

MEMORANDUM

ACT 150 (S.342): APPLYING PRESUMPTIONS FOR WORK-RELATED COVID WC CLAIMS

TO: Workers' Compensation Insurers, Insurance Adjusters, Claimant and Defense Attorneys, Vocational Rehabilitation Counselors, and Other Interested Parties
FROM: J. Stephen Monahan, Director WC & Safety Division
DATE: Monday, July 27, 2020
SUBJECT: Applying Presumptions for Work-Related Covid WC Claims

On July 13, 2020, the Governor signed S.342 (Act 150). A copy of the Act may be found here: <https://legislature.vermont.gov/Documents/2020/Docs/BILLS/S-0342/S-0342%20As%20Passed%20by%20Both%20House%20and%20Senate%20Official.pdf> . Section 2 of the Act creates two presumptions of compensability under the Vermont Workers' Compensation Act.

TWO PRESUMPTIONS CREATED

The first creates a presumption of compensability for front-line workers (defined in the bill). A worker in one of the described occupational categories that receives a positive COVID test, or a diagnosis from a licensed health care provider is presumed to have been affected at work unless the insurer is able to demonstrate by a preponderance of the evidence that the infection is due to non-work exposure or risk factors. This may be a difficult burden for the insurer to meet and may require contact tracing, employee interviews and other investigation to show non-work exposure.

The second presumption of compensability is available to non-front-line workers. In order to avail themselves of this presumption a non-front-line worker must show a positive test or diagnosis from a licensed health care provider AND either a documented exposure to COVID while working, or that the worker performed services at a residence or facility with one or more residents or employees who: were present at the time the services were performed; and either had COVID-19 at that time; or tested positive for COVID-19 within 14 days after the services were performed. An insurer may defeat the claimed presumption by demonstrating that the infection is due to non-work exposure or risk factors OR at the time the employee was potentially exposed to COVID-19, by demonstrating that its insured employee's place of employment was in compliance with:

(i) between April 1, 2020 and April 20, 2020, the relevant COVID-19 related guidance for businesses and workplaces issued by the U.S. Centers for Disease Control and the Vermont Department of Health and any similar guidance issued by local or municipal authorities; and (ii) between April 20, 2020 and January 15, 2021, the Restart Vermont Worksafe Guidance issued by the Agency of Commerce and Community Development, and any similar guidance issued by local or municipal authorities. This will require close work with the employer to determine if the guidance is being followed and enforced.

RETROACTIVITY

Although the Governor signed the bill in July, the express terms of the legislation provide that the presumptions are to be applied retroactive to March 1, 2020. Since the department has received between 115 and 120 WC claims alleging COVID work exposure or infection since March 1, 2020 those claims must be reviewed to determine whether they are now presumed compensable under the new legislation.

CLAIM REVIEW ORDERED

Therefore, I am directing all workers' compensation insurers and their adjusters to review all First Reports of Injury alleging COVID exposure that have been filed since March 1, 2020 that were not accepted as compensable. In each case determine whether the claimant received a positive test or COVID diagnosis from a licensed health care provider at the time of the claim or within fourteen days before or after the claim was filed. If it is determined that there is not a positive test or diagnosis during that time period, notify the Department that the claim has been reviewed and remains denied. If there has been a positive test or diagnosis, the adjuster shall determine whether or not the worker is a front-line worker and apply the appropriate statutory presumption. Notify the department in writing if the claim is now accepted, will be paid without prejudice pending further investigation, or remains denied. Any denial must include the evidence relied on to show non-work related exposure or that the employer is fully compliant with the CDC or Restart guidance. In each case the adjuster shall notify the claimant of the new law, advise the claimant where to obtain a copy, and advise the claimant on how to contest any adverse decision made after the claim has been reviewed.

ADDITIONAL INFORMATION REQUESTED

Section 4 of Act 150 directed the Department of Financial Regulation (DFR), with assistance from the Department of Labor to examine the average cost of paying a COVID-19 related workers' compensation claim in Vermont among other issues. To assist DFR, I am asking that adjusters obtain wage information (FORM 25) on each claim filed and provide that information to us. Specific identification of the occupations filing claims would also be appreciated.

Please e-mail me at Stephen.monahan@vermont.gov if you have questions, or contact a workers' compensation specialist. Thank you.