

# LEGAL QUESTIONS RE: WORKERS' COMP

— NATIONAL CONCRETE BURIAL VAULT ASSOCIATION —

May 20, 2021 - In this NCBVA newsletter: **Do you know all there is to know about Workers' Comp** (a new article by [Poul Lemasters, NCBVA Legal Counsel](#)) + [link to register for Q&A call on Thursday, 5/27](#).

## FIRST THE BIG QUESTION. IS IT WORKERS' COMPENSATION, WORKERS' COMP, WORK COMP, OR WORKMAN'S' COMP?

OK, that may not be the biggest question, and in fact it does go by a lot of names. Basically, **workers' compensation is a state mandated system that is meant to protect employees and employers** (yes - it was really designed to help employers too).

- It offers **protection to employees** by providing medical expenses and lost wages for employees hurt on the job.
- It **protects employers** by providing coverage if an employee sues for injuries.



Each state regulates its own workers' comp program, and sets rates based on various preset factors such as type of industry as well as a business's claim history or experience rating. And of all the basics of workers' comp, it is important to understand that workers' comp is a no-fault system. This means that if someone is injured in the 'course and scope of employment' then workers' comp insurance will cover the claim. **Yes - this means that even if someone is negligent - it is still covered.** Basically. **But there are always exceptions, and this article looks at a few specific areas to provide a more detailed understanding.** It may not cover everything - but it will give your business some understanding on a few areas that may affect you, especially in the wake of COVID.

If you need any answers to these questions - then this article and no-charge Q&A conference call (THIS THURSDAY, May 27 @ 2pm ET) are for you. [Register](#)

## REGISTER FOR THE Q&A CALL

Thursday, May 27 @2pm ET



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## COVID-19 CLAIMS - ARE THEY COVERED?

Let's just rip the band-aid off the recent COVID-19 vaccine and talk about COVID claims under workers' comp. First, the big question. **Are COVID-19 claims compensable under workers' comp?** There is a resounding answer of maybe - or if you'd like a more lawyerly answer, it's complicated.



### When Diagnosed with Covid...

The general rule is that workers' compensation **does not usually cover community-spread illnesses (think cold and flu)**, for the main reason that it is difficult or impossible to tie the illness to the workplace. Remember the basics - workers' comp covers any injury so long as it is caused in the 'course and scope of employment.' If the injury can't be tied directly to work - then it will not be covered. This same principle has also made other claims, such as chronic illnesses (think cancer) difficult to claim as a workplace injury as well. Here is where it gets complicated.

Over the years, many states have created exceptions to chronic illnesses if there is a link to harmful materials on the job site. Consider claims for mesothelioma from employees who can show working with asbestos in their job. This has also been extended to professions such as firefighters and first responders who develop respiratory diseases. This same principle is now being applied to COVID-19 claims.

*Many states are now looking at COVID-19 claims and determining if certain professions are more likely to have been impacted by COVID-19, and thus should be covered. What professions? **Currently, most states are looking at first responders and frontline workers.** Before you think, 'that's not me,' remember that **deathcare workers** fought hard to be included as a part of the first responder/front line group (think back to the 'essential worker' fight) and*

therefore **could be part of this group**. If a state recognizes the claim, it does not seem that it is an automatic coverage. In most states, this just changes the burden of who must prove the claim. If recognized, then the COVID-19 claim would be presumed to be work-related and then it would shift the burden to the employer to prove it was not work-related.

### **Mandating the Vaccine, Recommending the Vaccine, and Offering Incentives for Becoming Vaccinated**

There is also one more COVID-19 area of workers' comp claims, and that is connected to the vaccine. While severe adverse reactions to the vaccine are not common - they are being reported. The question is if these adverse reactions could be workers' comp claims. The answer - Maybe. But this maybe is a little less complicated. OSHA recently provided guidelines on COVID-19 and indicated that the protection of employees from COVID-19 falls under OSHA's general duty clause. Simply put, the general duty clause requires employers to provide workers a safe working environment from recognized hazards - COVID-19 being one such recognized hazard. Part of a safe workplace, according to OSHA is making COVID-19 vaccines available at no cost to eligible employees.

As this relates to workers' comp, currently **it is believed that if an employer mandates the vaccine, then it is deemed within the course and scope of employment, and as such, any adverse reaction to the vaccine would be compensable under workers' comp**. However, if it is only recommended - not mandated - then it would not be part of the employment, and therefore not covered under workers' comp. Of course, the grey area is employers that are offering special incentives for employers to take the vaccine. As of now, the view is that if the incentive is not available to all employees, then this is really just a method of requiring employees to get vaccinated - and therefore would be covered under workers' comp insurance.

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## **DRUGS AT WORKPLACE**

### **Drug Testing**

As stated earlier, workers' compensation is a no-fault program that covers all work-related injuries, even if the employee was negligent. However, one exception to the no-fault rule is if the employee was under the influence of drugs or alcohol at the time of the accident. This leads to the issue of drug testing - especially post-incident drug testing.



There has been some confusion and contradicting information over the years as it comes to post-incident drug testing. In 2016, OSHA prohibited employers from retaliating against employees for reporting work-related injuries. As a result, this led to confusion and the belief

that post-incident drug testing was retaliatory. However, in 2018, OSHA clarified this statement and stated that employers that have workplace safety programs, including post-incident drug testing, are in the best interest of employees, and that these programs are supported by evidence that employers enforce these programs whether an injury occurs or not. The idea is that as an employer, your safety program should be more than just testing everyone for drugs after an accident.

If your drug testing program is only for post-accident proof, OSHA has stated this is meant to penalize employees - and not legitimize. OSHA has stated that random drug testing, as well as post drug testing of all those who could have contributed to the injury - in addition to the injured party are all permissible methods of drug testing that provide framework for a safety program. Keep in mind - your state will have specific drug testing regulations. In addition, make sure that you, as an employer have your drug testing policy formalized so that every employee can not only read it - but also sign and acknowledge the program. Also, consider training on your policy with both employees and management.

### Have a Clear Plan

As far as the actual post-incident drug testing, there are a few items to consider. First, make sure you have a written program and follow those guidelines. Second, your testing should fall under either a reasonable suspicion method or a blanket testing method. The reasonable suspicion method makes your program and implementation of drug testing only in the case where you suspect drugs are involved. To do this you should have a checklist or some document that gives you guidelines on what is reasonable suspicion (consider the smell of drugs/alcohol/slurred speech/staggering). The blanket testing method allows you to test all individuals post-incident so long as it meets the pre-determined threshold. This could be determined if there is a medical injury; a death; or possibly if a certain amount of property damage is part of the accident. In either program, a written plan is a must. Lastly, consider how you will obtain the test. If there is an injury, it may be impossible or not practical to go off-site. Consider services that will come to the site and provide sample collection. The idea here is having the entire plan in place - and not wait until the accident to make the plan.

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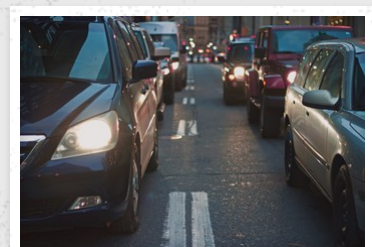
## TRAVELING TO AND FROM WORK

### General Rule of Thumb - Coming and Going is Not Covered

In today's COVID-19 world, we have more people working from home and in some cases traveling for work in different ways.

The question - and it's not a new one - is **when are employee**

**injuries while traveling covered under workers' comp?** The general rule is known as the



actually on the clock, so no coverage for any injuries. This also, typically, applies to lunch breaks. But there are always exceptions!

## EXCEPTIONS

### No fixed office and/or running work errands

The most common exceptions are: no fixed place of work; special assignment; and company vehicle. No fixed place of work applies to employees whose job is typically traveling (think salesperson). Under this exception, if you are in your own car, going to an appointment, the car could be considered your office, and as such, any accident could be covered under workers' comp insurance. The special assignment is one that sneaks into the workers' comp claims, typically because no one expects the issue. The example here is when you ask an employee to do something because 'it's on your way home' or 'on your way to the office.' If you ask an employee to grab some donuts for the morning meeting - because it's on their way - and they get into an accident, then it's most likely covered under workers' comp.

### Company Vehicles

The company vehicle is probably the most common exception to the coming and going rule. Basically, if an employee is traveling in a company vehicle, and has an accident, then it will most likely be covered under workers' comp. The basis of these claims is that while traveling to and from work in your own car is not covered, if the company provides a vehicle for the employee, then it is more likely that even the commute is now part of the job. There is also an argument that if the vehicle provided has a company logo on it - then the employer is always being used for company-related activity and therefore, any injury would be covered. Of course, there are exceptions to the exceptions. There are cases that say if an employee is using a company vehicle, and running a personal errand that was not authorized, then an accident/injury would not be covered.

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## RETALIATION

First and foremost, **retaliation of any kind is prohibited** - and can be punishable.

### What is retaliation?

Retaliation is when an employer penalizes an employee for participating or doing an activity that is protected. In the area of worker' compensation, retaliation would be any instance where an employer makes a retaliatory action if an employee files or threatens to file a workers' comp claim. The retaliation can take many forms and includes, termination, pay-cut, demotion, or any unjustified discipline.



A few things that an employer can do to **help avoid a retaliation claim include the following:**

1. Have a policy that outlines your anti-retaliation policy. By having a written policy, it allows your management and employees to understand what the practice is as well as how to avoid it.
2. Make sure your practices do not create any unintentional retaliation claims. For example, if you do not have a drug-free policy; and do not test for drugs; and have no policy on workplace accidents; and then on one accident you do test for drugs - you may have created an inference of retaliation. It can, and has in several cases, make it appear that you are doing the drug test as a retaliatory act to try and prohibit the claim. This is why a written policy is so critical.
3. Make sure you train management and staff on your policy. Creating a policy, writing a policy are good first steps. However, until your business trains everyone on it - it's just words on paper. Lastly, don't be afraid to call your attorney or HR director before you make a decision on termination when there is a recent underlying workers' compensation claim. In the case of a retaliation claim, if you do terminate, soon after a termination there can be a presumption that there is a retaliation claim. The employee may still have to prove there is a causal connection to the termination and retaliation - but this is potentially a low hurdle for the employee. As the employer, you want to make sure your termination is free of any claim related to the workers' comp claim.

## **IN CLOSING...**

Overall, workers' compensation is meant to be a simple, no-fault program that covers all workplace injuries. Saying that, workers' compensation can be complex and there are always exceptions and changes. What was excluded years ago, such as community spread illnesses, are now a potential claim. As a business, you may never know everything about workers' compensation, but make sure you have a plan on how to handle your claims and continue to stay on top of current trends.

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### **CON CALL, BRIEFING AND Q&A SESSION WITH OUR LEGAL COUNSEL**

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THURSDAY, MAY 27 - 2pm ET  
Mark your calendar & [register](#).

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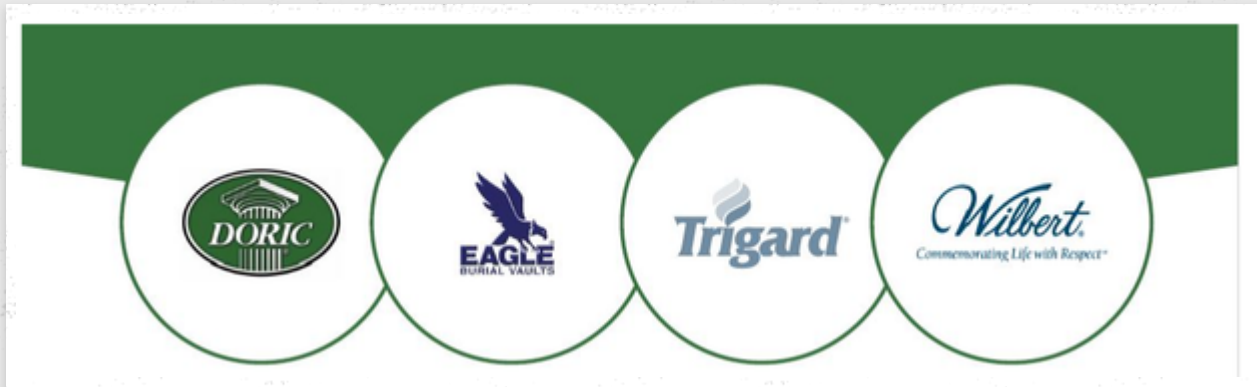
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