Two new COVID-19 presumption laws enacted in Washington

By Myla Sepulveda ■ May 14, 2021

New legislation affecting healthcare and frontline workers sets forth a different exposure standard for each affected group to establish an occupational disease presumption. In response to the global pandemic, the Washington State legislature recently passed SB 5115 ("Health Emergency Labor Standards," or "HELSA," for short) and SB 5190 ("Providing health care workers with presumptive benefits during a public health emergency"), which were signed into law by Governor Jay Inslee on May 11, 2021.

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Frontline workers' presumption (SB 5115)

HELSA applies to employees working in industries ranging from healthcare and retail to hospitality and education—many of the industries disproportionally dominated by self-insured employers. For frontline employees working in these industries, there is currently a presumption that any infectious or contagious diseases that *are transmitted through aerosols or respiratory droplets, or through contact with contaminated surfaces*, and are the subject of a public health emergency, are occupational diseases.

The HELSA bill limits the applicability of the presumption to respiratory diseases—it does not apply to all diseases. For example, if there is an Ebola outbreak and the governor declares a state of emergency, Ebola will not be considered an occupational disease because it is not a respiratory disease. However, if the disease is COVID-19 or whooping cough, then it will be considered an occupational disease rebuttable only by a **preponderance of the evidence** that 1) the exposure to the disease did not occur at work, 2) the employee was working from home, or 3) the employee was on leave for a period of quarantine. In Washington workers' compensation, this is the "more probable than not" standard with which we are all familiar. In other words, the evidence need only be greater than a 50 percent likelihood of being true. This is not the case with SB 5190.

Healthcare workers' presumption (SB 5190)

SB 5190 applies only to healthcare employees working in any healthcare facility or organization that provides emergency or medical services. The presumption under SB 5190 applies to any infectious or contagious diseases regardless of transmission that are the subject of a public health emergency—

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the diseases are limitless. This means that even Ebola would be considered an occupational disease under SB 5190 since there is no clause limiting the application to respiratory diseases only.

While the SB 5190 presumption is rebuttable, the evidentiary standard is harder to overcome. Under this bill, the occupational disease presumption may be rebutted by **clear and convincing evidence** that the exposure to the disease occurred outside of the workplace. This means that the employer must show that it was substantially more probable than not to be true. Practically speaking, this means that the employer may now require multiple medical experts to establish that it was substantially more probable than not that the employee contracted the disease outside of the workplace if there is a split in the medical evidence.

Furthermore, if the Department's current approach to COVID-19 is any indicator of how the Department will apply these presumptions to future diseases, it will likely be an uphill battle: The May 7, 2021 COVID-19 claims count for self-insured employers shows that of the 2420 claims allowed, only 220 have been rejected.

What does this mean for employers? Healthcare and other industries must be vigilant anytime there is a public health emergency, take immediate steps to keep their workers safe and prevent the spread of the disease. While most non-healthcare industries need only be concerned with respiratory diseases for the occupational disease presumption to apply under HELSA, healthcare industries must be mindful of all communicable diseases for the presumptions that apply under HELSA and SB 5190.

It is no surprise that COVID-19 has significantly changed the way we live: where we eat, where we work, and with whom we associate. The same is true for Washington law. While this legislation may seem daunting at first, the Reinisch Wilson Weier PC Washington practice attorneys are here to help you navigate the post-pandemic world of workers' compensation. ■

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