

With Presumption in Place, Investigators Could Play Role in COVID-19 Claims

By Mark Powell (Reporter)

Options

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Now that Gov. Gavin Newsom has signed a COVID-19 presumption into law, employers and insurance carriers in California could turn to private investigators in hopes of rebutting claims that workers contracted the virus while on the job, experts said.

Using private investigators in workers' comp cases is nothing new, but the practice could increase as companies look for ways to defend themselves against potentially pricy or drawn-out claims.

And in the age of social media, there may be more factors to consider than ever before for stakeholders on both sides of the process.

"It's about preserving and documenting evidence," said Chris Champlin, a private investigator who co-founded C&W Claims Solutions in Roseville. "Things are a little different with COVID."

With more traditional claims — such as orthopedic cases — there are usually objective findings obtained through medical evaluations, X-rays or MRIs, Champlin said.

Things aren't that simple when it comes to illnesses like COVID-19. Other than a positive test, there's usually no physical proof that someone has contracted the virus. Furthermore, it can be incredibly difficult to determine where an employee was first exposed, heightening the need to gather as much information as possible early in the claims process, Champlin said.

"What's important is what we do right now," he said. "We are documenting information for potential long-term litigation."

One of the most important steps during the information-gathering stage is asking workers and their employers a list of questions that can help determine how and where someone may have caught the virus, Champlin said.

For workers who do contract COVID-19, investigators should ask whether they followed quarantine guidelines prior to being diagnosed and whether any family members living in the same residence also had any known exposures, Champlin said.

Investigators also could ask whether employees can recall places outside of work where they might have contracted the virus, such as schools, stores, restaurants, gyms or large social gatherings. They also could ask workers if they visited any family members or friends outside the home and whether their children may have had any exposure through activities with friends, sports or school, Champlin said.

Whether employees have had past respiratory problems or other pre-existing conditions — or even if they've ever smoked, vaped, drank alcohol or used recreational drugs — are all valid questions that can be asked, Champlin said.



“Some of those questions are just normal, cursory questions you should ask,” he said. “We’re looking out for the claimants’ best interests. We’re trying to help them on the road to recovery. I’ve been a claimant before, so I’ve been on that side of it. We want to ask them questions they may not have thought of asking their provider. It doesn’t mean the injured worker still isn’t going to get treated. We’re just trying to help.”

Not everyone agrees that the investigations are helpful to injured workers. Steve Smith, communications director for the California Labor Federation, said businesses should be more focused on COVID-proofing their workplaces than finding out what employees are up to.

“In the middle of a devastating and deadly public health crisis, you’d think employers would be more worried about taking necessary precautions to protect their workers than hiring private investigators to spy on them,” Smith said.

But Champlin said workers aren’t the only ones likely to face tough questions to try and find out how workers contracted COVID-19.

He said investigators should ask employers what safety measures were put in place and whether these measures were being followed and monitored. Employers also must provide documentation that such safety measures were being kept and that personal protective equipment was made available to workers.

“We have to find out if their employer was not following safety protocols,” he said. “There are so many ways an employer can protect their employees. Was the employer doing their due diligence?”

Another relatively new factor may cause a wrinkle for one side or the other in COVID-19 workers’ comp investigations: the use of social media.

Investigators will comb Facebook, Instagram, Twitter and other applications to identify injured workers and anyone associated with them, Champlin said. Sometimes accounts are blocked or private, which can stonewall investigators. But family members’ and business accounts can be used to refute or back-up claims of illness or injury, he said.

“Restaurants, businesses on social media, these are public not private,” Champlin said. “If someone does check in or take a selfie or tag themselves in a public venue, we will be able to see that. Everyone’s on social media these days. We can determine if there needs to be surveillance and, if so, we know what they look like.”

Michael Duff, a University of Wyoming law professor and workers’ comp expert, said the use of private investigators in COVID-19 claims could be considered a positive development because it shows many employers have accepted that presumptions are now a “durable legal reality.”

“It seems to me that implicit in shifting to employers the burden of disproving work causation is making feasible their ability to discover evidence,” Duff said.

Privacy concerns are often issues in investigating workers’ comp claims, but claimants can carry expectations of privacy that are both reasonable and unreasonable, especially when social media is involved, Duff said.

“If you put yourself or your image out in the public domain, it is hard to argue those facts should be private,” he said.

Difficult questions, however, may begin to emerge when the right to privacy is contested, especially regarding family members, Duff said.

Duff said employers should be careful when asking workers personal questions, especially if those workers have obtained legal representation. Employers also should be cautious when pursuing or handling COVID-related medical information, he said. While workers' comp insurers are exempt from HIPAA privacy rules, employers are required to limit the amount of protected health information to the minimum needed to accomplish the goal workers' compensation, Duff said.

“Investigation of the activities of family members, for example, is highly likely to generate heightened scrutiny by policymakers,” he said. “As a former claimants’ attorney, I was deeply aware of the sharp differences in points of view between insurers and claimants on these questions.”

Last week, Newsom passed **Senate Bill 1159**, authored by San Mateo Democrat Jerry Hill, which created a COVID-19 presumption for first responders, health care workers and some essential employees.

The law codifies the presumption Newsom created via executive order in May that applied to any worker who tested positive for COVID-19 within 14 days of going to work between March 19 and July 5.

The SB 1159 presumption for firefighters, police officers and health care workers diagnosed starting July 6 would be triggered when someone tests positive within 14 days of going in to work. The new law also presumes that any claim filed by these workers that is not rejected within 30 days is compensable unless rebutted by evidence found outside the 30-day window. California law in general presumes claims not denied within 90 days are compensable.

Under SB 1159, workers' comp claims for COVID-19 filed by all other workers are considered compensable if not rejected within 45 days.

A separate presumption applies to all other classes of employees who test positive within 14 days of going to the workplace that is experiencing an outbreak. According to the language of SB 1159, an outbreak exists if: