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

Under the correct circumstances, a claim for COVID-19 may be considered compensable in Tennessee. The compensability determination will be very fact-specific. To be compensable under the Tennessee Workers’ Compensation Act, an Employee would have to prove that their exposure and contraction of COVID-19 was primarily (greater than 50% considering all possible causes) related to work. For COVID-19 to be compensable in Tennessee, the injured worker would need to show that it arose “primarily out of and in the course and scope of employment.” Tenn. Code Ann. § 50-6-102(14). To arise primarily out of and in the course and scope of employment, it must be “shown by a preponderance of the evidence that the employment contributed more than fifty percent (50%) in causing the injury, considering all causes.” Tenn. Code Ann. § 50-6-102(14)(C). “Shown to a reasonable degree of medical certainty’ means that, in the opinion of the physician, it is more likely than not considering all causes, as opposed to speculation or possibility.” Tenn. Code Ann. § 50-6-102(14)(D). “The opinion of the treating physician, selected by the employee from the employer’s designated panel of physicians . . . shall be presumed accurate on the issue of causation but this presumption shall be rebuttable by a preponderance of the evidence.” Tenn. Code Ann. § 50-6-102(14)(E).

Except in the most obvious, simple, and routine cases, an employee must establish by expert medical evidence the causal relationship between the alleged injury and their employment. Excel Polymers, LLC v. Broyles, 302 S.W.3d 268, 274 (Tenn. 2009). See also Cloyd v. Hartco Flooring Co., 274 S.W.3d 638,643 (Tenn. 2008). The mere presence of the employee at the place of work is not sufficient; the injury must result “from a hazard peculiar to the work or be caused by a risk inherent in the nature of the work.” Blankenship v. Am. Ordinance Sys., 164 S.W.3d 350, 354
It cannot be “purely coincidental, or contemporaneous, or collateral, with the employment.” *Jackson v. Clark & Fay, Inc.*, 270 S.W.2d 389, 390 (Tenn. 1954). In cases of COVID-19, like the flu, it is difficult to trace the source of infection. Accordingly, to successfully assert that COVID-19 is compensable, an employee will likely need a medical expert to establish the causal connection between the illness contracted and the conditions in which the Employee worked. Note that in professions in which there is an increased risk (ER physicians, for example), it may be easier for an employee to secure such a medical opinion, and to establish compensability.

Absent some specific legislative or rule changes, this may prove a difficult burden of proof. Tenn. Code Ann. § 50-5-102 defines injuries under the Tennessee Workers Compensation Act:

(14) “Injury” and “personal injury” mean an injury by accident, a mental injury, occupational disease including diseases of the heart, lung and hypertension, or cumulative trauma conditions including hearing loss, carpal tunnel syndrome or any other repetitive motion conditions, arising primarily out of and in the course and scope of employment, that causes death, disablement or the need for medical treatment of the employee; provided, that:

(A) An injury is “accidental” only if the injury is caused by a specific incident, or set of incidents, arising primarily out of and in the course and scope of employment, and is identifiable by time and place of occurrence, and shall not include the aggravation of a preexisting disease, condition or ailment unless it can be shown to a reasonable degree of medical certainty that the aggravation arose primarily out of and in the course and scope of employment;

(B) An injury “arises primarily out of and in the course and scope of employment” only if it has been shown by a preponderance of the evidence that the employment contributed more than fifty percent (50%) in causing the injury, considering all causes;

(C) An injury causes death, disablement or the need for medical treatment only if it has been shown to a reasonable degree of medical certainty that it contributed more than fifty percent (50%) in causing the death, disablement or need for medical treatment, considering all causes;

(D) “Shown to a reasonable degree of medical certainty” means that, in the opinion of the physician, it is more likely than not considering all causes, as opposed to speculation or possibility;

(E) The opinion of the treating physician, selected by the employee from the employer's designated panel of physicians pursuant to § 50-6-204(a)(3), shall be presumed correct on the issue of causation but this presumption shall be rebuttable by a preponderance of the evidence;

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

See above.
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 same rules from #1 apply; the employee will still need to establish that the occupational disease arose primarily out of and in the course and scope of employment; this will likely be established by the employee’s own testimony and a medical expert’s opinion on causation.

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

It depends. Pursuant to Tenn. Code Ann. § 7-51-201, there are certain presumptions associated with law enforcement officers suffering from hypertension or heart disease and firefighters suffering certain types of cancers; however, nothing presently addresses COVID-19. Arguably, a first responder whose job is to respond to medical emergencies may be at a greater risk; however, the criteria for establishing compensability is the same. Note that such line of work may make it more likely that an authorized treating physician would find that COVID-19 was over 50% caused by the employment, considering all causes.

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 at the present time. Currently no legislation or Bureau of Workers’ Compensation rules have been promulgated to specifically address COVID-19. However, this is a rapidly evolving issue and this may soon change.

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, Tennessee Governor Bill Lee has not issued an order associated with the compensability of COVID-19 at the present time.

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

No, not at this time.
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?

Under TN law, salary may be paid in lieu of workers’ compensation benefits. The employee is not entitled to both salary and temporary total disability benefits.

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

No. In Tennessee, no benefits are due for the first 7 calendar days of the disability period unless the disability period lasts at least 14 calendar days. In that event, an employee should receive back-owed TTD for the first 7 days as well. Accordingly, if an employee received his regular wages or salary for the first 14 days and his disability extends beyond 14 days, the employer would not owe TTD for the first 14 days, but would be required to pay TTD moving forward if the employer ceases to pay regular wages or salary.

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

Yes. Pursuant to Tenn. Code Ann. § 50-6-207(1)(B)(i), an employer may choose to continue to compensate an injured employee at the employee's regular wages or salary during the employee's period of temporary total and temporary partial disability. The payments shall not result in an employee's receiving less than the employee would otherwise receive for temporary disability benefits under this chapter; however, a court or the department has no authority to require an employer to pay any temporary disability benefits required by subdivision (1)(A), in addition to the employee's regular wages or salary.