



# STATE OF KENTUCKY WORKERS' COMPENSATION COVID-19 QUICK GUIDE

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## GENERAL PROVISIONS

**When must an Employer's First Report of injury be filed?** Within one week after the occurrence and knowledge of an injury to an employee causing his absence from work for more than one day. Any Employer shall report to his workers' compensation insurance carrier any work-related injury or disease within three working days of receiving notification of the incident or alleged incident.

**What is the statute of limitations for the filing of an Employee's Claim form?** Two years from the date of injury or last payment of TTD benefits. For occupational disease claims, three years from date of last exposure if the employee has knowledge of the condition or five years from last exposure if the employee did not have knowledge of the condition.

**When must an Employer/Insurer file contesting issues?** Within 45 days of the date the Notice of Filing of Application is issued by the Department of Workers' Claims, a Notice of Claim Denial or Acceptance must be filed.

## COMPENSABILITY

**Under Kentucky law, could COVID-19 be compensable as an occupational disease?** Very possible. KRS 342.0011 defines occupational disease as arising out of the employment, if there is apparent to the rational mind upon consideration of all circumstances, a causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident to the work as a result of the exposure occasioned by the nature of the employment and which can be fairly traced to the employment as the proximal cause. The occupational disease shall be incidental to the character of the business and not independent of the relationship of employer and employee. The occupational disease need not have been foreseen or expected, but, after its contraction, it must appear to be related to or a risk connected with the employment and to have flowed from the source as a rational consequence. Thus, if an employee who has contracted Covid-19 can prove his exposure at work likely caused the condition an occupational disease claim would likely be determined to be compensable. Workers in occupations with heightened risk of exposure to the corona virus will have an easier time establishing causation. See discussion below regarding the Governor's Executive Order. This Order certainly contemplates that persons within designated occupations most likely have had occupational exposure to the corona virus and have a potentially compensable occupational disease claim.

**Could COVID-19 be compensable as an accidental injury?** Accidental injuries must be related to a work-related traumatic event or series of traumatic events, including cumulative trauma arising out of and in the course of employment which is the proximate cause producing a harmful change to the human organism. The definition goes on to state, "'Injury' does not include the effects of the natural aging process and does not include any communicable disease, unless the risk of contracting the disease is increased by the nature of the employment." It would appear, therefore, that under either the injury or occupational disease statutes someone who contracts Covid-19 due to their occupation would have a compensable claim.

**If a person contracted COVID-19 while traveling on business, would that result in a compensable claim?**

Kentucky has adopted the positional risk test for traveling employees which means that if an employee is traveling for work and the travel has enhanced the risk for contracting the virus, the claim would be compensable if the employee proves that the disease was contracted while traveling.

**If a person is injured while teleworking, would those injuries be compensable?** If an employee is required to work at home and he can prove that he contracted the disease while working at his home, the claim could be considered compensable. The work would have to be known and sanctioned by the employer. The activity should be more than just a casual activity or something done by the employee out of convenience, such as checking an email at home while off work.

**Are psychiatric claims compensable for a person that has actually contracted COVID-19?** Under Kentucky law a psychological or psychiatric condition is not compensable unless it is a direct result of a physical injury. Assuming a person contracts Covid-19 as a result of occupational exposure, the worker would have to prove that Covid-19 caused physical injury. If the patient developed debilitating conditions as a result of Covid-19 such as pulmonary conditions or other organ failures, then a psychological condition arising from the injury would be compensable. On the other hand, if the worker tested positive for the corona virus, but had no symptoms and no evidence of physical injury, the worker's claim for psychological injury and treatment could be contested and denied.

Taking this question of physical injury a step further, Kentucky Courts have permitted psychological claims stemming from traumatic activities that resulted in no real physical injury. Thus, hypothetically an emergency room physician who has contracted Covid-19 due to physical contact with multiple Covid-19 patients would have a stronger claim to psychological injury resulting from those activities than a grocery worker who has tested positive for the virus, but has no physical injury.

**If a person were merely fearful of contracting COVID-19 at work, could the person have a valid psychiatric claim?** Not under Kentucky law. The employee must establish that a psychological condition resulted from a physical injury.

## **BENEFITS**

**If an employee is forced to quarantine as a result of a possible exposure at work, must TTD benefits be paid?** Gov. Beshear has issued an Executive Order dated April 9, 2020, which states that, "It shall be presumed that removal of the following workers from work by a physician is due to occupational exposure to Covid-19: employees of a healthcare entity; first responders (law enforcement, emergency medical services, fire departments); corrections officers; military; activated national guard; domestic violence shelter workers; child advocacy workers; rape crisis center staff; department for community based service workers; grocery workers; postal service workers; and child care workers permitted by the Cabinet for Health and Family Services to provide childcare in a limited duration center during the State of Emergency." These workers are entitled to TTD benefits if removed from work by a physician. The Order states that, "This order does not waive the employer's right to contest its liability for the claim or other benefits to be provided." The Order is in effect during the state of emergency or until the Order is rescinded.

The Department of Workers' Claims has provided additional guidance on the Governor's Emergency Order in a memo issued on April 15, 2020. It confirms that the Order only extends to the issue of paying temporary total disability benefits under the circumstances in which a worker is removed from work by a physician due to occupational exposure to the corona virus and has no application to the resolution of any issue beyond the scope of the Order. The Employer must promptly investigate the claim and may not deny payment of benefits pursuant to the Order without evidence forming a good faith basis for denial. For example, if a grocery worker's spouse tests positive for Covid-19 and the worker is removed from work solely due to that exposure, the Employer may deny the claim since the evidence rebuts the presumption that the exposure was occupational; and a worker whose removal from work that does not fall within the job classifications presumed to be related to an occupational exposure, must establish that the removal is due to occupational exposure as that term is defined in the Order. For example, a restaurant worker who is removed from work by a physician based on exposure to Covid-19 without further explanation has not established occupational exposure and has not established entitlement to benefits. Generally, an employee seeking temporary total disability benefits would have to prove that the employee is physically unable to work. Removal from work as a preventive measure would normally not be compensable. For now, workers who can establish that their physician removed them from work due to occupational exposure to the corona virus are entitled to TTD benefits.

**If COVID-19 were to be found compensable, what benefits might be due?** As previously described, temporary total benefits would be due during the time of quarantine or physical inability to work. Permanent total or partial disability benefits would be payable if the employee is able to establish a permanent impairment under the *AMA Guidelines, 5<sup>th</sup> Edition*. This would include any physical or pulmonary condition. Medical expenses would also be compensable. Vocational rehabilitation could be awarded, but this rarely occurs.

**Must an employer/insurer pay for medical testing to rule out COVID-19?** Kentucky courts have held that required testing caused by occupational exposure can be compensable. The case in question involved a worker at a diagnostic center who was flushing an IV of a patient when blood from the patient splattered onto his face and into his right eye. The employee underwent the testing protocol for post exposure to communicable diseases. He was tested for Hepatitis B, HIV, liver function and Hepatitis C on his initial visit and thereafter for several months. The court held that such testing was compensable. However, testing expenses incurred by an employee who did not work within a presumed employment classification but who just wanted to be tested for the corona virus, would not likely be found to be compensable unless occupational exposure is clearly established.

**May an employer/insurer make voluntary medical payments without prejudice?** Yes, as long as the claim has not been decided by an Administrative Law Judge, all payments are considered voluntary and can be terminated for good cause and the payment of those benefits or medical expenses would not prejudice the right of the employer to deny the claim.

**If an employee is working on light duty as a result of a workers' compensation claim and there is a layoff due to the economic downturn or government-mandated closure, is the employee entitled to TTD?** Most likely yes. TTD benefits are payable until the employee reaches maximum medical improvement or returns

to his regular job. If the employee is not at maximum medical improvement and he is laid-off from a light duty job, TTD benefits would be payable.

**May an employer terminate medical benefits due to non-compliance with treatment as a result of fear of going to a health care provider during the pandemic?** KRS 342.035 states, “No compensation shall be payable for the death or disability of an employee if his death is caused, or if and insofar as his disability is aggravated, caused or continued, by an unreasonable failure to submit to or follow any competent surgical treatment or medical aid or advice.” Whether this includes terminating medical benefits is not clear in Kentucky. If the employee can prove that he or she has a legitimate reason or fear for not following medical advice, benefits and medical treatment cannot be denied. The refusal must be “unreasonable”.

#### **AREAS OF INQUIRY DURING COVID-19 INVESTIGATIONS**

- Employee’s job duties/length of employment
- Employee’s symptoms/diagnosis/treatment/test results
- Employee’s allegation regarding exposure (i.e., have co-workers/vendors/clients/patients tested positively?)
- Other possible sources of exposure (i.e., roommates/family/friends?)
- Recent travel (personal and/or business) – what/when/where/for how long/purpose
- Secondary employment
- Use of mass transit/public transportation/carpools
- Hobbies/recent events prior to diagnosis (e.g., concerts/sporting events/rallies)
- Social media activity
- Medical canvasses
- Experts (e.g., epidemiologists/infectious disease specialists/industrial hygienists)
- Results of governmental investigations (OSHA/CDC/local health authorities)
- Employer precautions (e.g., did the employer follow CDC guidelines, what other measures did employer take to prevent spread?)

#### **HELPFUL LINKS**

- [CDC Workplace Guidance](#)
- [Centers for Disease Control and Prevention – COVID-19](#)
- [EEOC’s COVID-19 Page](#)
- [Executive Order – State of Emergency Relating to Workers’ Compensation](#)
- [Kentucky Department of Workers’ Claims 4/15/2020 Guidance Memo](#)
- [OSHA’s COVID-19 Page](#)
- [OSHA’s Guidance on Preparing Workplaces for COVID-19](#)
- [World Health Organization COVID-19 Updates](#)

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