.

***House Bill 617:** Directs Commission to engage independent organization to evaluate implications of awarding injuries caused by cumulative trauma.

**There were also numerous significant changes to laws that apply to public safety employees, which will be addressed in detail with our local government clients.*

City of Alexandria v. Handel

This case is still pending before the Supreme Court of Virginia, which just granted the Petition for Appeal filed by the City of Alexandria and supported by an amicus curiae brief filed by our office on behalf of several entities. Stay tuned for updates on this important injury by accident case.

Recent JLARC Recommendations

The Joint Legislative Audit and Review Commission (JLARC) issued a report on December 16, 2019 to the Governor and General Assembly, which set forth their findings and recommendations developed from a study of the Commonwealth's workers' compensation system. Some of the most relevant recommendations were:

- Improve the timeliness of Deputy Commissioner opinions;
- Amend the Act to require employers and carriers to notify an employee whether a claim is accepted within 30 days of receiving notice of the accident;
- Require employers and carriers to include in their denial letters a notice that the employee has a right to dispute the denial through the VWC;
- Add cumulative trauma injuries as compensable under the Act;
- Expand coverage of psychological injuries to those that could have been reasonably expected by employee in course of employment; and
- Several amendments to the public safety presumption statutes.