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

It is not certain that a claim for COVID-19 would be compensable. COVID-19 generally seems to be an ordinary disease of life to which employees are equally exposed outside of work, and not a risk specific to work. As such, it is possible that a claim for COVID-19 would not be compensable. On the other hand, it is possible that certain employees who have a higher risk of exposure to COVID-19 as a result of their employment may be considered to have a specific risk of exposure connected to their employment, and may have a compensable occupational disease under the West Virginia Workers’ Compensation Act. Nonetheless, it is questionable that even employees with heightened risk of exposure to COVID-19 and development of coronavirus would have a compensable claim. Please see Answer to Question 2 for more details.

In addition, there is a rebuttable presumption of compensability for certain occupation diseases and injuries applicable to professional firefighters. Arguably, this rebuttable presumption may apply to professional firefighters who file a claim for COVID-19, provided that the criteria for application of the rebuttable presumption are met. Please see Answer to Question 4 for more details.

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

Occupational diseases that are sustained “in the course of” and “resulting from” covered employment are compensable. W. Va. Code §§ 23-4-1(a) and (b). Six specific criteria must be met for an occupational disease to be compensable. W. Va. Code § 23-4-1(f). Specifically, the employee must prove that:

(1) There is a direct causal connection between work conditions and the occupational disease;

(2) The disease can be seen to have followed as a natural incident of work as a result of the exposure occasioned by the nature of the employment;

(3) The employment is the proximate cause of the disease;
(4) The disease did not result from a hazard to which the employee is equally exposed outside of employment;

(5) The disease is incidental to the character of the employment, and not independent of the employer-employee relationship; and

(6) The disease appears to have originated from a risk connected with employment and to have flowed as a natural consequence from that risk.

Id. No employee, however, may receive compensation for an “ordinary disease of life to which the general public is exposed outside of employment . . . except when it follows as an incident of an occupational disease . . . .” Id.

In light of the foregoing criteria, it is not certain that a claim for COVID-19 arising out of exposure at work would be compensable. COVID-19 is pervasive outside of the work environment. Because of this pervasiveness, an employee’s exposure to COVID-19 and development of coronavirus arguably is not a risk specific to employment. More precisely, COVID-19 and coronavirus arguably are not occupational disease that: can be considered to have followed as a natural incident of work; resulted from a hazard that the employee is not also equally exposed to outside of employment; is incidental to the character of the employment; or originated from a risk connected to employment. Id. As a result, it is arguable that exposure to COVID-19 at work would not meet at least criteria (2), (4), (5), and (6) of the standard for compensability. Furthermore, it would seem more likely that, in general, exposure to COVID-19 and coronavirus would be considered “an ordinary disease of life to which the general public is exposed outside of employment . . . .” Id. that would not be compensable.

It is possible, however, that an employee’s specific employment or job places him or her at greater risk for exposure to COVID-19. For example, healthcare workers, grocery store employees, pharmacy employees, delivery employees, and first responders whose job duties involve greater interaction with the public. This greater public interaction may cause these employees to have increased potential for exposure to COVID-19 as a result of their employment. Under these circumstances, it is possible that an employee in one of these higher risk jobs could have a compensable claim for COVID-19. It is possible that the employee’s unique circumstances and heightened risk would satisfy the requirements for an occupational disease. That is, the employee in the heightened risk category who develops coronavirus through exposure at work may be deemed to have developed the disease as a result of a specific risk of his or her employment. Nevertheless, it is not certain that the heightened risk employee would have a compensable claim. COVID-19 arguably may still be considered noncompensable because it seems to be an ordinary disease to which the general public is exposed.

In addition, professional firefighters are entitled to a rebuttable presumption of compensability for certain occupational injuries and diseases, including pulmonary diseases, if specific criteria are met. This rebuttable presumption of compensability arguably would apply to claim for COVID-19 filed by a professional firefighter. Please see Answer to Question 4 for more details.
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 employer’s action in this regard would not alter the statutory criteria for compensability of an occupational disease claim. The six criteria must still be met for the claim to be compensable. Please see Answer to Question 2 for more details. In addition, a possible exposure to an occupational hazard or risk cannot be the basis for an occupational disease claim; rather, the employer must have had actual exposure and actually contracted the disease from that exposure. Syl. Pt. 6, *Marlin v. Bill Rich Const., Inc.*, 198 W. Va. 635, 638, 482 S.E.2d 620 (1996).

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

Only one category of first responders, namely professional firefighters, is considered to be at a greater risk than the general public, and only with respect to specific occupational injuries and diseases. The West Virginia Workers’ Compensation Act provides for a rebuttable presumption that a professional firefighter who has developed a cardiovascular or pulmonary disease, sustained a cardiovascular injury, or developed leukemia, lymphoma, or multiple myeloma arising out of and in the course of employment as a firefighter has sustained a compensable disease or injury if certain criteria are met. *W. Va. Code* § 23-4-1(h)(1). The criteria are: (1) that the employee has been actively employed by a fire department as a professional firefighter for at least two years prior to the cardiovascular injury or onset of the cardiovascular or pulmonary disease or death; (2) the injury, disease, or death occurred within six months of having participated in firefighting or a training or drill exercise that actually involved firefighting; and (3) in the case of leukemia, lymphoma, or multiple myeloma, the employee has been actively employed by a fire department as a professional firefighter for at least five years in West Virginia prior to the development of leukemia, lymphoma, or multiple myeloma, has not used tobacco products for at least 10 years, and is not over the age of 65 years. *Id.*

Because the rebuttable presumption for professional firefighters includes a pulmonary disease, it arguably would apply to exposure to COVID-19 and development of coronavirus if the criteria for invocation of the presumption are satisfied. Under these circumstances, there would be a rebuttable presumption that the professional freighter’s COVID-19 claim is compensable under the Act.

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

No, pharmacy is not considered a first responder under the West Virginia Workers’ Compensation Act.
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.

As of the date of publication of this Workers’ Compensation COVID-19 Reference Guide, the West Virginia Legislature, Governor Jim Justice, and other state officials have not called for legislation that would eliminate the burden of proof for workers making a COVID-19 occupational disease claim.

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

No, Governor Jim Justice has not issues an executive order allowing for compensability of COVID-19 claims under the West Virginia Workers’ Compensation Act.

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

Assuming a COVID-19 claim is compensable, the waiting period for TTD benefits would not be waived. The employee with a compensable COVID-19 claim would still have to be unable to work due to COVID-19 for three consecutive calendar days in order to qualify for TTD benefits. W. Va. Code § 23-4-5; W. Va. Code St. R. § 85-1-5.1. Likewise, the employee would still have to be unable to work due to the compensable COVID-19 disease for more than seven consecutive calendar days before recovering benefits for the first three days. Id.

9. If the claim is compensable under the Workers’ Compensation Act and the employer pays the employee their full salary for the first two weeks during quarantine, how does this affect the TTD benefits?

The TTD benefits would be offset, dollar for dollar, by the wages received by the employee. See W. Va. Code § 23-4-1c(j).

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

Technically, yes. TTD benefits must commence within fifteen working days of receipt of the employee’s or employer’s report of injury or disease (whichever is received sooner), and a proper physician’s report and any other information necessary to make a decision on TTD. W. Va. Code § 23-4-1c(b). The start of TTD could be delayed until after the fourteen day period that the employee is off work due to COVID-19 and receiving their full pay, as long as TTD benefits are commenced within the fifteen working day time frame.

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

Yes, the TTD benefits would be offset by the wages paid to the employee. See W. Va. Code § 23-4-1c(j).