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COVID-19 and Nonsubscriber Injury Benefit Plans

Employers across the state of Texas face new and unique challenges in the wake of the ongoing COVID-19 pandemic. Employers wrestle daily with decisions related to the work environments for their employees, whether and how employees can continue working, and how best to keep employees, and the public they interact with, safe. Some industries have shut down, while others have implemented remote-work alternatives. Many, however, continue working despite potential COVID-19 exposure, providing essential services to patients, consumers, and others. Given the ubiquitous nature of the pandemic, responsible nonsubscribers in all industries face a common question: Are COVID-19 claims covered under nonsubscriber workplace injury benefit plans?

I. Are COVID-19 Claims Covered by Workplace Injury Plans?

The answer, of course, is not black and white. Each employer and its plan administrator(s) should take a hard look at their plan language and decide claims on a case-by-case basis according to the facts of each claim.

A. Analyze Your Benefit Plan's Language

Responsible nonsubscriber injury benefit plans define which work-related injuries they cover. Thus, the analysis of a claim must start with the plan language.

First, to be compensable, an injury or disease must occur in the "course and scope" of an employee's work. Most plans define "course and scope of employment" as "any activity which the employee was hired to do and that relates to, and originates in, the employer's business, and that is performed by the employee in furtherance of the affairs or business of the employer." Plan language like this is borrowed from, and nearly identical to, the Texas Labor Code's definition of "course and scope."[1]

Second, for a COVID-19-related illness to be covered, it must qualify as an "occupational disease." Most plans contrast an "occupational disease" with an "ordinary disease of life." For example, many plans have language like, "occupational disease does not include ordinary diseases of life to which the general public is exposed outside of your assigned duties in your scope of employment." This language likewise derives from the Texas Labor Code, which defines "occupational injury" as a "disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. The term includes a disease or infection that naturally results from the work-related disease. The

[1] *See* TEX. LAB. CODE ANN. § 401.011 (12).

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term does not include an ordinary disease of life to which the general public is exposed outside of employment. . ."[2]

Third, other common exclusions found in plans potentially apply to COVID-19 related claims. For example, many plans exclude injuries that arise out of an "Act of God," unless the employee's job duties exposed the employee to a greater risk of injury than ordinarily applies to the general public. Some exclude injuries arising out of "biological contaminants" or resulting from "airborne contaminants not commonly found in the employer's normal working environment."

B. Consider the Applicable Law

Nonsubscriber injury benefit plans are governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), a federal law that sets minimum standards for most voluntarily established retirement and health plans in private industry to provide protection for individuals participating in these plans. An employee's claim, and potential lawsuit, for denied plan benefits is governed, and preempted, by federal law.[3]

In deciding ERISA claims, federal courts apply an abuse of discretion standard of review when, as in the case of most nonsubscriber benefit plans, the plan gives an administrator(s) discretion to determine eligibility for benefits and construe plan terms.[4] Under the abuse of discretion standard, "when the plan fiduciary's decision is supported by substantial evidence and is not arbitrary and capricious, it must prevail."[5] Federal courts typically look at the plan language and the case facts to determine whether a denial of benefits is supported by relevant evidence that a reasonable mind might accept as adequate to support a conclusion. A federal court is not free to substitute its own judgment in place of the judgment of the plan administrator.

Given the unique nature of COVID-19's highly contagious transmission, a federal court's analysis of an ERISA benefits claim will likely hinge on whether the employee's claim constitutes an "occupational injury." While no federal court has yet decided this issue vis-à-vis COVID-19 claims, courts have, in the past, made determinations regarding what constitutes an "occupational injury." They do so by analyzing a claim's file including incident reports, witness statements, deposition testimony, medical records, etc.[6]

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[2] TEX. LAB. CODE ANN. § 401.011 (34).

[3] An ERISA claim is separate and apart from an employee's potential negligence claim that is governed by state law. ERISA does not preempt common law negligence claims.

[4] *Sanders v. Unum Life Ins. Co. of Am.,* 553 F.3d 922, 925 (5th Cir.2008) (citing *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 115, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989)).

[5] *Id*. (quoting *Corry v. Liberty Life Assurance Co. of Boston,* 499 F.3d 389, 397 (5th Cir.2007)).

[6] *See, e.g.*, *Leake v. Kroger Texas, L.P.*, 2006 WL 2842024, *6 (N.D. Tex. 2006) (wherein, the federal judge, after reviewing the incident report and medical records, upheld a plan administrator's finding that Leake's CTS was not caused by an occupational injury).

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Though no federal court has analyzed the occupational-injury-status of a communicable disease of this nature, the Texas Supreme Court provided analysis in *Schaefer v. Texas Employers' Insurance Association*,[7] that, though not directly controlling, may help guide a federal court's interpretation. In that case, Schaefer, who had worked as a plumber for twelve years, was diagnosed as having Group III mycobacterium intracellularis – an "extremely rare," incurable, and usually fatal disease that attacks lung tissue to the point that the lungs cease to function.[8] Schaefer's expert opined that Schaefer suffered from an avian form of the disease contracted when he worked "in soil contaminated with the feces of birds, other fowl, sheep, goats, dogs, cats, and humans," and that in addition to these conditions, the owner of the plumbing company where he worked raised birds commercially in a shed attached to the plumbing company to which he was exposed.[9]

In analyzing whether a potentially compensable occupational injury existed, the Court explained that it has held that in "workers' compensation cases expert medical testimony can enable a plaintiff to go to the jury if the evidence establishes "reasonable probability" of a causal connection between employment and the present injury."[10] Applying this more-likely-than-not standard, the Texas Supreme Court determined that the evidence (which included speculative expert testimony) was insufficient to establish it was more likely than not that Schaefer contracted the disease at work, was indigenous to his work, or present in an increased degree in that work.[11] As a result, the Court found that the disease was not an "occupational injury" and affirmed the lower court's finding that Schaefer's disease was an "ordinary disease of life to which the general public is exposed outside of the employment."[12]

If a federal court were to use similar logic, it may look to whether the disease was indigenous to the employer's work or present in an increased degree in that work. This analysis will be intensely fact-related and case specific.

C. Analyze the Facts of the Claim

In general, in order to be compensable under a workplace injury benefit plan, a disease must have been contracted while an employee is working **and** be an occupational disease. If either element is absent, a claim should be denied. But in order to adequately fulfill its fiduciary duty, a plan administrator must conduct a thorough investigation before any benefits determination is made.

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[7] 612 S.W.2d 199 (Tex. 1980).
[8] *Id*. at 200-01.
[9] *Id*. at 200.
[10] *Id*. at 202 (citing *Stodghill v. Texas Employers' Ins. Ass'n*, 582 S.W.2d 102, 105 (Tex.1979); *Parker v. Mutual Liability Ins. Co.*, 440 S.W.2d 43, 46 (Tex.1969); *Galveston, H. & S. A. Ry. Co. v. Powers*, 101 Tex. 161, 105 S.W. 491, 493 (1907).
[11] *Id*. at 205.
[12] *Id*.

A thorough investigation requires that once an employer determines what plan language potentially applies to COVID-19 claims, it should next evaluate the particular facts of each claim. For example, if the plan contains an "Act of God" exclusion, the employer should evaluate whether the employee's job duties exposed the employee to a "greater risk of injury" than ordinarily applies to the general public. Other relevant inquiries include: Was the employee quarantined outside of work? Where else did the employee go when not working? Did the employee follow strict social-distancing protocols away from work? If a federal court applies a *Schaefer*-like analysis for determining whether an occupational injury exists, the key inquiry is: Is it more likely than not that the disease was contracted at work or present in an increased degree in that work. If so, an occupational disease may exist.

From a practical perspective, employers that require certain employees to closely interact with people who have been confirmed positive with COVID-19 should consider accepting those employees' benefit claims. For example, healthcare workers who test positive after direct and repeated contact with patients suffering from COVID-19 more likely than not: (1) contracted the disease in the course and scope of employment; and (2) are exposed to the disease at an increased risk by virtue of their work. On the other hand, the more removed an employee is from direct contact with COVID-19 positive patients (*e.g.*, a medical billing healthcare worker with no direct patient contact), the less likely both prongs of coverage are met. For many essential workers, including retail employees, food service industry employees, truck drivers, etc. their risk of infection is arguably no greater than the general public, and a denial under the "ordinary disease of life" exclusion may be appropriate.

Whatever the industry, responsible nonsubscribing employers and their plan administrators should conduct a thorough review of their plan language, familiarize themselves with applicable ERISA law, and when claims arise, conduct an extensive and thorough investigation. Doing so will put employers in the best position possible to fully and fairly evaluate an employee's COVID-19 related claim.

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