

# Risk and Insurance implications of COVID-19

**World Business Chicago**  
Webinar - March 25, 2020

# Agenda

## 9:30 – Introduction:

Andrea Zopp, President and CEO, World Business Chicago  
Mark Vila, Managing Director, Willis Towers Watson

## 9:35 – Employment practices issues:

Talene Carter, Employment Practice Thought & Product Leader, Willis Towers Watson  
Jody Kahn Mason, Principal, Jackson Lewis P.C.

## 9:55 – Workers Compensation discussion:

Jill Kastner, Partner, Hennessy & Roach, P.C., IL Workers' Compensation Advisory Board  
Don Rutz, Area Practice Leader – Risk Control & Claims Advocacy, Willis Towers Watson

## 10:10 – Other liability considerations:

Jon Drummond, Head of Casualty Broking - North America, Willis Towers Watson  
Jim Dorion, Head of Liability Claim Consulting & Carrier Relations, Willis Towers Watson

## 10:25 – Property and Business Interruption discussion:

Henry Daar, Practice Leader – National Property Claims, Willis Towers Watson  
Ryan Volker, Head of Property Broking – Chicago, Willis Towers Watson

## 10:40 – Wrap Up/Q&A:

Moderator: Mark Vila, Managing Director, Willis Towers Watson

## Introduction

**Andrea Zopp**, President and CEO, World Business Chicago

**Mark Vila**, Managing Director, Willis Towers Watson

# Employment Practices Issues

**Talene Carter**, Employment Practice Thought & Product Leader,  
Willis Towers Watson

**Jody Kahn Mason**, Principal, Jackson Lewis P.C.

## Employment practices issues:

### What is Employment Practices Liability Insurance (EPLI)?

- Provides coverage for claims alleging employment practice violations, such as, wrongful termination, discrimination or harassment, against the Company, its employees and directors and officers
- Also provides third party liability coverage for discrimination and harassment claims brought against the employer or its employees by a third party

### Employment Event Crisis coverage

- Provides coverage for Loss that a Company is obligated to pay as a result of an “Employment Event” (which may include mass layoffs)
- Sublimit generally \$25,000 - \$75,000 with zero retention
- Covers the cost of a public relations firms and advertising materials

## Employment practices issues:

### Potential employment related exposures:

- Discrimination
- Harassment
- Invasion of privacy
- Failure to accommodate
- Retaliation
- Wage and hour issues

## Employment practices issues:

### Potential EPLI coverage concerns

- Bodily injury exclusion
- Benefits exclusion
- Family Medical Leave Act (FMLA)
- WARN Act exclusion

## Employment practices issues:

### EPLI best practices

- Work with counsel to ensure compliance with legal obligations, particularly under FMLA, ADA, paid sick leave laws, wage & hour laws, etc.
- Communicate plan to employees, especially line managers who will be responsible for addressing these issues with their employees.
- Ensure that any policies and procedures that are being implemented do not have a discriminatory impact.
- **REPORT CLAIMS!**



# Coronavirus Issues In the Workplace & The Families First Coronavirus Response Act

**Jody Kahn Mason**

March 25, 2020

Jackson Lewis P.C. • Chicago

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## Disclaimer

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# Handling Coronavirus Issues In The Workplace

## Legal Considerations for Employers:

- Occupational Safety and Health Act (OSHA)
- Americans with Disabilities Act (ADA)
- Title VII and other laws against national origin and other discrimination
- Federal, state and local leave laws including Family and Medical Leave Act (FMLA) and paid sick leave laws
- Fair Labor Standards Act (FLSA) and state and local wage and hour laws
- Section 7 of the National Labor Relations Act (NLRA)
- Benefits issues
- The Worker Adjustment and Retraining Notification (WARN) Act
- Genetic Information Nondiscrimination Act (GINA)
- Individual privacy rights under state laws and common law
- Immigration laws

# The Families First Coronavirus Response Act

# HR 6201: The Families First Coronavirus Response Act

## The Basics

- Signed by President Trump on March 18, 2020
- Applies to private employers with fewer than 500 employees and certain public agencies
- Effective no later than 15 days after the new law was enacted; unclear exactly what that means but DOL is supposed to issue guidance within 15 days of enactment
- The Act will expire on December 31, 2020
- The Act provides for paid FMLA and up to 80 hours of PSL (or 2 week equivalent for part-time employees) for specific COVID-19 related reasons
- An employer who is a health care provider or first responder can exclude employees who are HCPs or first responders from PFMLA and PSL under the Act
- The DOL can issue regulations that would make certain healthcare workers and first responders ineligible
- The DOL can issue regulations that would exempt employers with less than 50 employees who can't comply with PFMLA obligations without jeopardizing their business as an ongoing concern
- There are provisions in the bill that provide tax credits to employers

# Amendment of FMLA For COVID-19 Absences

## How Much Leave and Reasons for Leave

- Applies to all employees who have been employed for 30 calendar days
- Employees can take up to 12 weeks of FMLA for a “qualifying need related to a public health emergency”
- A “public health emergency” means emergency with respect to COVID-19 declared by a Federal, State, or local authority
- A qualifying need occurs when an employee is **unable to work or telework due to need for leave to care for a son or daughter who is under 18 if:**
  - the elementary or secondary school or place of care has been closed, or
  - the child care provider of such son or daughter is unavailable, due to a public health emergency.
- A child care provider is limited to a provider who receives compensation for providing child care services on a regular basis
- If need for leave is foreseeable, then employee must give such notice as is practicable

# Amendment of FMLA For COVID-19 Absences

## How Is Pay For Leave Calculated?

- The initial 10 days may be unpaid
  
- Remaining FMLA days (up to 10 weeks) must be paid based on:
  - 2/3 the employee's regular rate of pay as calculated under the FLSA
  - Number of hours the employee would otherwise have been normally scheduled to work
  - Capped at \$200/day and \$10,000 in the aggregate
  
- An employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave



# New Emergency Paid Sick Leave Act

## The Basics

- All employees of covered employers are immediately eligible for PSL
- There is no carry-over or payout upon separation
- Employers cannot require an employee to search for or find a replacement
- Nothing in the new law diminishes the rights or benefits that an employee is entitled to under any other Federal, State, or local law, CBA, or existing employer policy
- DOL will provide guidelines to assist in calculating PSL within 15 days after enactment
- After the first workday (or portion thereof) an employee receives PSL, an employer may require the employee to follow reasonable notice procedures in order to continue receiving PSL
- PSL is only available if employees are ***unable to work or telework due to need for leave due to a qualifying reason***

# New Emergency Paid Sick Leave Act

## Qualifying Reasons for Leave

- (1) The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
- (2) The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
- (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- (4) The employee is caring for an individual who is needs to quarantine, isolate, or self-quarantine under government order or health care advisor advice.
- (5) The employee is caring for their son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of the son or daughter is unavailable, due to COVID-19 precautions.
- (6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.

# New Emergency Paid Sick Leave Act

## PSL Benefit Amount

Paid sick leave is paid at the employee's regular rate but:

- Capped: \$511 per day and \$5,110 in the aggregate when used by employee for their own condition
- Capped \$200 per day and \$2,000 in the aggregate when used for family reasons and when employee experiences a “the substantially similar condition”
- Paid at 2/3 the employee's regular rate when used to care for another individual or due to school/day care closure.

# New Emergency Paid Sick Leave Act

## How Much PSL and What Is The Sequence

- Full-time employees are eligible to take up to 80 hours of PSL
- Part-time employees are eligible to take the equivalent of the average number of hours an employee works over a two week period
- An employee may first use PSL under the new law for the PSL approved reasons
- Employers cannot require that employees use other paid leave made available by their policies before an employee uses their PSL under the new law

# New Emergency Paid Sick Leave Act

## A Few Additional Considerations

- Employers must post a notice of employee rights
- If an employer is under a multi-employer CBA, the employer can satisfy its PFMLA and PSL obligations by making contributions to the multiemployer fund or plan based on the PMFLA and PSL each of its employees is entitled to, provided that the fund enables employees to obtain payment from the fund based on the hours they have worked under the multiemployer CBA
- The Act offers job protection. However, the FMLA's requirement that an employee be restored to the same or similar position after leave does not apply to employers with less than 25 employees under certain circumstances
- Employers cannot discharge, discipline, or in any other manner discriminate against employees who take leave in accordance with the Act or has filed a complaint, instituted a proceeding, or testified in a proceeding under the Act

## Stay Up To Date

- Subscribe to Jackson Lewis Disability Leave Law: <https://www.disabilityleavelaw.com/>
- Frequently check [cdc.gov](https://www.cdc.gov) and/or [coronavirus.gov](https://www.coronavirus.gov)
- Illinois Department of Employment Security:  
<https://www2.illinois.gov/ides/Pages/default.aspx>
- Illinois Department of Public Health: <http://dph.illinois.gov/>

## Workers Compensation

**Jill Kastner**, Partner, Hennessy & Roach, P.C.,  
IL Workers' Compensation Advisory Board

**Don Rutz**, Area Practice Leader – Risk Control & Claims Advocacy,  
Willis Towers Watson

## Worker's Compensation Implications:

### Are COVID-19 Cases Compensable?

- The answer is going to be state specific, but typically no, most states do not consider infectious disease to be compensable and will look to an increased risk rationale.
- An occupational disease can be defined as a disease arising out of and in the course of the employment as a result of the exposure of the employment.
- Exceptions to the general rule would be: Doctors, nurses, first responders, health care staff , employees traveling overseas as they would be exposed to greater degree than the general public.
- We cannot forget causation issues: the burden will still be on the employee to show when the exposure occurred. Can it be traced back to a definite exposure?
- Does a Stay at Home order change things? Are injuries occurring at home while working from home compensable?



## Lost time benefits:

- **Scenario 1:** Employee is working light duty for a compensable claim, he is one of many laid off – are benefits owed?
- **Scenario 2:** Petitioner is working light duty, light duty remains available, but employee chooses to stay home due to the order – is TTD owed?
- **Scenario 3:** Petitioner is off work, Employer schedules an IME, Employee refuses to submit to the exam out of fear, valid basis to suspend benefits?
- **Scenario 4:** Employee self quarantines as a precaution or as required due to a possible exposure: should the employee receive benefits?

## Workers Compensation - Three Recommendations involving Covid-19

1. If your employee reports an injury or illness to you as work related, report it immediately to your workers compensation carrier or third-party claim administrator. Follow your standard workers compensation reporting protocols and file the claim immediately. Allow the claim staff to conduct a thorough investigation to determine whether benefits are due based on the facts and applicable state statute.
2. Consider reporting the matter to other potential sources of medical care and benefits that may be due the employee if their workers compensation benefits are denied. This step expedites the process in case of denial (i.e. treating this as nonoccupational until a formal decision on the WC claim is determined)
3. Employees may allege mental anguish, psychology issues or post-traumatic stress disorder associated with contracting COVID-19 or exposure to it. Consider reinforcing to employees the availability of your Employee Assistance Program (EAP) if available and where appropriate.

# Workers Compensation discussion

## Marketing & Other Considerations

- Review ALL Payroll and class code information.
- Minimum earned premium provisions – current and prospective policy considerations
- Collateral and financial security. Will need to focus on:
  - Form of security
  - Connecting with credit officer
  - Short term policy for highly distressed business
  - Leveraging analytics as an offensive tool
- Communicable disease coverage
- Business continuity clause within the program agreement

## Other Liability Considerations

**Jon Drummond**, Head of Casualty Broking - North America,  
Willis Towers Watson

**Jim Dorion**, Head of Liability Claim Consulting & Carrier Relations,  
Willis Towers Watson

# Other liability considerations

## Coverage Considerations

*Coverage is highly dependent on the policy terms at issue, the facts of each claim and applicable state law. Here are the considerations:*

- Is there any form of communicable and/or infectious disease exclusion? (Not widespread but not unheard of.)
- Pollution / Fungi / Bacteria Exclusions will come into play
- Crisis Response coverage may be triggered – Important to note this is a “pay on behalf of” coverage.
- Comply with all policy conditions in the event of a claim to avoid contract breaches.

## Marketing & Other Considerations

- Review ALL Exposure information.
- Non-owned auto exposures may be rising (e.g. restaurants)
- Impact on hauling?
- Third-party onsite exposures? (e.g. service providers)
- Review cancelation clauses – consider cancel re-write if needed.
- If a COVID-19 claim is certain, consider incumbents when marketing.

# COVID 19 Market Update & Q&A

## Primary Casualty Update

### Rate Environment – COVID-19 vs Pre COVID-19?

- To date, minimal impact on rate
- Workers compensation starting to hear more commentary on rate inadequacy

### Quoting, Exclusions, Changes in Appetite, U/W Issues?

Markets are actively considering their positions for communicable disease exclusions. Industries under the greatest scrutiny are:

Healthcare

Hospitality

Retail

Collateral and financial wherewithal of underlying risk starting to be an important topic

### Broking / Negotiating Considerations?

Review ALL Payroll and class code information.

Minimum earned premium provisions – current and prospective policy considerations

Leverage analytics as an offensive tool to drive down collateral need

Ask for Business Continuity coverage to provide assurance of policy function for future catastrophes.

Program agreement may be the best place to address

# Property and Business Interruption

**Henry Daar**, Practice Leader – National Property Claims,  
Willis Towers Watson

**Ryan Volker**, Head of Property Broking – Chicago,  
Willis Towers Watson

# Property & Business Interruption discussion

## Coverage Considerations

*Very limited, if any, coverage. It is highly dependent on the specifics of each insured's policy terms. Here are the considerations:*

- Is there actual physical damage?
- Is this a covered peril?
- Does the policy provide any coverage for non-physical damage or “special peril” business interruption? Is there a sublimit? Is it site-specific?
- Is there an infectious disease exclusion?
- “Civil Authority” coverage normally requires a covered peril.

## Marketing & Other Considerations

- B.I. values changing rapidly for renewals and in-force programs.
- Cat Limit needs may be decreasing – review modelling
- Consider annual adjustment clause or agreed rate matrix
- Review cancellation clause – consider cancel re-write if needed.
- If a COVID-19 claim is certain, consider incumbents when marketing.



## Wrap up and Q&A

**Mark Vila**, Managing Director, Willis Towers Watson

# What Should Every Insured do?

- Comply with all governmental directives to reduce potential harm and mitigate potential liability.
- Be wary of actual or inadvertent discrimination based on ethnicity, race, etc. of employees, customers, etc.
- Gather your actual policies and have an expert review. Your policies will be the biggest and likely sole factor in determining coverage. **We are turning around expert reviews in 24-48 hours for clients.**
- Review cancellation clauses, minimum earned premium provisions, collateral positions, etc.
- Maintain records, especially payrolls, class codes, etc. as workers are furloughed etc. These will be critical in an audit.
- Comply with all policy conditions. Note where coverage is “pay on behalf of” and not “indemnification..”
- Secure closed locations.
- Use VPNs for remote working. Strongly discourage home equipment use.

# Q&A/Open Dialogue