1. Would a claim for COVID-19 be considered a compensable occupational disease injury under the Workers’ Compensation Act?

This question was addressed by the Montana Department of Labor & Industry (“Montana DOL”) in a frequently asked questions publication updated on March 19, 2020:

In Montana, workers’ compensation probably does not cover most workers who might become infected by COVID-19. The exception would likely be for health care and emergency medical services (“EMS”) workers who would be placed in a higher risk of exposure through their covered employment. To be accepted as a workers’ compensation claim, a worker would have to demonstrate that their job put them at significantly greater risk for infection than the risk they have already through daily contact and exposure with the population in general. When the contraction of COVID-19 is incidental to the workplace or common to all employment (such as an office worker who contracts the condition from a fellow employee), a claim for exposure to and contraction of the disease will likely be denied by the insurer.

(emphasis added). While a claim for COVID-19 infection may be compensable, the employee faces a significant hurdle in proving by a preponderance of the evidence that they actually contracted the disease arising out of and in the course and scope of their employment.

2. What is the jurisdictional rationale that makes the claim compensable? Provide all rules that would apply to make the claim compensable.

A blood-borne infection or contagious disease may be compensable under Montana workers’ compensation statutes as discussed above. An “injury” is defined as “internal or external physical harm to the body that is established by objective medical findings.” Mont. Code Ann. § 39-71-119(a). Again, the employer must prove by a preponderance of the evidence that they contracted the disease at work and in the course and scope of their employment.

3. If the employee is directed by the employer to quarantine due to possible exposure at work (and the employer is continuing full salary for 14 days), does the employer’s direction make the claim compensable under the Workers’ Compensation Act?
No. The fact that an employer is required to quarantine does not per se make a claim compensable under Montana’s workers’ compensation laws. In order to be compensable, the employee will have to prove a test positive for COVID-19 and that the infection resulted from exposure arising out of and in the course and scope of their employment.

4. Are “first responders” considered at greater risk than the general public under the Workers’ Compensation Act?


Additionally, pursuant to Mont. Code Ann. 39-71-118(1)(g), the terms “employee” or “worker” include voluntary firefighters as described in Mont. Code Ann. § 7-33-4109 and persons who provide ambulance services under Mont. Code Ann. § 7-34-101 – 103; see also, Mont. Code Ann. § 39-71-118(10)(a-g). With that said, and as mentioned above, the Montana DOL indicated that health care and EMS workers may be placed at a higher risk of exposure through their employment.

5. Is “Pharmacy” considered a first responder under the Workers’ Compensation Act?

No.

6. Is the state calling for legislation that would eliminate the burden of proof for workers making a COVID-19 occupational disease claim? If so, please provide summary of what is being proposed.

No. As of April 20, 2020, there is no pending legislation in Montana related to elimination of the burden of proof for workers making COVID-19 claims.

7. Has the state governor issued an executive order allowing for COVID-19 cases compensable under the Workers’ Compensation Act? If so, please provide copy of the executive order.

No. As of April 20, 2020, Montana Governor Steve Bullock has not issued an executive order or directive compelling the compensability of COVID-19 cases.

8. If COVID-19 claims are compensable under the Workers’ Compensation Act, is the waiting period waived?

Not applicable. Montana does not have a waiting period; therefore, COVID-19 claims do not affect any waiting period.
9. If the claim is compensable under the Workers’ Compensations Act and the Employer pays the employee their full salary for the first two weeks during quarantine, how does this affect the TTD benefits?

If the employee receives their full salary for the first two weeks, TTD benefits would still be owed. However, technically, the employer should be reimbursed by the WC insurer for any wages they continued to pay an employee for a compensable injury. Public policy prohibits employers from avoiding paying workers’ compensation benefits by continuing to pay a worker’s salary, unless they have applied for and have been approved for the statutory wage continuation program.

In Montana, a worker is eligible for TTD benefits when: (a) the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing or (b) until the worker has been released to return to the employment in which the worker was engaged at the time of the injury or to employment with similar physical requirements. Mont. Code Ann. § 39-71-701(1).

Weekly compensation benefits for an injury producing TTD are 66.66% of the wages received at the time of the injury subject to limitations. Mont. Code Ann. § 39-71-701(3).

A worker may not receive both wages and TTD benefit without the written consent of the insurer – a worker who receives both wages and TTD benefits without obtaining written consent of the insurer is guilty of theft and may be criminally prosecuted. Mont. Code Ann. § 39-71-701(7).

10. Can the TTD benefits start be delayed if the employee’s disability extends beyond 14 days if the employee receives their full salary for the first two weeks?

No. Even if an employee is receiving their full wages, they are entitled to TTD benefits. But, again, the WC insurer should reimburse the employer for any continuation of wages after the work injury.

TTD benefits must be paid for the duration of the workers’ temporary disability. Mont. Code Ann. § 39-71-701(3). However, benefits are not paid for the first 32 hours or 4 days of wage loss, whichever is less, that the worker is totally disabled and unable to work because of an injury. A worker is eligible for compensation starting on the 5th day. If the worker is totally disabled and unable to work in any capacity for 21 days or longer, compensation must be paid retroactively to the first day of total wage loss unless the worker waives payment. Mont. Code Ann. § 39-71-736.

11. Can the TTD benefits be offset by the full salary paid to the employee?

If an employee is receiving their full wages, they are not suffering a wage loss, and therefore TTD benefits are not owed. The employer should technically be reimbursed for the wages paid.