

Virginia Workers' Compensation Update

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Virginia Legislative Session Update | Presumption of Compensability for COVID-19

Virginia's General Assembly is approaching the business-end of the current legislative session with the deadline for the House and Senate to complete their work on February 5, 2021, with cross-house consideration of passed bills occurring February 6th.

Status of Bills Presented

- **House Bill 1985:** Establishes a presumption that COVID-19 causing the death or disability of *health care providers who, as part of the provider's employment are directly involved in diagnosing or treating persons known or suspected to have COVID-19*, is an occupational disease compensable under the Workers' Compensation Act. The provisions of the bill will be effective retroactive to January 1, 2020.
 - House Bill 1985 has been passed by the House and awaits Senatorial consideration.
- **House Bill 2207:** Establishes a presumption that COVID-19 causing the death or disability of *firefighters, emergency medical services personnel, law-enforcement officers and correctional officers* is an occupational disease compensable under the Workers' Compensation Act. The bill provides that the COVID-19 virus is established by a positive diagnostic test for COVID-19, an incubation period consistent with COVID-19 and signs and symptoms of COVID-19 that require medical treatment. The bill provides that such presumption applies to any death or disability occurring on or after March 12, 2020, caused by infection from the COVID-19 virus—provided that for any such death or disability that occurred on or after March 12, 2020, and prior to December 31, 2021, the claimant received a diagnosis of COVID-19 from a licensed physician, after either a presumptive positive test or a laboratory confirmed test for COVID-19 and presented with signs and symptoms of COVID-19 that required medical treatment.
 - House Bill 2207 has been passed by the House and awaits Senatorial consideration
- **Senate Bill 1342:** Establishes a presumption that COVID-19 causing the death or disability of *firefighters, emergency medical services personnel, law-enforcement officers and correctional officers* is an occupational disease compensable under the Workers' Compensation Act. The bill provides that the COVID-19 virus is established by a positive diagnostic test for COVID-19, an incubation period consistent with COVID-19 and signs and symptoms of COVID-19 that require medical treatment. The bill provides that such presumption applies to any death or disability occurring on or after March 12, 2020, caused by infection from the COVID-19 virus—provided that for any such death or disability that

occurred on or after March 12, 2020, and prior to December 31, 2021, the claimant received a diagnosis of COVID-19 from a licensed physician, after either a presumptive positive test or a laboratory confirmed test for COVID-19 and presented with signs and symptoms of COVID-19 that required medical treatment.

- Senate Bill 1342 has been incorporated by the Finance and Appropriation Committee but not passed as of the date of this article.
- Note: The language of SB 1342 is identical to HB 2207. A similar bill was defeated in the Appropriations Committee in the 2020 session.
- **Senate Bill 1375:** Establishes a presumption that COVID-19 causing the death or disability of *firefighters and emergency medical services personnel* is an occupational disease compensable under the Workers' Compensation Act. The provisions of the bill will be effective retroactive to March 1, 2020.
 - This bill has passed Finance and Appropriations and has incorporated SB 1342. The Senate is completing their Constitutional readings and this will likely pass.
 - The current version of the bill extends coverage to firefighters, law-enforcement officers and correctional officers. Oddly, emergency service personnel are presently excluded.

What is a Presumption Bill and how does it work?

Presumption legislation is not new to Virginia; there are several presumption laws codified within the Workers' Compensation Act with the most significant being §65.2-402, which extends coverage to special classes of public servants for respiratory diseases, hypertension, heart disease and certain cancers. Practically, a presumption law flips the burden of proof. Typically, the injured worker is required to prove that her claim meets the legal standard for compensability. In presumption claims, it is the opposite; the Employer has the burden to show that the disease did not arise from a condition of employment.

The proposed COVID-19 legislation would work the same way. The diagnosis will be presumed to arise from the employment unless the Employer can rebut this presumption by a preponderance of the evidence. As such, the important considerations are:

1. What is the anticipated total cost of the claim (i.e. is it worth fighting?),
2. Does the employee fall within the covered class of employee's established by the presumption bill and
3. What information points to the contraction of the disease outside of the work place?

Analysis of the Pending Legislation

Notably, the bills have passed the Finance and Appropriations Committee where it failed in 2020. The Appropriations Committee analyzes the fiscal impact of proposed legislation on the targeted system. With the continued difficulties presented by the virus, it appears the House and Senate are willing to overlook the fiscal impact and broaden coverage.

What is the potential fiscal impact? According to the Virginia Workers' Compensation Commission, there have been 11,598 COVID-19 cases reported but only 935 claims have been filed. Put differently, only 8% of reported cases have resulted in claims. Digging deeper, only 230 (or 24%) of the filed claims have resulted in an Award of benefits.

The total number of reported cases in November and December were the two highest totals, excluding April of 2020. The numbers suggest causes are being reported with more frequency and there are currently thousands of reported claims which could result in claims for benefits. Of course, these are only the reported figures. Given the difficult evidentiary burden faced by claimants in COVID-19 cases, there are likely many more claims waiting in the shadows of a presumption bill.

The proposed bills are not apocalyptic from a financial standpoint; NCCI has recently published figures showing 20% of COVID-19 claims result in an in-patient hospital stay with only 1% of those claims resulting in intensive care services. The average cost of these inpatient claims came to \$38,500. The cost is not insignificant but the introduction of a COVID-19 bill is unlikely to cripple the industry financially. More concerning may be the administrative burden created by processing, investigating and resolving the anticipated flood of newly filed claims.

What comes next? House Bill 2207 is substantially similar to SB 1375 and it would be surprising if a joint bill was not presented to the Governor for signing after both houses already passed their respective versions of the legislation. It would be a peculiar choice by the legislature to extend COVID-19 coverage to firefighters, law-enforcement and correctional officers and not frontline healthcare workers. So even though House Bill 1985 does not have a companion bill in the Senate, it seems likely that it will pass as well.

Procedurally, the presumption bills will be presented to the other legislative body and either approved or sent to conference committee for any last minute amendments. It is very common for bills to go to conference committee and this delay should not be viewed as though the bills have been defeated. The session deadline, or Adjournment Sine Die, is February 11, 2021. MGC Richmond is monitoring the legislative developments closely and will provide an update as soon as a final decision has been made by the legislature.

Questions? Please contact [Brian Frame](#) or [RJ Williams](#) in our MGC Richmond office.

ABOUT THE AUTHOR

[Brian Frame](#) joined MGC's Richmond office in 2019 with a focus on workers' compensation matters. He is a member of the Virginia Bar Association, and regularly speaks on Virginia workers' compensation topics for [MGC Webinar Wednesday](#). Brian can be contacted by [email](#) or phone at 804.944.2993.

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