



## 2023 Future Leaders Seminar

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#### Emerging Trends In and Around Workers' Compensation

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# Emerging Trends In and Around Workers' Compensation

## Remote and Hybrid Work

Until recently, remote work and work from home employment was uncommon enough that the vast majority of those working in the field of workers' compensation law never came across the legal questions that arise from this type of work arrangement. After COVID-19 relegated many office employees to work-from-home scenarios, these legal questions began to multiply in spades, far be it from the previously held perception that these were rare idiosyncrasies hardly worth our attention.

As the pandemic has abated, some have returned to in-office work, but many have continued to work remotely in some capacity. Whether employees work at home full-time or some kind of hybrid arrangement splitting days working at home and in the office, it seems that for many, remote work is here to stay. According to the United States Census Bureau, in 2021, 17.9% of the work force worked from home. Compare that to just 5.7% in 2019, before the pandemic took hold. Some predict that in the future 80% of remote-capable employees will work remotely in some capacity. Unsurprisingly, as the workforce has shifted, new questions and issues are arising, including what to do when an employee becomes injured on the job while working at home.

Of course, the basic tenets of workers' compensation remain the same when analyzing work-from-home injuries (*i.e.* the event must take place during working hours of employment, occur at a place where the employee may reasonably be incident to employment, and take place while the employee is fulfilling work duties or engaging in something incident thereto). However, at-home injuries add another obstacle to determining compensability because there is an augmented concern that the risk relates only to the employee's home, rather than a causative danger occurring as a result of an employment-related risk. Generally, if the risk is strictly personal to the employee and/or their home, the injury is not compensable because such a risk is not increased by virtue of working from home. On the other hand, where risks personal to the employee *mix* with those risks distinctively associated with employment, the injury is normally still compensable.

### *Positional Risk Doctrine*

There are certain principles that have particular implications on work-from-home scenarios. For example, the *Positional Risk Doctrine* (an injury is compensable if it would not have happened but for the fact that the conditions or obligations of the employment put the employee in the position where he or she was injured) often cuts against compensability in claims for work injuries occurring in an employee's home. The classic *non*-remote-work example of the *Positional Risk Doctrine* is from *Gargiulo v. Gargiulo*, 13 N.J. 8, 97 A.2d 593 (1953), where an employee, on his way to empty trash was struck in the eye by a stray arrow shot into the air by a child in the neighborhood, where the court reasoned that the employment brought him unwittingly into the line of fire of the arrow, where he would not have been except for his employment. However, when an employee works from their home, there is less likelihood the employee is in that location solely incident to their employment.

### *Personal Comfort and Convenience Doctrine*

A doctrine that can blur the line of compensability for remote workers rather than clarify it is the *Personal Comfort and Convenience Doctrine*. The doctrine holds that injuries arising out of on-site employees' engaging in reasonable activities related to personal comfort are compensable under Workers' Compensation. The quintessential example of this doctrine is the employee that slips on the way to the bathroom on company property, which would likely be

a compensable injury under the doctrine.

However, there arise multifaceted issues with the *Personal Comfort Doctrine* when remote employees are injured during activities of personal comfort at home, such as taking a bathroom break, or going to the kitchen to get a drink. Generally, courts have deemed these acts to be compensable when the employee is tending to their personal comfort in a manner similar to how they would on company property, particularly when the circumstances are substantially similar. However, there are personal comfort cases that courts deem non-compensable, such as an employee taking a break to get juice from her kitchen when she tripped over her dog and injured herself.

Another principle that can muddy the waters of compensability in a remote work scenario is the *Coming-and-Going Doctrine*, which generally rules out compensability when an employee is injured during their commute to and from work. A common exception to this doctrine applies when an employee leaves directly from their home office to perform a work errand. The confusion arises when the employee works a hybrid at-home/in-office scenario. Because the employee has a home office, one could reason that the employee's commute from home to the office should be covered, since the employee was leaving from their 'home office' to perform a 'work errand,' *i.e.*, commute to work. In answering these questions, seemingly minor details may have serious implications on compensability.

That is nothing to say of some of the less common issues that have, and surely will continue to arise, such as assaults in the home while working, mental health conditions that arise out of the isolation resulting from remote work, injuries from shoveling snow to get to the mailbox, or the employee injured during a commute from the office to home where he or she was going to perform additional work.

While it is impossible to anticipate every possible complicating scenario regarding remote worker injury claims, there are some practical tips for employers to prevent many issues before an injury occurs. These include defining work hours, requiring employees to check in and out, refraining from requiring work from home (if possible), identifying tasks employees are expected not to do while working, and communicating expectations regarding remote work. Once a claim is alleged, employers should develop a strong factual background, since minor details about exactly what caused the injury or what the employee was doing at the time of the injury can determine its compensability.

### Exclusive Remedy Doctrine

Lastly, while the above discussed factors can complicate issues surrounding in-house workers' compensation claims and investigations, there are circumstances when a claimant will bring third party claims directly against the employer for alleged injuries suffered on the job. Depending on the State, most employers are protected against these direct claims through what is commonly known as the "exclusive remedy" doctrine. In other words, if the employer provides, or in some cases merely offers, workers compensation packages to its employees, those same employees may not allege third party claims against the employer for on-the-job injuries. Although it varies by State, the same can be true for co-employers, temporary placement agencies, and third-party companies leasing someone else's employee (typically known as a "borrowed servant"). While the typical analysis to determine whether the alleged injuries did in fact occur on the job may still apply to be afforded these protections, workers compensation packages being offered to employees, independent contractors, or borrowed servants can serve as a shield to the company from dual liability.