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

Unlikely, for several reasons.

**DEFINITION OF OCCUPATIONAL DISEASE:**
Nebraska defines an occupational disease as “only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment and excludes all ordinary diseases of life to which the general public is exposed.” The causes and conditions that expose anyone to COVID-19 are not characteristic of and peculiar to any particular trade, occupation, process, or employment. Everyone who has contact with another human, or even touches surfaces touched by another human, is at risk of contracting COVID-19. Further, the general public is clearly exposed to COVID-19.

That being said, because the data seems to indicate that certain positions give rise to a greater likelihood of contracting the disease than most others—such as medical professionals and first responders—it is possible a Nebraska court could construe our statute to included COVID-19 as an occupational disease if contracted by such employees, but we think the chances of that happening are unlikely.

**ARISING OUT OF:**
An employee has the additional burden under Nebraska’s statute to prove that his/her employment gave rise to a greater risk of injury/disease than the employee was exposed in non-employment life. For most employees, this will likely be a burden that the employee will be unable to meet given the ubiquitous nature of the disease. For those employees—such as medical professionals, perhaps first responders and the like—who can prove with data that their employment is of the type which results in greater exposure to the disease than what they faced in non-employment life, they may well be able to meet this particular element of an employee’s burden of proof.

**CAUSATION:**
An employee also has the burden to establish that the employee’s work exposure more likely than not caused the employee to contract the disease. That would be a very difficult burden to meet for the vast majority of employees, given the ubiquitous nature of the virus which causes the disease. For employees who have evidence to establish that their job exposed them to individuals who had contracted the disease, and a greater percentage of people who worked with the employee contracted the disease than the percentage of the people in population as a whole who contracted
it, and evidence that no one they contacted away from work contracted the disease, those employees may be able to meet this burden. The Nebraska statute has never been interpreted in the context of a pandemic such as that with COVID-19, so to give a definitive answer the question is not possible.

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

See answer to No. 1.

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 mere fact that an employer takes the precautions recommended by health authorities is not proof of the elements of an employee’s burden of proof which are discussed in response to question No. 1. Further, even if an employer pays a medical or indemnity benefit on a voluntary basis, that payment does not establish the elements of the employee’s burden of proof. In this jurisdiction, a voluntary payment does not constitute an admission of liability or a waiver of any defenses to a claim.

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

“First responders” are probably at greater risk than the general public of contracting the disease. But as discussed in the answer to question No. 1, one’s status as a first responder would still not likely be sufficient to satisfy every element of an employee’s burden of proof to establish that the employee suffers from a compensable Occupational Disease.

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.

Not as of 4/9/20.

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.

Not as of 4/9/20. There is a significant question whether the governor has the constitutional authority to do that if he wanted to do so.

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

No.
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?

A voluntary payment of wages following a compensable condition will generally preclude an employee from recovering temporary benefits for the same period during which the wages are continued. The applicable law provides that if such wages are paid “in lieu of” temporary benefits, the employee may not recover any temporary benefits during the period that the wages were paid.

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?

Likely yes. But the employer may have to prove that the continuation of the salary was, at least in part, intended to be “in lieu of” temporary benefits. If it can, the employer could delay starting TTD for three weeks after the employee became disabled (one week for the waiting period plus the two weeks for the full salary that was paid).

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

Yes, if the employer can prove that the salary was intended to be, at least in part, to be in lieu of temporary benefits. See answer to Nos. 9 and 10.