

The Chase Sensale Law Group, L.L.P.

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October 12, 2021

OCCUPATIONAL EXPOSURE TO COVID-19

Undisputedly, law enforcement personnel are public-facing employees of their respective municipality. As such, a high probability exists members of law enforcement shall almost certainly sustain occupational exposure to the SARS-CoV-2 virus (the virus that causes COVID-19) in the environs of New York State. Indeed, given the incubation period of the virus, when a member of law enforcement contracts COVID-19, he or she may be unaware of it for several days, but still be a carrier of the virus resulting in spread to fellow members of law enforcement, family members, friends, etc. Because of the contemplated heightened risk of exposure, the New York State Workers' Compensation Law has fostered the concept of "prevalence," that is, a body of evidence which predicates a finding that "more likely than not," an occupational exposure to SARS-CoV-2/COVID-19, has occurred.

QUESTION: Why file a claim for occupational exposure to COVID-19 when no time from work was lost because of said exposure?

The New York State Workers' Compensation Law requires that an occupational exposure to COVID-19 be filed within two (2) years of such exposure. Failure to file within such two-year period may forever bar a claim. Even if no time or minimal time was lost from work from the contracture of COVID-19, two immediate benefits prevail by filing such a claim:

- (1) when such case is either accepted by the self-insured municipality and their third-party administrator, or, is established as a result of litigation (which is far more likely), the lifetime right to secure authorization for treatment related to COVID-19 immediately attaches. Given our experience with the medical conditions that became attributable to the attacks of September 11, 2001, filing a claim is prudent for occupational exposure to COVID-19 in the event long-term effects of such exposure may eventually manifest.
- (2) Should occupational exposure to COVID-19 become a basis for a claim for accidental disability retirement (as we are yet to understand all the far reaching impacts of the disease), the filing of a timely workers' compensation claim shall satisfy the 'notice' requirement for a valid accidental disability retirement claim pursuant to New York Retirement and Social Security Law and may be the only means by which to do so following the expiration of ninety (90) days from known exposure.

QUESTION: How is a claim for occupational exposure to COVID-19 filed?

To file a claim for occupational exposure to COVID-19, an EMPLOYEE CLAIM (FORM C-3) must be filed with the New York State Workers' Compensation Board in a timely manner; this form is separate and distinct from any form filed by the employer, such as Extraordinary Incident Notice (EIN) which does not satisfy

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the requirement of the law, if such form *is even filed*. No other type of accident /incident form satisfies the requirement.

QUESTION: What is necessary to file a claim for occupational exposure to COVID-19?

Legal precedent has developed to where evidence of a positive test result indicative of SARS-CoV-2 exposure, or, a medical report wherein COVID-19 is diagnosed, is sufficient evidence to prosecute a claim for occupational exposure to COVID-19 (this is known as “prima facie medical evidence”). Such positive test result or report of diagnosis, coupled with testimonial evidence (if the claim is litigated by the municipality/third-party administrator) sufficient to establish prevalence, will provide the basis for a valid workers’ compensation claim.

QUESTION: Why would a claim for occupational exposure to COVID-19 be litigated, and, how can a successful claim be prosecuted?

Recognizing the potential long-term effects of occupational exposure to COVID-19, self-insured municipalities and their third-party administrators are vigorously defending such claims, albeit, wrongfully. The law, as developed, requires the self-insured municipality or third-party administrator to rebut the evidence of prevalence of COVID-19 in the workplace with substantial evidence the member of law enforcement did not contract the disease on the job. Such evidence to rebut prevalence may include cross-examination of the member as to whether contracture occurred outside the scope of the job (e.g. from a family member residing with the member who tested positive before the member, personal travel to a hotbed of COVID-19 outside of New York State prior to testing positive, testimony from supervisory personnel that the member’s occupational duties precluded contact with the public or co-workers that tested positive).

During litigation, the municipality or third-party administrator will also pursue the defense of ‘notice to the employer’ of occupational exposure to COVID-19, as the New York State Workers’ Compensation Law requires that notice of such exposure be provided to the employer within thirty (30) days of such exposure (here, within thirty days of the date of a positive test). Since the law prefers such notice to be in writing, our office recommends that a member of law enforcement advise his or her immediate supervisor by email (a copy of which is to be retained by the member) specifically indicating they “have tested positive for COVID-19” on the date of said test result, and, the member “has a good faith basis to believe exposure to COVID-19 occurred on the job.” Such an email shall be documentary evidence notice was unquestionably provided to the employer. Because elements of prevalence abound with respect to members of law enforcement, a “good faith” belief exposure to SARS-CoV-2/COVID-19 is always present, even if there is ambiguity as to whether such exposure actually occurred on the job.

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QUESTION: What is the cost to file a claim for occupational exposure to COVID-19 with the New York State Workers' Compensation Board?

There is no cost associated with filing a claim with the New York State Workers' Compensation Board.

With proper development of the record of a claim, our office, to date, has won each and every claim for occupational exposure to COVID-19 filed with our office by members of law enforcement.

Despite any advice discouraging the filing of a claim from either the employer or the administration of the municipality, prudence requires a claim for occupational exposure to COVID-19 be filed immediately upon receipt of a positive test result or report of diagnosis of the disease to ensure the valuable benefits of same as discussed are not lost. Prudence also suggests a call to our office will substantially increase the likelihood a successful claim will prevail.

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